

CIRCUIT COURT OF HENRICO COUNTY, VIRGINIA

ARMANDO SOTO,)
)
 Plaintiff,)
)
 v.) No. CL 11-3439
)
 JOHN DOES 1-10,)
)
 Defendants.)

**DEFENDANT JOHN DOE’S MEMORANDUM
IN SUPPORT OF MOTION TO QUASH SUBPOENA
AND FOR SANCTIONS**

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INTRODUCTION

The plaintiff, Dr. Armando Soto, filed suit in Virginia court regarding online comments made about his Florida plastic surgery practice by patients whom Dr. Soto treated in Florida. In furtherance of that suit, Dr. Soto subpoenaed Comcast for the identity of an individual who posted a critical comment regarding Dr. Soto on the website www.RateMDs.com. Yet, notwithstanding the protections provided anonymous speakers by Virginia statute and the First Amendment, Dr. Soto failed to provide the individual the requisite notice of the allegations against him and has produced no evidence supporting his claim that John Doe's speech was defamatory or otherwise tortious.¹

Moreover, Dr. Soto brought this suit in an entirely inappropriate forum. He seeks to use the Virginia courts to attack speech that almost certainly was uttered in Florida about a Florida business. As a result, the apparent purpose of filing in Virginia is to increase the burden on Doe of defending against this litigation. That Dr. Soto seeks to attack Doe's speech is particularly troublesome because the speech addresses issues of public concern regarding the performance of a physician and the products he uses, and thus goes to the heart of the speech protected by the First Amendment. As a result, the subpoena should be quashed, and sanctions should be imposed against Dr. Soto and his attorney.²

¹ The pronouns used throughout this memorandum to refer to Doe are not meant to indicate gender. The male pronoun is used because the plaintiff captioned his complaint as a suit against John Does.

² Doe makes this appearance solely to contest the subpoena seeking to uncover his identity and does not concede this court's jurisdiction over him. If the complaint is served on him, Doe reserves the right to contest the court's jurisdiction and move to change venue.

STATEMENT OF THE CASE

Dr. Soto describes himself as running a “premier Orlando Aesthetic Surgery practice and surgical facility.” <http://www.drarmandosoto.com/index.html>. His website describes no place of business other than Orlando, Florida. There, his site states, his practice focuses on “all aspects of facial rejuvenation and body contouring procedures including brow lift, upper and lower lid blepharoplasty (eyelid surgery), face/neck lift (rhytidectomy), rhinoplasty, chin augmentation, laser resurfacing, Botox® and fillers, liposuction, abdominoplasty, inner thigh lift, brachioplasty, torsoplasty (body lift), and breast surgery, including breast augmentation, breast reduction and breast lift procedures.” <http://www.drarmandosoto.com/meet-drsoto.html>.

Among the types of liposuction that Dr. Soto offers is VASER Liposelection. His website describes VASER as an “excellent option for men interested in body contouring” and, in fact, “[o]ne of [his] most popular procedures among [his] male patients.” <http://www.drarmandosoto.com/other.html>. “You see dramatic improvement immediately after surgery[.]” *Id.* The website further states, “It is a great option for any healthy adult with unwanted collections of excess fatty tissue. VASER Liposelection has proven to be a wonderful option for many patients, with a very high rate of satisfaction, short recovery, and very low risk.” <http://www.drarmandosoto.com/liposuction.html>.

Several individuals who state that they were Dr. Soto’s patients have used the forum at www.RateMDs.com to comment on their experience with him. Complaint Exh. A. Posting on a page specifically devoted to Dr. Soto, which lists his place of business as Orlando, these commenters have described wide-ranging experiences with Dr. Soto’s

services. *Id.* One provides the advice “[r]un from him.” *Id.* at 5. Another declares “I am thrilled with my new body.” *Id.*

On September 15, 2011, movant Doe posted on this forum. He stated:

I paid for Vaser HD and had very little fat around my abdomen. I just wanted the sculpting look that is advertised. Got all the “yes we can’s” before surgery. The worst wake up in recovery EVER. I was rished [sic] on a Friday afternoon to wake up and I remember how bad it was. The biggest concern. I paid almost 8K with misc stuff and I see absolutely “no results” and feel that my love handles actually look bigger. Wasted money, bad experience!

Id. at 4. Alongside this text is a drawing of a frowning face.

Dr. Soto filed a complaint in Henrico County court against ten John Does who posted on the www.RateMDs.com forum, among other sites. *See* Complaint Exh. A. His justification for filing in this jurisdiction was his assertion that “upon information and belief, *some* Defendants *may* be located within the Commonwealth of Virginia.” Complaint ¶ 2 (emphasis added). The complaint also asserts that the websites the Does utilized to post their comments are “widely accessible and utilized throughout the Commonwealth of Virginia.” *Id.* ¶ 3. The complaint alleges that each of the Does’ comments constitutes defamation, tortious interference with contract rights, and tortious interference with business expectancies, and that the Does conspired to injure Dr. Soto’s trade, business and reputation. *Id.* ¶¶ 11-26. Dr. Soto seeks \$49,000 in compensatory damages, among other relief. The complaint includes as an exhibit a copy of the comments regarding Dr. Soto posted on www.RateMDs.com, but does not provide or reference evidence supporting its allegations. *See* Complaint Exh. A.

Dr. Soto's attorney then prepared a subpoena directed to Comcast of Georgia/Virginia requiring it to release the identity of the individual associated with a particular IP address that was in use on September 15, 2011, at 8:48pm. Presumably, Dr. Soto has determined that this IP address is associated with the September 15, 2011, post on www.RateMDs.com. Although the subpoena was transmitted by Comcast to movant Doe, whose identity would be revealed by Comcast's response to the subpoena, Comcast did not provide Doe a copy of the complaint or any other documentation describing the nature of the allegations against Doe. Exh. 1. As undersigned counsel has confirmed with Comcast's counsel, Dr. Soto's attorney did not serve a copy of the complaint when it served the subpoena on Comcast.

To preserve his constitutional right to speak anonymously, and because Dr. Soto has failed to state a colorable claim against him, let alone produce the supporting evidence that both Virginia Code § 8.01-407.1 and the First Amendment require before a subpoena such as this one will be enforced, movant Doe moves to quash the subpoena served on Comcast. He further moves for sanctions against Dr. Soto and his attorney because the complaint is not well grounded in fact, is clearly not the product of the requisite reasonable investigation, and appears to have been filed for the improper purpose of coercing movant Doe into removing his criticism to avoid the expense and inconvenience of litigating in a foreign jurisdiction.

ARGUMENT

I. To protect Doe’s constitutional right to speak anonymously, the First Amendment and Virginia Code § 8.01-407.1 require the plaintiff to make preliminary showings before he can compel Comcast to release Doe’s identity.

A. The First Amendment protects the right to speak anonymously. *Jaynes v. Com.*, 276 Va. 443, 461 (2008); *see Watchtower Bible & 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). As the United States 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).

“[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). Indeed, the Supreme Court has held that “our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.” *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

B. A court order compelling disclosure of a speaker, even if granted for a private party, is a form of state action. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). As a result, “th[e] Court [has] recognize[d] that abridgement of” First Amendment rights, “even though unintended, may inevitably follow.” *NAACP v. Alabama*, 357 U.S. 449, 461 (1958). Thus, an order to compel production of a person’s identity “is subject to the closest scrutiny.” *Id.* at 461; see *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960).

To ensure that speakers’ First Amendment rights are not trammled, a growing consensus of courts have subjected subpoenas seeking to identify anonymous internet speakers to a balancing test that requires a finding of compelling need for such information to justify an order of disclosure. 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).

In particular, the case law has moved “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 this standard 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 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; *see, e.g., McMann v. Doe*, 460 F. Supp. 2d 259 (D. Mass. 2006); *Best Western Int'l, Inc. v. Doe*, No. CV-06-1537-PHX-DGC, 2006 WL 2091695 (D. Ariz. July 25, 2006) (unpublished).

C. Consistent with this case law, the Virginia legislature enacted Virginia Code § 8.01-407.1, establishing procedures for issuing “any subpoena seeking information held by a nongovernmental person or entity that would identify the tortfeasor” in a case in which

it is “alleged that an anonymous individual has engaged in Internet communications that are tortious.” Va. Code § 8.01-407.1(A). Section 8.01-407.1 establishes protections for anonymous speakers that are largely equivalent to those the courts have concluded are constitutionally required. These protections require the party seeking to uncover the identity of the anonymous speaker to submit the subpoena to the court along with “supporting materials” 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 conduct actionable in the jurisdiction where the suit was filed.” Va. Code § 8.01-407.1(A)(1)(a). That party must then serve these materials on the person to whom the subpoena is addressed and that person must then transmit the materials to the speaker so that he has an opportunity to object. Va. Code § 8.01-407.1(A)(2)-(3).

In this manner, the courts and the Virginia legislature have crafted interrelated standards for protecting anonymous speakers’ First Amendment rights against unwarranted civil discovery requests.

II. The subpoena should be quashed because Dr. Soto has not made, and cannot make, the necessary showings in support of the subpoena.

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

Both the Virginia Code and *Dendrite* require the party seeking to obtain an anonymous Internet speaker’s identity to provide that speaker notice of the allegations against him so that he can challenge the subpoena. Such documentation necessarily must include an explanation of how the subpoena issuer believes the speech is tortious. *See Dendrite*, 775 A.2d at 759-60; Va. Code § 8.01-407.1(A)(1)(a). Dr. Soto has not satisfied

these requirements. As the undersigned has confirmed with Comcast's counsel, Dr. Soto never provided Comcast a copy of the complaint or any other materials explaining or supporting his allegations. Therefore, when Comcast contacted Doe to inform him of the subpoena, it only attached the subpoena signed by Dr. Soto's counsel and the order of this court enforcing that subpoena. Exh. 1. Neither document describes any of the claims against Doe. Exh. 1. Put another way, as Dr. Soto provided Comcast insufficient information, Comcast could not and did not inform Doe of the allegations against him. Thus, Dr. Soto and his counsel failed to comply with Virginia law and the widely accepted requirements of courts reviewing subpoenas that seek to uncover the identity of anonymous speakers.

B. Dr. Soto has provided no evidence supporting his claims, which, in any event, are meritless.

Under both the Virginia Code and *Dendrite* standard, the subpoena issuer must both allege colorable claims justifying the subpoena and come forward with evidence supporting those claims. The Virginia Code requires that the party seeking the subpoena "file with the appropriate circuit court a complete copy of the subpoena and all items annexed or incorporated therein, *along with supporting material showing,*" at the least, that the conduct at issue may be tortious or that the plaintiff has a "legitimate, good faith basis" to contend that it is actionable. Va. Code § 8.01-407.1(A)(1)(a) (emphasis added). Likewise, under *Dendrite*, a request for the identity of an anonymous speaker must be supported by a properly alleged cause of action and evidence demonstrating each element of that cause of action. *Dendrite*, 775 A.2d at 760 (discussing prongs two through four of

the test). Here, Dr. Soto alleged *no* colorable claims in support of his subpoena and produced no evidence supporting his claims. Therefore, the subpoena should be quashed.

1. Dr. Soto's first claim is for defamation. Complaint ¶¶ 11-14. In a defamation case, the plaintiff bears the burden to show that the defendant published false information that harmed the plaintiff and that the defendant either knew that the information was false or 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).

Here, the entirety of movant Doe's online post reads:

I paid for Vaser HD and had very little fat around my abdomen. I just wanted the sculpting look that is advertised. Got all the "yes we can's" before surgery. The worst wake up in recovery EVER. I was rished [sic] on a Friday afternoon to wake up and I remember how bad it was. The biggest concern. I paid almost 8K with misc stuff and I see absolutely "no results" and feel that my love handles actually look bigger. Wasted money, bad experience!

Complaint Exh. A at 4.

In support of the defamation claim, the complaint states only that "[d]efendant[] ha[s] authored, published, and distributed materially false and defamatory statements," "[d]efendant[] knew that [his statements] were false or acted negligently in failing to determine the facts on which the statement were based" and that Dr. Soto was damaged by the statements. Complaint ¶¶ 12-14. Such conclusory pleadings are entirely insufficient under the Virginia Code and *Dendrite*. Dr. Soto has put forward no materials supporting these allegations, let alone demonstrating each element of the claim.

Indeed, Dr. Soto could not introduce such documentation supporting his claim, as each negative statement in the post is an unactionable statement of opinion. As the Virginia Supreme Court has explained, opinion statements are “relative;” that is, they “depend[] for [their] import largely upon the speaker’s viewpoint.” *Chaves v. Johnson*, 230 Va. 112, 119 (1985). “[S]peech which does not contain a provably false factual connotation, or statements which cannot reasonably be interpreted as stating actual facts . . . cannot form the basis of a common law defamation action.” *Fuste*, 265 Va. at 132 (quoting *Yeagle v. Collegiate Times*, 255 Va. 293, 295 (1998)) (internal quotation marks omitted). “[R]hetorical hyperbole” should be treated as a constitutionally protected statement of opinion. *Yeagle*, 255 Va. at 296.

The crux of Doe’s criticism specifically indicates that it is based on his personal perspective. He explains that he “see[s]” no results stemming from the procedure, and he “feel[s]” that his love handles “look” bigger. His conclusion that the treatment was not worth the expense and was a bad experience is self-evidently a reflection of his personal assessment. *See Chaves*, 230 Va. at 119 (“[A] charge that professional fees are excessive is largely dependent upon the speaker’s viewpoint.”). Moreover, Doe’s assessment of his personal appearance and the value that he places on it certainly cannot be proved factually false.

The other statements that could possibly reflect negatively on Dr. Soto are clear examples of rhetorical hyperbole. Doe’s assertions that his wake-up in recovery was the worst wake up “EVER” and that he felt rushed and could still recall how “bad it was” convey Doe’s personal perception of the experience and do not represent a factual

retelling of events. And because these statements are anchored in Doe’s personal experience, they cannot be proved false.

In sum, Dr. Soto’s defamation claim cannot justify the subpoena because he failed to produce evidence—as required by Virginia’s statute and the *Dendrite* standard—supporting this claim and because the claim against this Doe is not facially valid.

2. Dr. Soto’s remaining claims, which essentially recharacterize the defamation claim as other torts, are also insufficient to justify the subpoena. To begin with, a plaintiff cannot circumvent the First Amendment’s protections, including the limits the First Amendment places on civil discovery, by repackaging his cause of action. *See Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988). 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.*

Moreover, these claims are insufficiently pled and proved and plainly without merit. Claims two and three allege that Does tortiously interfered with Dr. Soto’s contracts with current patients and his future business expectancies. Complaint ¶¶ 15-22. Proof of these torts requires a prima facie showing that the defendant induced or caused a breach of a contract or expectancy. *Chaves*, 230 Va. at 120; *Masco Contractor Servs. E., Inc. v. Beals*, 279 F. Supp. 2d 699, 709 (E.D. Va. 2003). Dr. Soto has introduced no evidence supporting these elements, as required by the Virginia Code and *Dendrite* for the issuance of the instant subpoena.

What is more, both torts require more specific allegations than are present in the complaint. “The purpose of laws against tortious interference [either with contract rights or business expectations] is not to protect consumers or the operation of the marketplace generally. Rather, these causes of action provide a legal remedy where a particular party’s *specific, existing* contract or business expectancy or opportunity has been interfered with in a tortious manner. Thus, the first element that a party claiming under either of these torts must prove is the existence of some *specific* contract or relationship. Failure to allege any *specific*, existing economic interest is fatal to the claim.” *Masco Contractor Servs. E., Inc.*, 279 F. Supp. 2d at 709 (third and fourth emphases added) (citing *Eurotech, Inc. v. Cosmos European Travels Aktiengesellschaft*, 189 F. Supp. 2d 385, 391 (E.D. Va. 2002)). The complaint alleges generally that Dr. Soto’s “multiple contractual relationships” and “valid business relationships” have been harmed by the conduct, but offers no specific information as to any relationship or any harm. Complaint ¶¶ 16, 20. Under Virginia law, the complaint is insufficient to state a claim.

Further, “Virginia caselaw applying the tort of intentional interference with a business expectancy contain a fifth, unstated element to the prima facie case: a competitive relationship between the party interfered with and the interferor.” *17th Street Assocs., LLP v. Markel Int’l Ins. Co. Ltd.*, 373 F. Supp. 2d 584, 600 (E.D. Va. 2005). Here, no such relationship is alleged.

Finally, the complaint alleges that the Does conspired to injure Dr. Soto’s trade, business, and reputation in violation of § 18.2-499 of the Virginia Code. Complaint ¶¶ 23-26. “[B]usiness conspiracy, like fraud, must be pleaded with particularity, and with more

than ‘mere conclusory language.’” *GEICO v. Google, Inc.*, 330 F. Supp. 2d 700, 706 (E.D. Va. 2004) (quoting *Bay Tobacco, LLC v. Bell Quality Tobacco Prods., LLC*, 261 F. Supp. 2d 483, 499 (E.D. Va. 2003)). As with the tortious interference claims, the complaint fails to specify any business or reputational interest that was harmed. Nor does the complaint plead any facts to support the conclusory allegation that movant Doe had the malicious intent to harm the plaintiff’s business, or that he acted in concert with other Does or anyone else. *See GEICO*, 330 F. Supp. 2d at 706 (dismissing claim under Va. Code § 18.2-499 because allegations were “not sufficiently specific to support the conclusory language that the parties entered into an agreement with the purpose of injuring GEICO in its business”). Therefore, the claim is inadequately pled and cannot justify the subpoena.

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

The final step of the *Dendrite* test involves a balancing of the First Amendment interest in speaking anonymously against the strength of the plaintiff’s prima facie case and the plaintiff’s need to discover the defendant’s identity. *Dendrite*, 775 A.2d at 760-61. In light of the weakness of Dr. Soto’s claims, even a very weak First Amendment interest in the anonymous speech at issue would warrant quashing the subpoena.

Nonetheless, it is worth underscoring that because Doe’s speech addresses matters of public concern, the highest level of First Amendment interest is at stake. *See Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (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 1216 (quoting *Connick v. Meyers*, 461 U.S. 138, 146 (1983)). Here, Doe’s speech addresses two matters of public concern. First, members of the public have

an interest in knowing about patients' experiences with medical care so that they can make informed decisions about where and from whom to seek treatment. In light of the extensive self-promotion on Dr. Soto's website, *see, e.g.*, <http://www.drarmandosoto.com/liposuction.html> (promising "a very high rate of satisfaction"), patients' ability both to support and to counter his statements is particularly important. Second, prospective patients have an interest in knowing about others' experience with the products Dr. Soto uses. Consumers considering utilizing VASER Liposelection have an interest in knowing that the procedure does not always produce the desired results or the results that are advertised. Given the public interest in the performance of health-care providers and health-care products, Dr. Soto would have had to demonstrate a particularly compelling justification to warrant interfering with Doe's expression. That his allegations are so self-evidently lacking only underscores that the subpoena should be quashed to protect Doe's rights.

III. Dr. Soto and his 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. Soto and his attorney, Domingo Rivera, 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, is the apparent improper purpose motivating this lawsuit—to coerce the Does into removing their posts, thereby silencing critical speech by threatening them with expensive litigation in a foreign jurisdiction. Moreover, as discussed below, Mr. Rivera has a history of filing similar litigation in this jurisdiction.

Dr. Soto and Mr. Rivera 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 Florida. Dr. Soto and his business are in Florida. As a result, Doe's treatment was necessarily in Florida and those searching for reviews of Dr. Soto are most likely to be in Florida.

As the Virginia Supreme Court has recognized, forcing an individual to litigate in a foreign jurisdiction exposes the "defendant to expense and hardship." *Clark v. Clark*, 11 Va. App. 286, 294 (1990). Moreover, it can mean that essential witnesses cannot be summoned, preventing the defendant from being able to disprove the allegations. *See Williams v. Joynes*, 278 Va. 57, 61 (2009). By filing this frivolous suit in a jurisdiction in which (1) the plaintiff does not engage in business; (2) the plaintiff has proffered no reason to believe the defendant resides; and (3) the defendant's conduct likely had no effect, one can only conclude that Dr. Soto and Mr. Rivera hoped to pressure Doe to abandon his

speech by removing his post so that he would not have to face the burdens of defending his statements in a foreign court.

Indeed, the prior actions of Mr. Rivera indicate that this suit was solely meant to chill the defendant's speech. He previously filed an almost identical complaint in this same Court, on behalf of a California physician unhappy with criticism of her. *See Rajagopal v. Does 1-10*, No. CL 10-3014 (filed October 22, 2010) (complaint attached as Exhibit 2). *Rajagopal* involved online comments regarding an article in a San Francisco newspaper, about a physician who practices in San Francisco. Nonetheless, Mr. Rivera filed suit in this Court. The *Rajagopal* complaint closely parallels the complaint here. The causes of action are identical. The factual claims establishing the elements of each cause of action are nearly identical. Moreover, both prayers for relief demand the same amount of compensatory damages, \$49,000, even though the statements at issue were of a different kind, against different doctors, who practice in different jurisdictions. This pattern of filing meritless suits in Virginia state courts, on behalf of and against people with no apparent connection to Virginia, based on facts that have no apparent connection to Virginia, strongly suggests that these suits are filed here to increase the defendants' costs and limit the defendants' ability to defend themselves in the hope that they will remove their online criticism rather than facing suit.

Moreover, the close resemblance between the instant complaint and the complaint in *Rajagopal* provides another basis for sanctions: that Mr. Rivera did not conduct the requisite "reasonable inquiry" to ensure that "to the best of his knowledge, information and belief" the complaint was "well grounded in fact." Va. Code § 8.01-271.1. It is

farfetched to believe that Mr. Rivera conducted an inquiry into the allegations in this case and those in *Rajagopal* and then concluded that each supported identical compensatory damages and identical causes of action.

The Court should not allow itself to become the go-to jurisdiction for physicians from across the country who are unhappy about online criticism. The facially meritless claims and the strong appearance of an improper purpose in bringing the suit here (or at all) warrant an award of sanctions against the plaintiff and his counsel in this case.

CONCLUSION

The Court should quash the subpoena and impose sanctions on Dr. Soto and his attorney.

Respectfully submitted,

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May 4, 2012

EXHIBITS

1. Attachments sent to Doe by Comcast on April 13, 2012, providing him documentation regarding the subpoena.
2. Complaint in *Rajagopal v. Does 1-10*, No. CL 10-3014, filed October 22, 2010.

Exhibit 1

VIRGINIA: IN THE CIRCUIT COURT OF HENRICO COUNTY

ARMANDO SOTO,

Plaintiff,

vs.

JOHN DOES 1 through 10,

Defendants.

CASE NO.: CL11-3439

**ORDER GRANTING PLAINTIFF'S
MOTION TO ENFORCE SUBPOENA**

Upon Plaintiff's Motion to Enforce Subpoena, the Court, having fully considered all of the materials filed and good cause being shown, hereby:

ORDERS the enforcement of the subpoena issued by Plaintiff to Comcast of Georgia/Virginia, Inc., ("Comcast") on February 13, 2012, ("Subpoena"), which is attached to Plaintiff's Motion to Enforce Subpoena as Exhibit A,

and therefore ORDERS the disclosure by Comcast of the information requested in the Subpoena after Comcast notifies the subscriber of such disclosure.

IT IS FURTHER ORDERED THAT good-faith attempts by Comcast to notify the subscriber(s) shall constitute compliance with this Order.

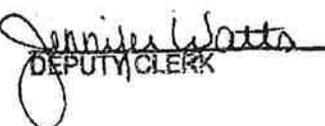
Dated: 4-5-12


Henrico County Circuit Judge

I ask for this.


Domingo J. Rivera, Esq. (VSB #71407)
Jacqueline Chiang, Esq. (VSB #73577)
Rivera Law Group

A COPY TESTE:
YVONNE G. SMITH, CLERK


DEPUTY CLERK

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Subpoena Duces Tecum - Attorney Issued [Form DC-498 7/00]

SUBPOENA DUCES TECUM

ATTORNEY ISSUED VA. CODE Sections 8.01-413, 16.1-89, 16.1-265

Commonwealth of Virginia Supreme Court Rules 1:4, 4:9

HEARING DATE AND TIME: March 16 at 9:30 a.m.

HENRICO CIRCUIT COURT

4301 East Parham Road

Richmond, Virginia 23273

Armando Soto v. John Does, Case No. CL11-3439

TO THE PERSON AUTHORIZED BY LAW TO SERVE THIS PROCESS:

You are commanded to summon:

**Comcast of Georgia/Virginia, Inc.
CT Corporation System
4701 Cox Road, Suite 301
Glen Allen, VA 23060**

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

1. All account information, including without limitation account holder names, mailing addresses, billing addresses, email addresses, and registration information, relating to the IP address **76.29.144.159** on **September 15, 2011, at 8:48 p.m. CDT.**
2. Any and all Comcast Internet subscriber agreements, terms of service, content policies, and acceptable use policies in effect on September 15, 2011.

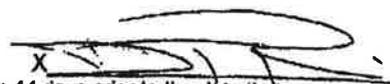
Make these available at Rivera Law Group, 8527 Mayland Drive, Suite 107, Richmond, VA 23294, no later than Friday, March 9, 2012. The documents may be faxed to the undersigned at (866) 651-2004 to permit such party or someone acting in his or her behalf to inspect and copy, test or sample such tangible things in your possession, custody or control and for the Court's use on the aforesaid date.

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

Rivera Law Group
8527 Mayland Drive, Suite 107
Richmond, VA 23294
Tel: (804) 332-6585 / Fax: (866) 651-2004

ISSUED: February 13, 2012

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.



Domingo J. Rivera, Esq., Of Counsel

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 ARMANDO SOTO HAS EITHER ASKED THE COURT TO ISSUE A SUBPOENA, OR A SUBPOENA HAS BEEN ISSUED, TO YOUR INTERNET SERVICE PROVIDER COMCAST CABLE COMMUNICATIONS, LLC 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:

Virginia: In the Circuit Court for Henrico County

Armando Soto

Case No. CL11-3439

OBJECTION TO SUBPOENA DUCES TECUM

I object to the Subpoena Duces Tecum addressed to for the following reasons:

Comcast Cable Communications, LLC

(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 Armando Soto, c/o Rivera Law Group, 8527 Mayland Drive, Suite 107, Richmond, VA 23294 and Comcast of Georgia/Virginia, Inc., CT Corporation System, 4701 Cox Road, Suite 301, Glen Allen, VA 23060.

John Doe

Enter e-mail nickname or other alias used in communicating via the Internet service provider to whom the subpoena is addressed.

Exhibit 2

VIRGINIA:
IN THE CIRCUIT COURT OF HENRICO COUNTY

USHA RAJAGOPAL,

Plaintiff,

v.

Case No. CL 10-3014

JOHN DOES 1-10,

Defendants.

COMES NOW Plaintiff USHA RAJAGOPAL (hereinafter "Dr. Rajagopal"), and for her Complaint, respectfully represents as follows:

1. Dr. Rajagopal is a citizen of the State of California with a business address at 490 Post Street, Suite 430, San Francisco, CA 94102.

2. Defendants John Does 1 through 10 are unknown persons, firms, entities or corporations that have engaged in various illegal, unauthorized, and wrongful actions against Dr. Rajagopal as hereinafter described. Defendants' identities, locations, and residences are currently unknown to Dr. Rajagopal because Defendants, in perpetrating their illegal, unauthorized, and wrongful actions, have intentionally hidden their identities to evade detection.

3. Upon information and belief, some of the Defendants may be located within the Commonwealth of Virginia. Additionally, to perpetrate their unlawful actions, the Defendants utilized "www.google.com" and other Internet websites that are widely accessible and utilized throughout the Commonwealth of Virginia. The contents of some of these websites are routed through an Internet Service Provider (ISP) located in Sterling, Virginia.

4. Dr. Rajagopal received her Medical Degree from the University of Texas Southwestern Medical School, where she was inducted into Alpha Omega Alpha, a national medical honor

10-22-10
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CLERK
Sammi Headle
Deputy Clerk, Henrico
Circuit Court

society. She completed her surgical residency at Parkland Hospital in Dallas Texas and went on to complete a fellowship in plastic surgery at the University of California. Dr. Rajagopal has been a Board Certified Plastic Surgeon for 15 years and is an active member of the American Board of Plastic Surgery, the American Society for Aesthetic Plastic Surgery, the American Society of Plastic Surgery, and the California Society of Plastic Surgeons.

5. Defendants have engaged in a malicious campaign of unlawfully defaming and spreading lies about Dr. Rajagopal and have utilized the aforementioned Internet websites to advance their campaign against her.

6. As part of their campaign, Defendants have directly and indirectly contacted Dr. Rajagopal's patients and potential future patients to spread false and defamatory information about her.

7. Defendants' actions have damaged Dr. Rajagopal in her good name and reputation.

8. Defendants have conspired together, acted as an agent for each other, and joined together in this misconduct through a meeting of the minds in an agreement, understanding, and effort to carry out the acts alleged herein.

9. Defendants' conduct is negligent, reckless, intentional, malicious, wanton, and represents a conscious and total disregard for Dr. Rajagopal's rights. Defendants' conduct caused, and continues to cause, Dr. Rajagopal to be seriously damaged.

10. Defendants have utilized the Internet website "www.google.com," specifically "http://maps.google.com," to post false statements regarding Dr. Rajagopal and her business practices. These false statements include, but are not limited to: "See the Sept 15-21 SF 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.”, “After reading the article in SF 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://www.sfweekly.com/2010-09-15/news/doctoring-the-web>” A true and correct copy of these false statements is attached hereto and made a part hereof as Exhibit A.

11. Defendants are working under an agenda to cause irreparable harm to Dr. Rajagopal, her business, and her reputation.

COUNT I
DEFAMATION

12. The allegations contained in paragraphs 1 through 11 and all subsequent allegations are adopted and incorporated by reference as if set forth fully in this paragraph.

13. As described herein, Defendants have authored, published, and distributed materially false and defamatory statements about Dr. Rajagopal.

14. Defendants knew that said statements were false or acted negligently in failing to determine the facts on which the statements were based.

15. Dr. Rajagopal has been seriously damaged as a direct and proximate cause of this defamation by Defendants.

COUNT II
TORTIOUS INTERFERENCE WITH CONTRACT RIGHTS

16. The allegations contained in paragraphs 1 through 15 and all subsequent allegations are adopted and incorporated by reference as if set forth fully in this paragraph.

17. Defendants knew of the existence of many valid contractual relationships between Dr. Rajagopal and her patients.

18. Defendants, through the misconduct alleged herein, intentionally and materially induced Dr. Rajagopal's patients to end their contractual relationships with her.

19. Dr. Rajagopal has been seriously damaged as a direct and proximate cause of this tortious interference with contract by Defendants.

COUNT III
TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCIES

20. The allegations contained in paragraphs 1 through 19 and all subsequent allegations are adopted and incorporated by reference as if set forth fully in this paragraph.

21. Defendants knew that Dr. Rajagopal had a reasonable expectation of entering into valid business relationships with many additional patients, with the probability of future economic benefit to her.

22. Defendants intentionally and materially interfered with Dr. Rajagopal's prospective business relationships by acting as alleged herein.

23. Dr. Rajagopal has been seriously damaged as a direct and proximate cause of this tortious interference with prospective business relationships by Defendants.

COUNT IV
CONSPIRACY TO INJURE IN TRADE, BUSINESS AND REPUTATION
UNDER VA. CODE § 18.2-499

24. The allegations contained in paragraphs 1 through 23 and all subsequent allegations are adopted and incorporated by reference as if set forth fully in this paragraph.

25. Defendants have combined, associated, agreed, mutually undertook, or concerted together, and with others not presently known to Dr. Rajagopal, and acted as agents of each other, for the purpose of willfully and maliciously injuring Dr. Rajagopal in her reputation, trade, business, and profession by committing the tortious acts alleged herein.

26. Defendants' actions have such a relation to the profession or occupation of Dr. Rajagopal that they directly touch Dr. Rajagopal in her profession in a different way than they would touch a person in any other trade or profession.

27. Defendants' defamatory actions tend to injure Dr. Rajagopal with respect to her trade and impair confidence in her character or ability. Because of the nature of Dr. Rajagopal's business, great confidence must necessarily be reposed.

28. Dr. Rajagopal has been seriously damaged as a direct and proximate cause of this conspiracy of Defendants and those with whom they are acting in concert.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, USHA RAJAGOPAL, moves for judgment against Defendants:

(a) Granting preliminary and permanent injunctive relief against Defendants, and their agents, servants, and employees, and against any and all persons, firms, or corporations with whom Defendants have acted in concert who receive actual notice of the order by personal service or otherwise, enjoining them from directly or indirectly engaging in any of the illegal, unauthorized, and wrongful acts complained of herein and granting such other injunctive relief which the circumstances may require in order to protect Dr. Rajagopal's interests;

(b) An award of compensatory damages in the amount of Forty-Nine Thousand Dollars (\$49,000.00);

(c) An award of exemplary and punitive damages;

(d) An award of attorneys' fees and court costs expended; and

(e) Such other and further relief as this Court deems proper and just.

JURY DEMAND

Dr. Rajagopal hereby demands trial by jury.

USHA RAJAGOPAL

By 
Counsel

Domingo J. Rivera, Esq. (VSB # 71407)
Domingo J. Rivera, Attorney at Law, PLC
4870 Sadler Road, Suite 300
Glen Allen, VA 23060
Phone: (804) 332-6585
Fax: (866) 651-2004

Exhibit A

Google maps

Search Maps

Show search options

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Overview

Reviews (3)

Maps (1)

Recent Reviews

Rajagopal Usha MD Ste 430, 490 Post St, San Francisco, CA 94102-1411
Beware! - Sep 17, 2010

After reading the article in SF 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://www.sfwkly.com/2010-09-15/news/doctoring-the-web>

Was this review helpful? [Yes](#) - [No](#)

[\(Flag as inappropriate\)](#)

Security Public Storage 1101 Carter Street, Daly City, CA 94014
Couldn't be happier - Sep 9, 2010

This facility is tops - every aspect is handled in a professional and exemplary manner. It is scrupulously clean, well lit, secure and every aspect has been thought out to make leaving your worldly possessions an anxiety free experience. If you need storage, this is the best place imaginable. Plus the rates are extremely reasonable.

Was this review helpful? [Yes](#) - [No](#)

[\(Flag as inappropriate\)](#)

[See all 3 reviews »](#)

Recent Maps



[Directions to Greenwich PT, Old Greenwich, CT 06870 \(Town Of Greenwich Greenwich Pt Old Grnwch\) »](#)

Updated Apr 9

[Rate this map](#) - [Write a comment](#)

From: 21 Topping Rd, Greenwich, CT 06831

To: Greenwich PT, Old Greenwich, CT 06870 (Town Of Greenwich Greenwich Pt Old Grnwch)

Directions to Greenwich PT, Old Greenwich, CT 06870 (Town Of Greenwich Greenwich Pt Old Grnwch)

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Google maps

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Reviews (1)

Reviews

Dr. Rajagopal, MD, Plastic Surgeon 490 Post St, Suite 430, San Francisco, CA 94102
warning about this MD & these postings - Sep 19, 2010

See the Sept 15-21 SF 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.

Was this review helpful? [Yes](#) - [No](#)

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