IN THE
SUPREME COURT OF VIRGINIA

AMERICA ONLINE, INC.,	)	
Petitioner,	)	
v.	)	**Record No. 012761**
NAM TAI ELECTRONICS, INC.,	)	
Respondent.	)	

PETITION FOR REHEARING

America Online, Inc. ("AOL") petitions the Court for rehearing of its decision affirming the trial court's denial of AOL's motion to quash a subpoena issued by a California commission for out-of-state discovery of the identity of one of AOL's subscribers. The subpoena violates Virginia public policy because, after *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the same First Amendment protections that preclude Nam Tai Electronics, Inc. ("Nam Tai") from making out its libel and trade libel claims foreclose its claim based on the same statement under California's unfair business practices statute. The Court's decision represents a significant incursion on First Amendment protections that will only encourage plaintiffs to circumvent those guarantees through artful pleading. The Court's decision is foreclosed by *Hustler Magazine* and its progeny, and nothing in *Maximus, Inc. v. Lockheed Information Management Systems Co., Inc.*, 254 Va. 408, 493 S.E.2d 375 (1997), is to the contrary.

AOL seeks rehearing to protect the First Amendment rights of its members to speak anonymously. As the United States Supreme Court has explained, "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." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995). The United States Supreme Court recently reaffirmed the importance of this right, noting that the decision to maintain 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." *Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton*, 122 S. Ct. 2080, 2089 (2002). Anonymous speech "thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation — and their ideas from suppression — at the hand of an intolerant society." *McIntyre*, 514 U.S. at 357.

If the subpoena is enforced, then a violation of this right to anonymous speech will occur immediately and without any intervening layers of judicial review or discretion. Although the AOL member's First Amendment rights with regard to respondent's libel and unfair business practices claims "remain to be ultimately determined in the California courts," *America Online, Inc. v. Nam Tai Electronics Inc.*, No 012761, 2002 Va. LEXIS 157, at *22 (Cir. Ct. Loudoun Cty. Nov. 1, 2002), the same cannot be said of the right to speak anonymously — that right will be forever lost at the moment that AOL reveals the speaker's identity following enforcement of the subpoena. In other words, this is not a situation where the Court can defer to the forum state to decide whether the defendant's First Amendment right to anonymous speech ultimately outweighs the plaintiff's alleged injuries. The question of the defendant's right to anonymity is a threshold issue that is being decided once and for all by this Court.

BACKGROUND

In its complaint filed in the California court, Nam Tai presented three claims: (1) libel, (2) trade libel, and (3) unfair business practices under California Business and Professional Code § 17200 *et seq.* (*See* Joint Appendix ("JA"), Tab 6, pp. 14-34.) While these claims were styled as three separate causes of action, the gravamen of each claim is the same — the publication of a false statement that allegedly has caused Nam Tai reputational harm. Underlying all three claims is a single message posted by AOL subscriber "scovey2," which stated, in its entirety:

> Sinking is not a province in China but an observation of this company's stock market performance. This low tech crap that they produce is in an extremely competitive and low profitability industry. I see see-sawing of the stock with no real direction. (See-sawing is also not a province.)

(*Id.* Ex. A.) Nam Tai's libel claim alleges that this message "defamed and damaged [its] reputation, injured [its] good will and interfered with [its] relationship with its shareholders and the general public." (*Id.* ¶ 19.) Similarly, Nam Tai's unfair business practices claim alleges that the same message "defamed and damaged [its] reputation, injured [its] good will and interfered with [its] relationship with its shareholders and the general public." (*Id.* ¶ 29.)

After filing its complaint, Nam Tai sought and obtained from the Circuit Court for Loudoun County, Virginia, a subpoena demanding that AOL reveal the identity of "scovey2." AOL filed a motion to quash. The Circuit Court ultimately concluded that "[n]either of the defamation claims would withstand demurrer if filed in Virginia" because they would be barred by the First Amendment. (JA Tab 23, p.3.) Thus, it held that comity did not require enforcement of the subpoena as to those claims because "it would facilitate process not otherwise available to litigants in the Commonwealth." (*Id.*) It concluded, however, that it should afford comity to the California court with respect to the unfair business practices claim because the First Amendment did not preclude that claim. (*Id.* p.5.)

On appeal, this Court rejected AOL's argument that the subpoena violates Virginia public policy because its enforcement would violate the First Amendment protections explained in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). 2002 Va. LEXIS 157 at *21-22. In the Court's view, *Chaves v. Johnson*, 230 Va. 112, 335 S.E.2d 97 (1985), and *Maximus, Inc. v. Lockheed Information Management Systems Co., Inc.*, 254 Va. 408, 493 S.E.2d 375 (1997), allow a claim for unfair business practices to be established without proof of actual malice or false statements of fact, even if that claim sounds in defamation and is based on alleged injury to reputation from speech. Because the Court's conclusion is foreclosed by *Hustler Magazine* and its progeny and in order to protect its members' First Amendment right to speak anonymously, AOL filed a Notice of Intent to Apply for Rehearing on November 6, 2002, pursuant to Rule 5:39(b), and now asks the Court to reconsider its decision.

ARGUMENT

I. The First Amendment, Particularly After *Hustler Magazine*, Precludes Enforcement of the Subpoena Here.

This Court affirmed the trial court on the basis of the holding in *Chaves* that First Amendment protections do not apply where "[t]he tort complained of . . . is an intentional wrong to the property rights of another, accomplished by words, not defamatory in themselves, but employed in pursuance of a scheme designed wrongfully to enrich the speaker at the expense of the victim." 2002 Va. LEXIS 157 at *20 (quoting *Chaves*, 230 Va. at 122). After *Hustler Magazine*, however, it is not enough simply to ask whether the words complained of were "in pursuance of a scheme designed wrongfully to enrich the speaker at the expense of the victim." Courts must look beyond the allegations in the non-defamation tort claim to ask whether the gravamen of the claim is damage to reputation and whether the plaintiff is attempting to

circumvent First Amendment protections through artful pleading. To the extent *Chaves* suggests the contrary, *Chaves* is no longer good law after *Hustler Magazine* and its progeny.

In *Hustler Magazine*, Jerry Falwell sued Hustler for, *inter alia*, libel and intentional infliction of emotional distress after the magazine published a parody advertisement concerning Falwell. 485 U.S. at 48. The jury rejected Falwell's libel claim because the advertisement could not reasonably be understood to describe actual facts or events, but it ruled in his favor on the emotional distress claim. The United States Supreme Court reversed the latter judgment, holding that "public figures and public officials may not recover for the tort of intentional infliction of emotional distress . . . without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,'" the same First Amendment protection applicable in defamation cases. *Id.* at 56. The Court's holding reflected its "considered judgment that such a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment," *id.* and the practical concern that a contrary rule would allow plaintiffs to circumvent free speech protections by refashioning libel claims as suits for other torts, *id.* at 53 ("Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject").

The Court subsequently made clear that its decision in *Hustler Magazine* was broad and not simply limited to emotional distress claims. In *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), the Court considered whether *Hustler Magazine* precluded a plaintiff from asserting a state law theory of promissory estoppel to prevent the defendant newspaper from disclosing his identity. In rejecting that claim, the Court reasoned:

> Nor is Cohen attempting to use a promissory estoppel cause of action to avoid the strict requirements for establishing a libel or defamation claim. ... *Cohen is not*

> *seeking damages for injury to his reputation or his state of mind.* He sought damages in excess of $50,000 for breach of a promise that caused him to lose his job and lowered his earning capacity. Thus, this is not a case like *Hustler Magazine, Inc. v. Falwell. . . .*

Id. at 671 (emphasis added). Thus, the Court recognized the principle that *Hustler* stands for today: namely, that constitutionally protected speech which does not support a claim for defamation cannot then be made the target of litigation simply by alleging the same speech and damage to reputation as the basis for a different tort.

Lower courts have since applied *Hustler Magazine*'s reasoning to foreclose a broad range of other tort claims that sounded in defamation where the constitutional requirements for defamation could not be met. Indeed, a federal court in California has already applied First Amendment protections to a claim for unfair business practices under California Bus. & Prof. Code § 17200 — the same claim at issue here. *See Isuzu Motors Ltd. v. Consumers Union of United States, Inc.*, 12 F. Supp. 2d 1035, 1048-49 (C.D. Cal. 1998) and *Isuzu Motors Ltd. v. Consumers Union of United States, Inc.*, 66 F. Supp. 2d 1117, 1128-29 (C.D. Cal. 1999). In addition, courts have applied the holding in *Hustler Magazine* to a wide range of other causes of action. As the Fourth Circuit explained in *Food Lion* in rejecting the plaintiff's claim for damages "relating to its reputation, such as loss of good will and lost sales," resulting from breach of a duty of loyalty: "What Food Lion sought to do, then, was to recover defamation-type damages under non-reputational tort claims, without satisfying the stricter (First Amendment) standards of a defamation claim. We believe that such an end-run around First Amendment strictures is foreclosed by *Hustler*." *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 522 (4th Cir. 1999); *see also Veilleux v. NBC*, 206 F.3d 92 (1st Cir. 2000) (fraudulent misrepresentation); *Brown v. Hearst Corp.*, 54 F.3d 21 (1st Cir. 1995) (false light); *Beverly Hills Foodland, Inc. v. United Food and Commercial Workers Union*, 39 F.3d 191, 196 (8th Cir.

1994) (tortious interference); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1058 (9th Cir. 1990) (tortious interference and commercial disparagement); *In re Am. Cont'l/Lincoln Sav & Loan Sec. Litig.*, 884 F. Supp. 1388, 1396 (D. Ariz. 1995) (tortious interference); *EEE ZZZ Lay Drain Co., Inc. v. Lakeland Ledger Publ'g Corp.*, 2000 U.S. Dist. LEXIS 21266, *13 (W.D. N.C. Feb. 8, 2000) (negligence); *Doe v. TCI Cabletelevision*, 2002 Mo. App. LEXIS 1577 at *44 (July 23, 2002) (misappropriation of name and right of publicity); *Hornberger v. ABC, Inc.*, 351 N.J. Super. 577, 627-30, 799 A.2d 566 (2002) (fraud).

II. This Court's Holding in *Maximus* Is Inapposite and Did Not Find the First Amendment Inapplicable to Tort Claims Based on Damage to Reputation Caused by Speech.

This Court recognized that other courts have taken AOL's view and "have sustained challenges to tort litigation on the ground that the plaintiff was seeking to 'avoid the protection afforded by the Constitution ... merely by the use of creative pleading.'" 2002 Va. LEXIS 157 at *21 (quoting *Beverly Hills Foodland*, 39 F.3d at 196). It nevertheless found that the holding in *Chaves* survived *Hustler Magazine*, relying solely on *Maximus, Inc. v. Lockheed Information Management Systems Co.*, 254 Va. 408, 412, 493 S.E.2d 375, 377 (1997). The Court found that, because *Maximus* "declined to extend First Amendment protections to a tortious interference with a contract expectancy cause of action," *Maximus* "supports the proposition that *Chaves* is sound precedent," and concluded that it could not say that "the trial court erred in determining that Nam Tai's statutory cause of action for unfair business practices under California law is reasonably comparable to the law of Virginia and is not repugnant to the public policy of Virginia." 2002 Va. LEXIS 157 at *21-22.

AOL respectfully submitst that this Court's reasoning misconstrued both the facts and the holding in *Maximus*. *Maximus* involved a free-standing claim for tortious interference with a contract expectancy. 254 Va. at 410. The plaintiff lost a government contract after the

defendant, a competing bidder, filed a formal protest stating that two members of the evaluation panel awarding the contract "had undisclosed conflicts of interest which interfered with their objectivity and compromised the integrity of the evaluation process." *Id.* The complaint did not include a defamation claim against the defendant, nor could it have because the plaintiff was not the subject of any allegedly injurious statement; the two members of the evaluation panel were the only ones arguably defamed. Moreover, the plaintiff did not allege any reputational harm; the only alleged injury was the loss of the government contract. The trial court in *Maximus* nevertheless analogized to the law of defamation, holding that the defendant was entitled to a qualified privilege and that the plaintiff would have to satisfy a heightened burden similar to a defamation action. It determined therefore that the plaintiff was required to show malice or prove that the defendant's improper conduct was so egregious as to override the qualified privilege. *Id.* at 411-12. The trial court based its defamation analogy on *Chaves* because that decision "recognized a similarity between the affirmative defense of justification or privilege in a tortious interference with contract suit and the defense of qualified privilege in a defamation suit." *Id.* at 412. In both contexts, according to the trial court, the interests of the speaker or actor had to be balanced against the interests of the injured party.

In rejecting the trial court's analogy, this Court explained in *Maximus* that the similarity between defamation and business torts in terms of balancing interests "neither suggests nor demands that the specific requirements for imposition of liability in one cause of action must be applied to the other cause of action." *Id.* As a statement of Virginia law in the context of a free-standing tortious interference claim like the one alleged in *Maximus* where there is no allegation of reputational injuries, this is clearly true. There is no reason to think that, under the facts of *Maximus*, simply because there is balancing of interests in both contexts, the same defenses must

apply. Nevertheless, this Court's analysis in *Maximus* did not address at all the concern at issue in *Hustler Magazine* and in this case that a tort claim for reputational injuries can be used to circumvent First Amendment protections that would otherwise apply to a libel claim based on the same speech — indeed, it did not even mention the First Amendment at all. Nor did it address the continuing viability of *Chaves*' holding on this issue after *Hustler Magazine*. There simply was no occasion for this Court to address these questions in *Maximus* because the plaintiff could not have styled its interference with contract expectancy claim as a defamation claim, there was no claim for damage to reputation, and there was no reason to think the plaintiff was using this tort claim as a vehicle for circumventing First Amendment protections.

Here, however, the Court must confront for the first time whether, after *Hustler Magazine*, in a case where the plaintiff has a claim for reputational injury that sounds in defamation, the plaintiff can circumvent First Amendment protections by recasting the claim as a different tort, whether as a claim for intentional infliction of emotional distress, interference with a contract expectancy, or unfair business practices. *Hustler Magazine* and its progeny establish that a plaintiff cannot evade the First Amendment in that manner, while *Maximus* is simply inapposite. And to the extent that *Chaves* stands for the proposition that tort claims for reputational injuries do not have to satisfy First Amendment requirements, this Court should overrule *Chaves* and in that way bring Virginia's First Amendment jurisprudence in line with every other court that has confronted this question. *See In re Am. Cont'l/Lincoln Sav & Loan Sec. Litig.*, 884 F. Supp. at 1396 ("Lexecon maintains, however, that opinions may be actionable under a theory of tortious interference, citing [*Chaves*]. However, the continuing viability of Chaves' holding is highly questionable in light of [*Hustler Magazine*].").

Finally, the Court need not be concerned here with the worry articulated in *Chaves* that applying First Amendment protections to interference with contract claims "[b]y logical extension, [] would apply to any verbal conduct, however tortious, and would completely destroy the right of action universally recognized." 230 Va. at 121. AOL does not contend that all torts involving speech implicate First Amendment protections. Rather, AOL urges the Court to apply a more modest rule that is already established in precedent: the First Amendment should apply to the particular subset of tort claims that involve allegations of reputational harm resulting from speech. It is in the context of these tort claims that the risk of circumventing First Amendment protections, identified in *Hustler Magazine*, is particularly high.

The United States Supreme Court already adopted this theory in *Cowles* when it distinguished *Hustler Magazine* on the ground that the plaintiff in *Cowles* was not seeking damages for reputational injuries and, therefore, was not "attempting to use a promissory estoppel cause of action to avoid the strict requirements for establishing a libel or defamation claim." 501 U.S. at 671. Other lower courts have not had difficulty containing the *Hustler Magazine* rule. In *Food Lion*, for example, the Fourth Circuit recognized that despite First Amendment protections for members of the press, the reporters who accepted employment in the plaintiff's supermarket while reporting undercover were still liable for breaching a duty of loyalty and for trespass, 194 F.3d at 521, even though they could not be found liable for reputational injuries related to the same conduct, *id.* at 523. As the court explained:

> Food Lion, in seeking compensation for matters such as loss of good will and lost sales, is claiming reputational damages from publication, which the *Cowles* Court distinguished by placing them in the same category as the emotional distress damages sought by Falwell in *Hustler*. In other words, according to *Cowles*, 'constitutional libel standards' apply to damage claims for reputational injury from a publication such as the one here.

Id. Similarly, in *Veilleux*, the First Circuit readily applied this distinction, noting that "the type of damages sought bears on the necessity of constitutional safeguards," 206 F.3d at 127, and holding that plaintiffs could recover for pecuniary losses stemming from fraudulent misrepresentation, but that reputational and emotional distress damages would not be available. *Id.* at 128 ("Unlike *Hustler* and *Food Lion*, this is not a case where [plaintiff] could avoid the strict requirements of a defamation claim by seeking 'defamation-type' damages under an easier common law standard.").

Considering the ease with which courts have distinguished claims for reputational injuries, this Court need not worry that First Amendment protections will swallow up independent tort claims. But what should concern the Court is that if the current ruling is allowed to stand, numerous meritless defamation claims may turn into viable alternative tort claims — or claims that are at least viable enough to require that speakers lose their First Amendment right to speak anonymously. As Judge Posner noted nearly twenty years ago:

> Any libel of a corporation can be made to resemble in a general way [an] archetypal wrongful-interference case, for the libel will probably cause some of the corporation's customers to cease doing business with it. ... But this approach would make every case of defamation of a corporation actionable as wrongful interference, thereby enabling the plaintiff to avoid the specific limitations with which the law of defamation--presumably to some purpose--is hedged about. We doubt that the Illinois courts would allow this end run around their rules on defamation, and we therefore need not consider any constitutional implications of their doing so.

Brown & Williamson Tobacco Corp. v. Jacobson, 713 F.2d 262, 273-74 (7th Cir. 1983).

CONCLUSION

What is at issue in this case is not only the AOL member's First Amendment right to express his or her opinion about Nam Tai's products (a right the Circuit Court held would preclude enforcement of Nam Tai's subpoena on the defamation counts of its complaint), but also the member's First Amendment right to express that opinion anonymously. The former right may eventually be adjudicated in the California courts; the latter right never will — it can be protected only by this Court. For this and the foregoing reasons, AOL respectfully requests that the Court grant this petition for rehearing.

Respectfully submitted,

AMERICA ONLINE, INC.
22000 AOL Way
Dulles, Virginia 20166
Phone: (703) 265-1000
Fax: (703) 265-6459

By: Laura A. Heymann /or
Laura A. Heymann (VSB No. 45461)

Patrick J. Carome
Samir Jain
WILMER, CUTLER & PICKERING
2445 M Street, NW
Washington, DC 20037
Phone: (202) 663-6000
Fax: (202) 663-6363

Counsel for America Online, Inc.

November 27, 2002