SUPREME COURT OF DELAWARE

JOHN DOE NO. 1,	)	
	)	No. 266, 2005
Defendant Below-Appellant,	)	
	)	Court Below -
v.	)	Superior Court of the
	)	State of Delaware
PATRICK CAHILL and JULIA CAHILL,	)	in and for
	)	New Castle County
Plaintiffs Below-Appellees.	)	C.A. No. 04C-011-022

BRIEF FOR PUBLIC CITIZEN, AMERICAN CIVIL LIBERTIES UNION, ELECTRONIC FRONTIER FOUNDATION, AND AMERICAN CIVIL LIBERTIES UNION OF DELAWARE AS AMICI CURIAE URGING REVERSAL

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August 1, 2005

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STATEMENT OF THE CASE

The Internet is a democratic institution in the fullest sense. It is the modern equivalent of Speakers' Corner in England's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant, to all who choose to listen. As the Supreme Court explained in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 853, 870 (1997),

> From a publisher's standpoint, [the Internet] constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers and buyers. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, . . . the same individual can become a pamphleteer.

Full First Amendment protection applies to free speech on the Internet. *Id.*

Knowing that people have personal interests in news developments, and that people love to share their opinions with anyone who will listen, many companies have organized outlets for the expression of citizen opinions. Yahoo! and Raging Bull, for example, have separate "message boards" for each publicly traded company. Many newspapers provide "blogs" for citizens to discuss particular topics, or the affairs of particular communities. Typically, these outlets are electronic bulletin board systems where individuals can discuss major companies and public figures at no cost by posting comments for others to read and discuss.

The individuals who post messages there generally do so under pseudonyms – similar to the system of truck drivers using "handles"

when they speak on their CB's. Nothing prevents an individual from using a real name, but the blog at issue here is typical in that most people choose nicknames. These often colorful monikers protect the writer's identity from those who express disagreement, and encourage uninhibited exchange of ideas and opinions. Such exchanges can be very heated and, as seen from the messages and responses on the blog at issue in this case, App. 22-40, they are sometimes filled with invective and insult. Most, if not everything, said on blogs is taken with a grain of salt.

There is one aspect of blogs like the Smyrna/Clayton Issues Blog that makes them very different from almost any other form of published expression: Because any member of the public can express a point of view, a person who disagrees for any reason with something that is said – including the belief that a statement contains false or misleading information – can respond immediately at no cost. That response will have the same prominence as the offending message. Such a blog is thus unlike a newspaper, which cannot be required to print a response to its criticisms. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). The reply can provide facts or opinions to controvert the criticism and persuade the audience that the critics are wrong. Indeed, the blog excerpt in the record makes clear that Cahill was an active participant in the blog. App. 27, 29. And, because many people regularly revisit the blog, the response is likely to be seen by much the same audience as those who saw the original criticism. In this way, the

Internet provides the ideal proving ground for the proposition that the marketplace of ideas, rather than the courtroom, provides the best forum for the resolution of disagreements about the truth of disputed propositions of fact and opinion.

The Smyrna/Clayton Issues Blog is devoted to discussion of local affairs. In September 2004, appellant "Proud Citizen" posted two messages on the blog that unfavorably compared Patrick Cahill, a member of the Smyrna Town Council, with Smyrna Mayor Mark Shaeffer. The first message claimed that Cahill had lesser leadership skills, energy and enthusiasm, referring to Cahill's "character flaws," "mental deterioration," and "failed leadership." The second began, "Gahill [sic] is . . . paranoid." App. 26, 28.

On November 2, Cahill and his wife sued four anonymous posters to the blog. Plaintiffs named Proud Citizen as Doe No. 1 and alleged that his name-calling had accused Cahill of suffering from "mental defects and diseases," and that the misspelling of his name accused him of "engaging in extramarital, homosexual affairs."

Without notice to the posters, the Cahills sought leave of Court to subpoena the Internet Protocol ("IP") numbers that the four posters had used when posting their messages. After learning that all posters used IP numbers belonging to Comcast, a provider of cable Internet access, plaintiffs subpoenaed identifying information from Comcast which, in turn, pursuant to 47 U.S.C. § 551, notified the four Doe's of the subpoena.

Proud Citizen ("Doe 1") moved to quash the subpoena arguing

that disclosure would violate his First Amendment right to criticize a public official anonymously. *Dendrite v. Doe*, 775 A.2d 756 (N.J. Super. 2000). Doe 1 argued that prevailing standards governing the enforcement of such subpoenas required balancing the right of free speech against plaintiffs' interest in identifying the person who must be served to prosecute the action, and allow enforcement only if plaintiffs identify the defamatory words, show that they are actionable, and, at a minimum, establish a prima facie case on the elements of his claim. Plaintiffs argued that this standard was too exacting, and proposed a standard allowing access if plaintiffs sued in "good faith."

The trial court denied the motion, expressing concern that *Dendrite* effectively requires a plaintiff to present the degree of evidence that would be needed to win the case, which would be unreasonable at the initial stages of the case. Opin. 16-17. Good faith is to be determined, the court decided, solely by considering the complaint and the briefs. *Id.* 19-20. The good faith standard was met, the court decided, because Cahill is a married man, and hence the misspelling of his name as "Gahill" might be interpreted as alleging that he engaged in an extra-marital, same-sex affair, and because, as a public official, an imputation of diminished mental capacity might cause harm to his reputation. *Id.* 20-21.

SUMMARY OF ARGUMENT

1. The Internet has the potential to be an equalizing force within our democracy, giving ordinary citizens the opportunity to communicate, at minimal cost, their views on issues of public concern to all who will listen, and full First Amendment protection applies to communications on the Internet. Longstanding precedent also recognizes that speakers have a First Amendment right to communicate anonymously, so long as they do not violate the law in doing so. Thus, when a complaint is brought against an anonymous speaker, the courts must balance the right to obtain redress from the perpetrators of civil wrongs, against the right of those who have done no wrong to remain anonymous. In cases such as this one, these rights come into conflict when a plaintiff seeks an order compelling disclosure of a defendant's identity, which, if successful, would irreparably destroy the defendant's First Amendment right to remain anonymous.

2. Suits against anonymous speakers are unlike most tort cases, where identifying an unknown defendant at the outset of the case is merely the first step toward establishing liability for damages. In a suit against an anonymous speaker, identifying the speaker gives an important measure of relief to the plaintiff because it enables him to employ extra-judicial self-help measures to counteract both the speech and the speaker, and creates a substantial risk of harm to the speaker, who not only loses the right to anonymous speech but is exposed to the plaintiff's efforts

to restrain or oppose his speech. For example, an employer might discharge a whistleblower, and a public official might use his powers to retaliate against the speaker, or might use knowledge of the critic's identity in the political arena. Similar cases across the country, and advice openly given by lawyers to potential clients, demonstrate that access to identifying information to enable extrajudicial action may be the only reason for many such lawsuits. Our legal system ordinarily does not give substantial relief of this sort, even on a preliminary basis, absent proof that the relief is justified because success is likely and the balance of hardships favors the relief.

3. Whatever the reason for speaking anonymously, a rule that makes it too easy to remove the cloak of anonymity will deprive the marketplace of ideas of valuable contributions. For example, a "good faith" standard, as adopted and applied by the court below, may not even require plaintiff to meet the standards of Rule 11 and thus avoid the imposition of sanctions. The First Amendment right to speak anonymously deserves more protection than that.

4. Some individuals may speak anonymously because they fear the entirely proper consequences of improper speech, such as the prospect of substantial damages liability if they tell lies about somebody they do not like for the purpose of damaging her reputation. The challenge for the courts is to develop a test for the identification of anonymous speakers which makes it **neither** too easy for vicious defamers to hide behind pseudonyms, **nor** too easy

for a big company or a public official to unmask critics simply by filing a complaint that manages to state a claim for relief under some tort or contract theory.

5. This Court should reject the minimal "good faith" standard adopted below, and expand the developing consensus among those courts that have considered this question, by relying on the general rule that only a compelling interest is sufficient to warrant infringement of free speech rights. Specifically, when faced with a demand for discovery to identify an anonymous speaker, a court should (1) provide notice to the potential defendant and an opportunity to defend his anonymity; (2) require the plaintiff to specify the statements that allegedly violate its rights; (3) review the complaint to ensure that it states a cause of action based on each statement and against each defendant; (4) require the plaintiff to produce evidence supporting each element of its claims, and (5) balance the equities, weighing the potential harm to the plaintiff from being unable to proceed against the harm to the defendant from losing his right to remain anonymous, in light of the strength of the plaintiff's evidence of wrongdoing. The court can thus ensure that a plaintiff does not obtain an important form of relief – identifying its anonymous critics – and that the defendant is not denied important First Amendment rights, unless the plaintiff has a realistic chance of success on the merits.

6. Meeting these criteria can require time and effort on a plaintiff's part and may delay his quest for redress. However,

everything that the plaintiff must do to meet this test, it must also do to prevail on the merits in a case. So long as the test does not demand more information than plaintiffs will be reasonably able to provide shortly after they file the complaint, the standard does not unfairly prevent the plaintiff with a legitimate grievance from achieving redress against an anonymous speaker.

7. Moreover, most cases of this kind will primarily involve demands for monetary relief, except in the rare case where the plaintiff has a sound argument for being granted a preliminary injunction, notwithstanding the strong rule against prior restraints of speech. Accordingly, although applying this standard may delay service of the complaint, it will not, ordinarily, prejudice the plaintiff. On the other hand, the fact that after the defendant is identified, his right to speak anonymously has been irretrievably lost, counsels in favor of caution, and hence in favor of allowing sufficient time for the defendant to respond and requiring a sufficient showing on the part of the plaintiff.

ARGUMENT

I. The First Amendment Protection Against Compelled Identification of Anonymous Speakers.

It is well-established that the First Amendment protects the right to speak anonymously. *Watchtower Bible and Tract Soc. of New York v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from the literary efforts of Shakespeare and Mark Twain to the authors of the Federalist Papers.

As the Supreme Court said in *McIntyre*:

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

514 U.S. at 341-342, 356.

These rights are fully applicable to speech on the Internet. The Supreme Court has treated the Internet as a forum of preeminent importance because it places in the hands of 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. Accordingly, First Amendment rights fully apply to communications over the Internet. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). Several courts specifically uphold the right to communicate anonymously online. *See* cases cited by appellant at 10-11; *see also ApolloMEDIA Corp. v. Reno*, 119 S.Ct. 1450 (1999), *aff'g* 19 F. Supp.2d 1081 (C.D. Cal. 1998); *Global Telemedia v. Does*, 132 F. Supp.2d 1261 (C.D. Cal. 2001).

Internet speakers speak anonymously for various reasons. They may wish to avoid having their views stereotyped according to their racial, ethnic or class characteristics, or according to their gender. They may be associated with an organization but want to express an opinion of their own, without running the risk that, despite the standard disclaimer against attribution of opinions to the group, readers will assume that the group feels the same way. They may be discussing embarrassing subjects and may want to say or imply things about themselves that they are unwilling to disclose otherwise. And they may wish to say things that might make other people angry and stir a desire for retaliation. Whatever the reason for wanting to speak anonymously, a rule that makes it too easy to remove the cloak of anonymity will deprive the marketplace of ideas of valuable contributions.

Moreover, at the same time that the Internet gives individuals the opportunity to speak anonymously, it creates an unparalleled

capacity to monitor every speaker and discover his or her identity. Speakers who send e-mail or visit a website leave behind electronic footprints that can, if saved by the recipient, provide the beginning of a path that can be followed back to the original senders. Thus, anybody with enough time, resources and interest, if coupled with the power to compel the disclosure of the information, can learn who is saying what to whom.

A court order, even if granted for a private party, is state action and hence subject to constitutional limitations. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). A court order to compel production of individuals' identities in a situation that threaten the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *Bates v City of Little Rock*, 361 U.S. 516, 524 (1960). Abridgement of the rights to speech and press, "even though unintended, may inevitably follow from varied forms of governmental action," such as compelling the production of names. *NAACP v. Alabama*, 357 U.S. at 461. Rights may also be curtailed by means of private retribution following court-ordered disclosures. *Id.* at 462-463; *Bates*, 361 U.S. at 524.

Due process requires the showing of a "subordinating interest which is compelling" where, as here, compelled disclosure threatens a significant impairment of fundamental rights. *Bates*, 361 U.S. at 524; *NAACP v. Alabama*, 357 U.S. at 463. Because compelled identification trenches on the First Amendment right of speakers to

remain anonymous, justification for incursions on that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 347 (1995).

In a closely analogous area of law, courts have evolved a standard for the compelled disclosure of the sources of libelous speech, recognizing a qualified privilege against disclosure of otherwise anonymous sources. In such cases, many courts apply a three-part test, under which the person seeking to identify the anonymous speaker has the burden of showing that (1) the issue on which the material is sought is not just relevant to the action, but goes to the heart of the plaintiff's case; (2) disclosure of the source is "necessary" to prove the issue because the party seeking disclosure is likely to prevail on all the other issues in the case, and (3) the discovering party has exhausted all other means of proving this part of its case. *United States v. Driden*, 633 F.2d 346, 358 (3d Cir. 1980); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974); *Cervantes v. Time*, 464 F.2d 986 (8th Cir. 1972); *Baker v. F&F Investment*, 470 F.2d 778, 783 (2d Cir. 1972); *Fuester v. Conrail*, 1994 WL 555526 (Del. Super., Sept. 16 1994).

As one court stated in refusing to enforce a subpoena to identify anonymous Internet speakers whose identity was allegedly relevant to defense against a shareholder derivative action, "If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this

would have a significant chilling effect on Internet communications and thus on basic First Amendment rights." *Doe v. 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001).

II. Applying the Qualified Privilege for Anonymous Speech to Develop a Standard for the Identification of John Doe Defendants.

Several courts have enunciated standards to govern identification of anonymous Internet speakers. In the leading case, a company sued four individuals who had criticized it on a Yahoo! bulletin board. *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001). The court set out a five-part standard for cases involving subpoenas to identify anonymous Internet speakers, which amici urge the Court to apply in this case:

> We offer the following guidelines to trial courts when faced with an application by a plaintiff for expedited discovery seeking an order compelling an ISP to honor a subpoena and disclose the identity of anonymous Internet posters who are sued for allegedly violating the rights of individuals, corporations or businesses. The trial court must consider and decide those applications by striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants.
>
> We hold that when such an application is made, the trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application. These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board.
>
> The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech.
>
> The complaint and all information provided to the court should be carefully reviewed to determine whether

> plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants. In addition to establishing that its action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to R. 4:6- 2(f), the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant.
>
> Finally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.
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> 342 N.J. Super. at 141-142, 775 A.2d at 760-761.

Similarly, in *Melvin v. Doe*, 49 Pa. D&C 4th 449 (2000), *rev'd on other grounds*, 575 Pa. 264, 836 A.2d 42 (2003), the court ordered disclosure only after finding genuine issues of material fact requiring trial. In reversing the order of disclosure, the Pennsylvania Supreme Court expressly recognized the right to speak anonymously and sent the case back for a determination of whether, under Pennsylvania libel law, actual economic harm must be proved as an element of the cause of action (836 A.2d at 50):

> court-ordered disclosure of Appellants' identities presents a significant possibility of trespass upon their First Amendment rights. There is no question that generally, the constitutional right to anonymous free speech is a right deeply rooted in public policy that goes beyond this particular litigation, and that it falls within the class of rights that are too important to be denied review. Finally, it is clear that once Appellants' identities are disclosed, their First Amendment claim is irreparably lost as there are no means by which to later cure such disclosure.
>
> Several federal trial courts follow the same approach,

considering **evidence** supporting plaintiff's claim before giving discovery to identify an anonymous defendant. In *Equidyne Corp. v. Does 1-21*, No. 02-430-JJF (D. Del., Nov. 1, 2002) at 6-7 (Addendum ("Add.") 9-10), Judge Farnan followed *Dendrite* to the extent of considering evidence that the defendant had used the Internet to solicit proxies in support of candidates for director, that this defendant had not described his own holdings, and that no proxy statement had been filed for those candidates, thus showing a potential violation of the proxy rules. (In a later opinion, the Court also held that no showing of harm was required for that cause of action. (D. Del., Feb 13, 2005), at 2, Add. 12). In *Sony Music Entertainment v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004), the Court weighed the limited First Amendment interests of alleged file-sharers but upheld discovery to identify them after satisfying itself that plaintiffs had produced evidence showing a prima facie case that hundreds of songs that defendants had posted online were copyrighted and had been infringed. And in *Alvis Coatings v. Doe*, 2004 WL 2904405 (W.D.N.C., Dec. 2, 2004), the court ordered the identification of a commercial competitor of the plaintiff who posted defamatory comments on bulletin boards only after considering a detailed affidavit (Add. 28-30) that explained the ways in which certain comments were false.

A similar approach was used in *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), where the plaintiff sued several defendants for registering Internet domain names that

used the plaintiff's trademark. The court expressed concern about the possible chilling effect of such discovery (*id.* at 578):

> People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate . . . . People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identities.

Accordingly, the court required plaintiff to make a good faith effort to communicate with the anonymous defendants and give them notice that suit had been filed against them, thus providing them an opportunity to defend their anonymity. The court also compelled the plaintiff to demonstrate that it had viable claims against the defendants. *Id.* at 579. This demonstration included a review of the evidence in support of the plaintiff's trademark claims against the anonymous defendants. *Id.* at 580.[1]

Here, the court below relied on a Virginia trial court decision as supporting a far weaker standard, whereby plaintiff need only show that it is pursuing a claim in good faith, Opin. at

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[1] A Connecticut court applied a balancing test to decide whether it was appropriate to compel Time-Warner Cable Co. to identify one of its subscribers, who was accused of defaming the plaintiff. *La Societe Metro Cash & Carry France v. Time Warner Cable*, 2003 WL 22962857, 36 Conn. L. Rptr. 170 (Conn. Super. 2003). The Court took testimony from one of the plaintiff's officials, who attested both to the falsity of the defendant's communication and to the damage that the communication has caused, and decided that the evidence was sufficient to establish "probable cause that it has suffered damages as the result of the tortious acts of defendant Doe," at *7, and therefore ordered identification.

17-18, but the court failed to note several features of that case. In that case, a company, having first sued a Doe in Indiana and obtained from that court a commission to seek discovery in another state, subpoenaed AOL in Virginia to identify an AOL subscriber. The subscriber did not oppose enforcement, but AOL argued for a standard that would protect its subscribers against needless piercing of protected anonymity. The court noted that considerations of comity required it to respect the Indiana court's ruling that discovery was appropriate. Even then, the court articulated the following standard for disclosure:

> [The Court must be] satisfied by the pleadings **or evidence** supplied . . . 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 . . . the subpoenaed identity information [must be] centrally needed to advance that claim.
>
> *In re Subpoena to AOL*, 52 Va. Cir. 26, 34, 2000 WL 1210372 (Va. Cir. Fairfax Cty. 2000), *rev'd on other grounds sub nom., AOL v. Anonymous Publicly Traded Co.*, 261 Va. 350, 542 S.E.2d 377 (2001) (emphasis added).

Although each of these cases sets out a slightly different test, each court weighed plaintiff's interest identifying the people who allegedly violated its rights against the interests implicated by the potential violation of the First Amendment right to anonymity, thus ensuring that First Amendment rights are not trammeled unnecessarily. Put another way, the qualified privilege to speak anonymously requires courts to review a plaintiff's claims and the evidence supporting them to ensure that the plaintiff has a valid reason for piercing the speaker's anonymity.

III Procedures That Courts Should Follow In Deciding Whether to Compel Identification of John Doe Defendants in Particular Cases.

A. Give Notice of the Threat to Anonymity and an Opportunity to Defend Against the Threat.

First, when asked to subpoena anonymous Internet speakers, a court shuold is ensure that the plaintiff has undertaken the best efforts available to notify the speakers that they are the subject of a subpoena, and then withhold any action for a reasonable period of time until the defendants have had the time to retain counsel. *Seescandy*, 185 F.R.D. at 579. Thus, in *Dendrite*, the court required the plaintiff to post on the message board a notice of its application for discovery. The notice identified the four screen names that were sought to be identified, and gave information about the local bar referral service so that the individuals concerned could retain counsel to voice their objections, if any. (The posted Order to Show Cause is appended as Add. 44-45). The Appellate Division specifically approved of this requirement and ordered trial judges in New Jersey to follow it. 342 N.J. Super. at 141, 775 A.2d at 760. Because, in a suit over anonymous speech, preliminary injunctive relief would ordinarily be barred by the rule against prior restraints, and the only relief sought is damages, there is rarely any reason for expedition that counsels against requiring notice and opportunity to object. A concomitant of requiring notice to the anonymous defendant and identifying the specific statements alleged to be actionable is allowing enough time to respond to the allegedly unlawful statements – ordinarily,

at least as much time as would be allowed after receipt of a motion for summary judgment.

In this case, it would have been simple for plaintiffs to have posted notice of their motion on the blog itself. Although such transmission is not tantamount to service of a summons, it would have represented the Cahills' best efforts to provide fair notice to the Does. In future cases, amici suggest that courts should not entertain motions to identify anonymous Internet speakers until they are assured that comparable efforts have been made.

To be sure, the Doe defendants eventually received notice that their anonymity was threatened because all of them connected to the Internet through Comcast, which, as a cable Internet provider, was required by the federal Cable Act to provide notice of the subpoena. Many major Internet service providers ("ISP") who provide access by dial-up, broadband or satellite do likewise, and in fact the Cyberslapp Coalition of which amici are a part have proposed a model notification policy for ISP's to follow. (This policy is posted on line at www.cyberslapp.org/ISPLetter.cfm.) However, some ISP's still do not provide notice to their customers before they respond to subpoenas. Accordingly, an order such as the one that was entered and affirmed in *Dendrite* provides an important procedural protection for the right to speak anonymously.

B. Require Specificity Concerning the Statements.

The qualified privilege to speak anonymously requires a court to review a plaintiff's claims to ensure that the plaintiff does,

in fact, have a valid reason for piercing each speaker's anonymity. Thus, courts should require plaintiffs to quote the exact statements by each anonymous speaker that is alleged to have violated its rights. It is startling how often plaintiffs in these sorts of cases do not bother to do this. Instead, they may quote messages by a few individuals, and then demand production of a larger number of identities.

Plaintiffs here quoted the two posts on which they sued Doe 1. Although the use of ellipses at the end of the quotation from the second post is troubling, Doe 1 placed the entire post in the record, along with other comments on the blog. In future cases, however, the entire posting should be set forth for review.

C. Review the Facial Validity of the Claims After the Statements Are Specified.

Third, the court should review each statement to determine whether it is facially actionable. In this regard, plaintiffs' libel claims appear highly dubious. First, although plaintiff Julia Cahill is no doubt offended by the criticisms of her husband, none of the statements by Doe 1 are "of and concerning" her, and it is a cardinal principle of libel law that a plaintiff may only sue over factual statements that pertain directly to the plaintiff. *Restatement (Second) of Torts* § 564, *adopted by Q-Tone Broadcasting Co. v. Musicradio of Maryland*, 1994 WL 555391 (Del. Super., Aug. 22, 1994). Indeed, the First Amendment requires that an allegedly defamatory statement be "of and concerning" the plaintiff. *New York Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964).

Second, the statements that plaintiff Patrick Cahill alleges as defamatory are a thin reed with which to support a libel action. Expressions of opinion are not actionable for defamation, and the issue of whether a statement is opinion or fact is one for the Court to resolve as a matter of law. *Riley v. Moyed*, 529 A.2d 248, 251 & n.2 (Del. 1987). Moreover, just as readers will anticipate that newspaper commentators "will make strong statements, sometimes phrased in a polemical manner that would hardly be considered balanced or fair elsewhere as a news reporting column," *id.* at 252, so, too, statements on a message board are typically exaggerated and most readers will take them with a grain of salt rather than anticipating complete objectivity. The very context thus militates against a finding of defamatory meaning.

Similarly, the language used in the postings is suggestive of opinion rather than statements of fact. In common discourse, vague references to a public figure as being "paranoid" and showing "mental deterioration" are non-verifiable statements of opinion and sarcasm, rather than suggestions that the official suffers from a clinical defect. Courts have "refused to hold defamatory on its face or defamatory at all an imputation of mental disorder which is made in an oblique or hyperbolic manner." *Bratt v. IBM Corp.*, 392 Mass. 508, 516, 467 N.E.2d 126, 133 (Mass. 1984).

Moreover, putting aside the substantial debate about whether labeling an individual as a gay or lesbian is defamatory, Cahill's specific claim, that the lone misspelling of his name as "Gahill"

constitutes an accusation of engaging in a same-sex, extra-marital affair, is nonsensical. Plaintiffs have set forth no reason why the reference should be taken as a sly characterization of sexual orientation rather than a typographical error stemming from the proximity of the "g" and "c" keys on a computer keyboard, or some other reason for substituting the initial letter of Cahill's name. *See Amrak Prod's v. Morton*, 410 F.3d 69, 71 (1st Cir. 2005) (upholding district court ruling that refused to find photo caption to be a defamatory statement that plaintiff is gay because Court would have to "pile inference upon innuendo").

Finally, the fact that this case involves statements about an elected public official militate against a finding of defamatory reading. In *Riley*, this Court warned against expansive application of libel law to cases brought by public officials:

> A contrary ruling would inhibit a significant segment of discourse vital in a democracy. [E]ven the most careless readers must have perceived that the [words were] no more than rhetorical hyperbole. . . . The language used must consider[] the broader social context in which the column appeared, i.e., that it addressed a current topic of ongoing public debate . . . [L]anguage which might otherwise be considered statements of fact have here assumed the character of statements of opinion.
>
> 529 A.2d at 252-253.

D. Require an Evidentiary Basis for the Claims.

Fourth, no person should be subjected to compulsory identification through a court's subpoena power unless the plaintiff produces sufficient evidence supporting each element of the cause of action to show a realistic chance of winning a lawsuit against

each Doe defendant. The requirement of presenting evidence prevents a plaintiff from being able to identify critics simply by filing a facially adequate complaint. In this regard, plaintiffs often claim that they need identification of defendants simply to proceed with the case. However, the Court should recognize that identification of an otherwise anonymous speaker is itself a major form of **relief** in cases like this, and relief is generally not awarded to a plaintiff absent evidence in support of the claims. Withholding relief until evidence is produced is particularly appropriate where the relief may undermine, and thus violate, the defendant's First Amendment right to speak anonymously.

Indeed, in a number of cases, plaintiffs have succeeded in identifying their critics and then sought no further relief from the court. Thompson, *On the Net, in the Dark, California Law Week*, Volume 1, No. 9, at 16, 18 (1999). Some lawyers who bring cases like this one have publicly stated that the mere identification of their clients' anonymous critics may be all they desire to achieve in court. *E.g.*, http://www.zwire.com/site/news. cfm?newsid=1098427 &BRD=1769&PAG=461&dept_id=74969&rfi=8. One leading advocate of discovery procedures to identify anonymous critics urges corporate executives to use discovery first, and to decide whether to pursue a libel case only after the critics have been identified and contacted privately. Fischman, *Your Corporate Reputation Online*; Fischman, *Protecting the Value of Your Goodwill from Online Assault* (Add. 54-59). Lawyers who represent plaintiffs in these cases have

also urged companies to bring suit, even if they do not intend to pursue the action to a conclusion, because "[t]he mere filing of the John Doe action will probably slow the postings." Eisenhofer and Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 (Sept./Oct. 2000), at 46. These lawyers similarly suggest that clients decide whether to pursue a defamation action only after finding out who the defendant is. *Id.* When respected members of the Bar are seeking clients by promoting the benefits that can be obtained from subpoenas without winning the lawsuit, the dangers posed by a mere "good faith" standard when libel suits are brought pro se are even more troubling.

As Eisenhofer and Liebesman acknowledge, the mere pendency of a subpoena may have the effect of deterring other members of the public from discussing the public official who has filed the action. However, imposing a requirement that proof of wrongdoing be presented to obtain the names of the anonymous critics may well persuade plaintiffs that such subpoenas are not worth pursuing unless they are prepared to pursue litigation.

To address this potential abuse, the Court should borrow by analogy the holdings of cases involving the disclosure of anonymous sources that require a party seeking discovery of information protected by the First Amendment to show reason to believe that the information sought will, in fact, help its case. *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 6-9 (2d Cir. 1982); *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976). *Cf.*

Schultz v. Reader's Digest, 468 F. Supp. 551, 566-567 (E.D. Mich. 1979). In effect, the plaintiff should be required to meet a summary judgment standard of creating genuine issues of material fact on all issues in the case, including issues on which it needs to identify the anonymous speakers, before it gets the opportunity to obtain their identities. *Cervantes v. Time*, 464 F.2d 986, 993-994 (8th Cir. 1972). "Mere speculation and conjecture about the fruits of such examination will not suffice." *Id.* at 994.

If the plaintiff cannot come forward with concrete evidence sufficient to prevail on all elements of its case on subjects that are based on information within its own control, there is no need to breach the anonymity of the defendants. *Bruno v. Stillman*, 633 F.2d 583, 597 (1st Cir. 1980); *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303, 1311 (W.D. Mich. 1996). The requirement that there be sufficient evidence to prevail against the speaker to overcome the interest in anonymity is part and parcel of the requirement that disclosure be "necessary" to the prosecution of the case, and that identification "goes to the heart" of the plaintiff's case. If the case can be dismissed on factual grounds that do not require identification of the anonymous speaker, it can scarcely be said that such identification is "necessary."

The extent of the proof that a proponent of compelled disclosure of the identity should be required to offer may vary depending on the element of the claim that is in question. On many issues in suits for tortious speech, several elements of the

plaintiff's claim will be based on evidence to which the plaintiff is likely to have easy access, even access that is superior to the defendant. For example, the plaintiff is likely to have ample means of proving that a statement is false. Thus, it is ordinarily proper to require a plaintiff to present proof of this elements of its claims as a condition of obtaining or enforcing a subpoena for the identification of a Doe defendant. Plaintiff might also be able to produce evidence of context (for example, other accusations) that makes it reasonable to infer that "Gahill" is, in fact, a sly statement about Cahill's sexual orientation.

The same is true with respect to the proof of damages. Courts have traditionally required such proof in some cases, and a plaintiff should have ample means of proving its damages or other harm without need of discovery from the defendant. When a defamation action is filed over statements which, like anonymous internet postings, have less potential for damage – because they are less premeditated, or less likely to be perceived as true – courts have traditionally required a higher standard of proof. For example, slander, except in the case of slander per se, requires proof of economic harm. *Spence v. Funk*, 396 A.2d 967 (Del. 1978); Restatement 2d Torts § 575.

It is worth noting that, although a posting on the Internet is "written," the notes to the Restatement point out that "in modern times, with the discovery of new methods of communication, many courts have condemned the distinction [between written and

non-written communication] as harsh and unjust." Indeed, in *Spence v. Funk*, this Court specifically acknowledged that the traditional rationales that underlie the distinction may not apply in the case of new media. 396 A.2d at 970, fn. 2. Here, the distinction between written and spoken defamation serves its purported purpose poorly: anonymous internet communications are typically spontaneous, and readers of internet communications typically understand them to be so. Although not the same, the similarities between slander and anonymous internet posting support extending the requirement of proof of economic harm to this context.

The court below declined to follow *Dendrite* by requiring the presentation of evidence because it was worried that the rule was onerous for plaintiffs to meet. No evidence supports this concern. Most of the cases cited in Part II above were ones in which courts reviewed evidence as part of their analyses, and nevertheless found sufficient evidence and **enforced** the subpoena. In *Dendrite* itself two Doe defendants were identified. Similarly, in *Immunomedics v. Doe*, 342 N.J.Super. 160, 775 A.2d 773 (2001), a companion case to *Dendrite*, enforcement of the subpoena was affirmed.

E. Balance the Equities.

Even after the Court has satisfied itself that the speaker has made an actionable statement,

> the final factor to consider in balancing the need for confidentiality versus discovery is the strength of the movant's case . . .. If the case is weak, then little purpose will be served by allowing such discovery, yet great harm will be done by revelation of privileged information. In fact, there is a danger in such a case

> that it was brought just to obtain the names . . ... On the other hand, if a case is strong and the information sought goes to the heart of it and is not available from other sources, then the balance may swing in favor of discovery if the harm from such discovery is not too severe.
>
> *Missouri ex rel. Classic III v. Ely*, 954 S.W.2d 650, 659 (Mo. App. 1997).

Just as the Missouri Court of Appeals approved such balancing in a reporters' source disclosure case, *Dendrite* called for individualized balancing when a plaintiff seeks to compel identification of an anonymous Internet speaker:

> assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.
>
> The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.
>
> 342 N.J. Super. at 141-142, 775 A.2d at 760-761.

The adoption of a standard comparable to the test for evaluating a request for a preliminary injunction – considering the likelihood of success and balancing the equities – is particularly appropriate because an order of disclosure is an injunction, and denial of a motion to identify the defendant does not compel dismissal of the complaint, but only defers its ultimate disposition. Apart from the fact that, under *New York Times*, "[t]he First Amendment requires that we protect some falsehood in order to

protect speech that matters," *Gertz v. Welch*, 418 U.S. 323, 341 (1974), the issue at this stage of the case is not whether the action should be dismissed or judgment granted rejecting the tort claims in the complaint, but simply whether a sufficient showing has been made to overcome the right to speak anonymously.

Denial of a motion to enforce a subpoena identifying the defendant does not terminate the litigation, and hence is not comparable to motion to dismiss or a motion for summary judgment. **At the very least, plaintiffs retain the opportunity to renew their motion after submitting more evidence.** In this case, for example, it should be a simple matter for Cahill to show that he is just as mentally acute as he ever was, and that he is single-mindedly heterosexual, assuming that these facts are true.

In contrast, a refusal to quash a subpoena for the name of an anonymous speaker causes irreparable injury, because once a speaker loses her anonymity, she can never get it back. And it is settled law that any violation of an individual speaker's First Amendment rights constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976). Indeed, the injury is magnified where the speaker faces the threat of economic or other retaliation. If, for example, the person whom the plaintiff seeks to identify is employed by someone over whom the plaintiff exercises influence or control, the defendant could lose a great deal from identification, even if the plaintiff has a wholly frivolous lawsuit.

Moreover, the nature of the plaintiff and of Doe 1's criti-

cisms weighs heavily against enforcement of the subpoena. Cahill is a public official trying to identify a constituent who criticized his conduct in office. By holding elective office, Cahill voluntarily made his conduct a fair subject for comment, even robust and unkind comment; and the comments for which Doe 1 has been sued are core political speech, for which the protection of the First Amendment is at its apogee.

On the other side of the balance, the Court should consider the strength of the plaintiffs' case and their interest in redeeming Cahill's reputation. In this regard, the Court can consider not only the strength of the plaintiffs' evidence but also the nature of the allegations and their propensity to case damage to important interests. In a case such as *Biomatrix v. Costanzo*, Docket No. BER-L-670-00 (N.J. Super., Bergen Cy.), where the anonymous poster alleged that the head of a biotech company was a doctor who had collaborated with the Nazis in their heinous medical experiments, or *Hvide v. Doe*, Case No. 99-22831 CA01 (Fla. Cir. Ct, 11th Judicial Cir., Dade Cy.), where the defendant claimed that the head of the company was guilty of embezzling corporate funds and the plaintiff lost his job as a result of the claims, or *HealthSouth Corp. v. Krum*, Case No. 98-2812 (Pa. Ct. C.P. 1998), where the poster claimed that he was having an affair with the CEO's wife, a court will have little difficulty in recognizing a real defamation case and weighing the plaintiff's interest in disclosure quite heavily.

In this case, even if the Court passed beyond the third prong of the test, by holding that Doe 1's words are capable of a defamatory meaning, they are barely so. It is hard to imagine plaintiffs carrying this case to judgment and obtaining a substantial award of damages. The relief of "outing" his critic would likely be the **only** relief Cahill obtained in this case. Moreover, if this Court holds that the rhetoric and name misspelling at issue here suffice to enforce the subpoena, the ruling will send a message that Delaware citizens can never preserve their anonymity when they criticize public officials.

IV. Dendrite's Flexible Standard Discourages Frivolous Lawsuits While Allowing Genuine Cases to Proceed.

The main advantage of the *Dendrite* test is its flexibility. The test seeks to balance the relative interests of the plaintiff who claims that her reputation has been unfairly besmirched against the interest in anonymity of the Internet speaker who claims to have done no wrong, and provides for a preliminary determination based on a case-by-case, individualized assessment of the equities. It avoids creating a false dichotomy between protection for anonymity and the right of tort victims to be compensated for their losses. It ensures that online speakers who make wild and outrageous statements about public figures or private individuals or companies will not be immune from identification and from being brought to justice, while ensuring at the same time that persons with legitimate reasons for speaking anonymously while making measured criticisms will be allowed to maintain the secrecy of their identity as the First Amendment allows.

The *Dendrite* test also has the advantage of discouraging unnecessary lawsuits. In the first few years of the Internet, hundreds or even thousands of lawsuits were filed to identify online speakers, and the enforcement of subpoenas in those cases was almost automatic. Consequently, many lawyers advised their clients to bring such cases without being serious about pursuing a defamation claim to judgment, on the assumption that a plaintiff could compel the disclosure of its critics simply for the price of filing a complaint. ISP's reported staggering statistics about the

number of subpoenas they have received – AOL's amicus brief in *Melvin* reported the receipt of 475 subpoenas in a single fiscal year, and Yahoo! told one judge at a hearing in California Superior Court that it had received "thousands" of such subpoenas.

Although we have no firm numbers, amici believe that the adoption of strict legal and evidentiary standards for defendant identification in Delaware, like those adopted by lower courts in other states, will encourage would-be plaintiffs and their counsel to stop and think before they sue, and to ensure that litigation is undertaken for legitimate ends and not just to chill speech. At the same time, those standards have not stood in the way of identifying those who face legitimate libel and other claims.

The Maine Supreme Court did not reach the First Amendment issue because it had not been presented below, *Fitch v. Doe*, 869 A.2d 722 (2005), and the Pennsylvania Supreme Court, although recognizing the serious First Amendment implications of a disclosure order, remanded for consideration of whether evidence should be required on a particular issue. *Melvin v. Doe*, 575 Pa. 264, 836 A.2d 42 (2003). This case could be the first in which a state Supreme Court squarely decides the proper procedures and standards to be employed when deciding whether a Doe defendant should be identified. We urge the Court to preserve this balance by adopting the *Dendrite* test that balances the interests of defamation plaintiffs to vindicate their rights in meritorious cases against the right of Internet speaker defendants to maintain

their anonymity when their speech is not actionable.

CONCLUSION

The order enforcing the subpoena should be reversed.

Respectfully submitted,

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August 1, 2005