IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

OPENING BRIEF OF APPELLANT JOHN DOE NO. 1

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NATURE AND STAGE OF THE PROCEEDINGS

On November 2, 2004, plaintiffs Patrick Cahill and Julia Cahill (collectively, the "Cahills") filed suit against John Doe Nos. 1, 2, 3 and 4, asserting defamation and invasion of privacy claims. That same day, the Cahills filed a Motion for Leave of Court to Conduct Deposition Prior to Service of Process.

On December 8, 2004, the Cahills filed a Motion for Leave of Court to Conduct Depositions of Comcast Corporation and Comcast Cable Communications, Inc. Prior to Service of Process. On December 21, 2004, the Cahills filed an *ex parte* Motion to Approve Issuance of Subpoena for Disclosure of Personally Identifiable Information, to require Comcast to disclose the identity of certain of its Internet subscribers. The Superior Court entered that Order on December 22, 2004.

On January 4, 2005, John Doe No. 1 ("Doe") filed an Emergency Motion for a Protective Order to preserve his anonymity. After briefing and argument, the Superior Court denied that motion in an Opinion dated June 14, 2004 (as corrected June 16, 2005) (the "Opinion"). The parties entered in to a stipulation staying the effect of the ruling of the Superior Court, which the Superior Court entered as an Order on June 15, 2005. On June 16, 2005, the Superior Court entered an Order certifying the ruling for an interlocutory appeal. Doe filed a Notice of Appeal from Interlocutory Order on June 20, 2005, which was accepted by this Court by Order dated June 28, 2005. This is Doe's opening brief on appeal.

SUMMARY OF ARGUMENT

I. The constitutional issue in this case is ultimately quite narrow. Doe does not argue that the First Amendment grants absolute immunity from defamation suits. Nor does Doe argue that the First Amendment provides absolute protection for all anonymous communication, or even absolute protection for the anonymous utterances in this case. Rather, Doe argues that the First Amendment requires an additional threshold step - some proof that the plaintiffs actually have a case, including evidence that the statements actually harmed them - before anonymity can be breached, for the following reasons: (1) since anonymous speech is deeply valued in this country's constitutional tradition, threats to anonymous speech must overcome "exacting scrutiny"; (2) political speech is at the core of First Amendment protection - nothing is more fundamental to a democracy than protecting the right of citizens to criticize the conduct of their elected officials; (3) preserving the right to engage in anonymous speech on the Internet is especially critical because of the democratizing power of the medium; and (4) the First Amendment substantially limits the ability of public officials to recover for defamation - even where statements about them are demonstrably false and hurtful. Requiring a public official to prove *prima facie* elements of a claim, including falsity and economic harm, before anonymity can be breached is consistent with these principles, and consistent with the overall trend disfavoring recovery for less tangible harm in defamation cases.

STATEMENT OF FACTS

Plaintiffs Patrick Cahill and Julia Cahill are residents of Smyrna, Delaware. (A-10-11). Mr. Cahill is a member of the Smyrna Town Council. (Opinion at 4).

On or about September 19, 2004, Doe, using the alias "Proud Citizen," posted the following statement on an Internet Website sponsored by the Delaware State News called the "Smyrna/Clayton Issues Blog," located at http://newblog.info/0405:

> If only Councilman Cahill was able to display the same leadership skills, energy and enthusiasm toward the revitalization and growth of the fine town of Smyrna as Mayor Schaeffer has demonstrated! While Mayor Schaeffer has made great strides toward improving the livelihood of Smyrna's citizens, Cahill has devoted all of his energy to being a divisive impediment to any kind of cooperative movement. Anyone who has spent any amount of time with Cahill would be keenly aware of such character flaws, not to mention an obvious mental deterioration. Cahill is a prime example of failed leadership - his eventual ousting is exactly what Smyrna needs in order to move forward and establish a community that is able to thrive on economic stability and common pride in its town.

(A-11-12).

On or about September 19, 2004, Doe posted another comment to the same blog:

> Gahill is as paranoid as everyone in town thinks he is. The mayor needs support from his citizens and protection from unfounded attacks.

(A-12).

These are the only Internet postings attributed to Doe.

ARGUMENT

I. INTRODUCTION.

The Internet is a relatively new and powerful democratic forum in which anyone "can become a town crier with a voice that resonates farther than it could from any soapbox." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). The recent emergence and rapid growth of the Internet "has raised novel and complex legal issues and has challenged existing legal doctrine in many areas." *Doe v. 2themart.com, Inc.*, 140 F. Supp. 2d 1088, 1091 (W.D. Wash. 2001), *petition for mandamus denied sub nom. In re Magliarditi*, 2001 WL 747835 (9th Cir. June 19, 2001).

This case presents novel issues of national and statewide importance involving a citizen's First Amendment right to criticize a public official anonymously on the Internet. While the implications of the ruling are far-reaching, the ultimate question in the case is quite narrow: what burden must a public official plaintiff satisfy before he can strip an anonymous speaker of the constitutionally protected right to anonymity?[1]

This case is typical of a rapidly expanding category of Internet defamation actions in which public figures and corporations are deciding to sue their anonymous online critics.[2] Although some of

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1 Although Mrs. Cahill is also a plaintiff, none of the statements attributed to Doe concern her, and so her presence as a plaintiff does not affect the legal analysis. *See Ramunno v. Cawley*, 705 A.2d 1029, 1035 (Del. 1998) (defamation involves a statement "concerning the plaintiff").

2 There were only a handful of these cases in January of 1999. A (continued...)

these suits may be legitimate defamation actions, many appear to be brought by public official and public figures for the purposes of unmasking, harassing and - ultimately - silencing legitimate criticism of their behavior.[3] The important issues raised by this new category of Internet defamation actions have taken center stage in the public debate over the scope of the right to free speech in cyberspace.

The First Amendment strongly protects the right to engage in anonymous political speech, and strongly disfavors defamation suits brought by public officials. To prevent the unnecessary curtailment of First Amendment rights, this Court should require public official defamation plaintiffs to provide *prima facie* proof of elements of their claim, *i.e.*, defamatory content, falsity and economic harm before they can use court-ordered discovery to unmask their critics. That rule is consistent with the rationale underlying the U.S. Supreme Court's First Amendment decisions and the overall trend disfavoring defamation recovery for less tangible harm. Doe urges the Court to follow that trend, which properly balances the right to speak freely

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(...continued)
year later there were hundreds making their way through the courts, and, often, into the news. *See generally* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 101 (2000)(hereinafter, "Lidsky").

3 Lawyers in Delaware and elsewhere are advising clients to file suit to unmask anonymous posters to silence them, and then decide later whether to actually follow through with the litigation. *See, e.g.*, Eisenhofer and Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 at 46 (Sept./Oct. 2000) ("[t]he mere filing of the John Doe action will probably slow the postings"); Fischman, *Your Corporate Reputation Online*,http://www.fhdlaw.com/html/corporate_reputation.htm.

and anonymously on the Internet with the state's legitimate interest in providing public officials with a remedy for defamation.

II. FIRST AMENDMENT PRINCIPLES STRONGLY REQUIRE A HEIGHTENED STANDARD OF PROOF BEFORE DENYING A PERSON THE RIGHT TO ANONYMOUS SPEECH.

A. SCOPE OF REVIEW.

The issue of what is the appropriate legal standard is an issue of law subject to *de novo* review by this Court. *MCA, Inc. v. Matsushita Electric Industrial Co.*, 785 A.2d 625, 638 (Del. 2001).

B. THE FIRST AMENDMENT PROTECTS THE RIGHT TO COMMUNICATE ANONYMOUSLY.

The First Amendment protects the right to speak anonymously. *See, e.g., McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 341-42 (1995) ("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").

Anonymity is more than just one aspect of protected speech; it is part of "our national heritage and tradition." *Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 166 (2002).

The U.S. Supreme Court first documented the historical role of anonymity in *Talley v. California*, 362 U.S. 60 (1960), wherein it observed that:

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been

> able to criticize oppressive practices and laws either anonymously or not at all . . .
>
> Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

Id. at 65.

In *McIntyre*, the U.S. Supreme Court explained that the First Amendment protects anonymity to shield unpopular speakers and thereby encourage a diversity of voices:

> Anonymity is a shield from the tyranny of the majority... It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation... at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.

514 U.S. at 357.

C. POLITICAL SPEECH IS AT THE CORE OF FIRST AMENDMENT PROTECTION.

Political speech is at the very heart of First Amendment protection, and is the lifeblood of a self-governing people. "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). "[S]peech concerning public affairs is more than self-expression; it

is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). *See also Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (noting that "the First Amendment 'has its fullest and most urgent application'" to political speech). Because criticizing the government can be dangerous business, many citizens do so only if they can remain anonymous. *See McIntyre*, 514 U.S. at 342; *Talley*, 362 U.S. at 64.

Doe's speech here falls squarely within the core political speech the First Amendment was designed to protect. The comments about Mr. Cahill questioned his fitness to serve as a public official - undoubtedly an issue of utmost concern to the public. The substance, thus, as well as the form of his speech, merits the utmost First Amendment protection.

D. THE INTERNET IS ENTITLED TO FULL CONSTITUTIONAL PROTECTION.

Preserving the right to engage in anonymous political speech in the medium used by Doe - the Internet - is especially critical because of the unique nature of the Internet. The rise of the Internet has created the opportunity for dialogue on an unlimited range of political matters that could hardly have been imagined fifteen years ago. Now, alongside the traditional print and broadcasting media, largely controlled by corporations, is the Internet. Individuals can send their views to anyone who cares to read them by participating in Internet bulletin board and chat room discussions, or by posting their ideas on a Web page. No longer are the channels of communication and

debate quite so dominated by political figures, celebrities, and corporate officers. The press, in other words, is no longer free only to those who can afford one.

The democratic nature of discussion on the Internet means that Internet speakers need not win the approval of the mainstream media in order to be heard: Internet speakers are free to define for themselves what topics are worthy of discussion. Almost inevitably, therefore, Internet speech tends to be more lively and freewheeling than discussions in the mainstream media, and tends to offer more perspectives.

Recognizing the speech-enhancing and equalizing features of Internet speech, the U.S. Supreme Court has accorded it the highest degree of constitutional protection. *Reno*, 521 U.S. at 870 (noting that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium").

This rigorous protection extends to speech conducted anonymously on the Internet. *See, e.g., 2theMart.com*, 140 F. Supp. 2d at 1093 ("the constitutional rights of Internet users, including the right to speak anonymously, must be carefully safeguarded"); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (noting the "legitimate and valuable right to participate in online forums anonymously or pseudonymously"); *ACLU v. Johnson*, 4 F. Supp. 2d 1029, 1033 (D. N.M. 1998), *aff'd*, 194 F.3d 1149 (10th Cir. 1999) (striking down law that "prevents people from communicating and accessing information anonymously"); *ACLU v. Miller*, 977 F. Supp. 1228, 1232

(N.D. Ga. 1997) (striking down law prohibiting anonymous Internet speech "because 'the identity of the speaker is no different from other components of [a] document's contents that the author is free to include or exclude'") (quoting *McIntyre*, 514 U.S. at 348).

Although a great amount of speech on the Internet is not anonymous, the kind of Internet speech at issue here - core political speech - is most frequently engaged in anonymously. Anonymity makes people even more willing to express controversial ideas because it facilitates the exchange of a broader range of information than individuals would be willing to exchange if their identities were known. *See 2theMart.com*, 140 F. Supp. 2d at 1093 ("[t]he free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously"). *See also McIntyre*, 514 U.S. at 342 ("[t]he decision in favor of anonymity may be motivated by fear of economic or official retaliation or by concern about social ostracism").

Anonymous speakers also express themselves without worry that their speech will be dismissed or marginalized because it is spoken by someone who is young, poor, of a particular race, religion or ethnic background, or any of the myriad other bases on which society judges speech other than by its content. *See* Lidsky, 49 Duke L.J. at 896 ("[m]any participants in cyberspace discussions employ pseudonymous identities ... This unique feature of Internet communications promises to make public debate in cyberspace less hierarchical and discriminatory than real world debate to the extent that it disguises

status indicators such as race, class, gender, ethnicity, and age which allow elite speakers to dominate real-world discourse"). Anonymous speech is, thus, a uniquely free speech.

Although anonymity is critical to the Internet, another unique - but highly problematic - feature of the Internet is that all Internet speakers leave behind an electronic trail that can be traced back to the original sender. *See* Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 Stan. L. Rev. 1193, 1225, 1233 (1998). To access the Internet, would-be participants must register (typically with a variety of personal, identifying information) with an Internet Service Provider. A subpoena directed to that provider will, thus, uncover the identity of almost any anonymous speaker. Many companies have, unfortunately, tried to take advantage of this powerful and previously unavailable weapon over the past few years, by filing scores of lawsuits - and accompanying subpoenas - designed to uncover the names of their anonymous Internet critics. In response, Congress passed 47 U.S.C. §551(c)(2), which requires a court order and notice to the subscriber (and an opportunity for the subscriber to seek protection from such disclosure) before such information may be disclosed.

The unique nature of the Internet also increases the likely chilling effect of breaching anonymity. If Internet anonymity were compromised, fewer individuals may be willing to express themselves, and may be less willing to express unpopular, risky or innovative ideas on the Internet. Unlike traditional media speakers, Internet

speakers typically do not have professional training to judge the credibility of the information they post, editors to peruse their posts for problems, lawyers to advise them of the complexities of defamation law, or libel insurance to pay large judgments. If speakers face liability for casual remarks made on the Web, they are unlikely to hire counsel to review their speech before posting. Instead, they are likely to refrain from speaking entirely or to steer far away from any speech that might risk liability. *2theMart.com*, 140 F. Supp. 2d at 1093 ("[i]f Internet users could be stripped of...anonymity by a civil subpoena enforced under liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment Rights"); Lidsky, 49 Duke L.J. at 861 (the filing of lawsuits simply as a pretext to compel the disclosure of a speaker's identity "threaten[s] not only to deter the individual who is sued from speaking out, but also to encourage undue self-censorship among the other John Does who frequent Internet discussion fora"). Thus, the loss of a speaker's anonymity on the Internet would have a substantial chilling effect on the free exchange of ideas that otherwise takes place in this "vast democratic forum," whose opportunities for discussion and debate range on subjects "as diverse as human thought." *Reno*, 521 U.S. at 852, 868.

E. PUBLIC OFFICIALS HAVE A REDUCED RIGHT TO REDRESS FOR DEFAMATION.

In marked contrast to the strong First Amendment protection for anonymous, political speech on the Internet, the U.S. Supreme Court has repeatedly reiterated that public officials have a substantially reduced right to redress for defamation because they "have voluntarily exposed themselves to increased risk of injury." *Gertz v. Welch*, 418 U.S. 323, 344-45 (1974).

Four principal constitutional rules limit defamation suits brought by public officials and public figures over published statements critical of their actions or character:

1. In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the U.S. Supreme Court held that a public official plaintiff cannot recover under state defamation law even for demonstrably false statements unless the plaintiff can prove actual malice. *Id.* at 279-80. Moreover, actual malice must be proven with "convincing clarity." *Id.* at 285-86. *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) ("convincing clarity" standard applies at summary judgment stage as well as at trial). Under the actual malice rule, a court cannot impose defamation liability for merely negligent falsehoods, not because such falsehoods are valuable in and of themselves, but because "erroneous statement is inevitable in a free debate, and ... must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Id.* at 271-72. As the Pennsylvania Supreme Court recognized, reduced defamation

remedies for public figures express the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," even when it includes "vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *Melvin v. Doe*, 836 A. 2d 42, 46 n. 8 (Pa. 2003) (quoting *Sullivan*, 376 U.S. at 270).

2. In *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), to ensure protection of "the breathing space which gives life to the First Amendment," the U.S. Supreme Court held that appellate judges must perform an independent review of the trial record in libel cases in order to "preserve the precious liberties established and ordained by the Constitution." *Id.* at 511.

3. In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), the U.S. Supreme Court transformed the burden of proving truth, formerly assigned to libel defendants, into a burden for the plaintiff to prove falsity, recognizing that "requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so." *Id.* at 778. The U.S. Supreme Court stated that "'[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.'... Here the speech concerns the legitimacy of the political process, and therefore clearly 'matters.'" *Id.* (*quoting Gertz*, 418 U.S. at 341).

4. In *Gertz*, the U.S. Supreme Court held that, where the plaintiff is a public figure or public official, in the absence of actual malice, damages (I) may not be presumed, (ii) must be

"supported by competent evidence," (iii) must represent compensation for no more than "actual injury," and (iv) must not constitute punitive damages in disguise. 472 U.S. at 349-50.

The foregoing rules embody the fundamental principle that it is better to allow some statements - even false and unscrupulous ones - to go unpunished than to risk self-censorship of legitimate criticism. *Bose*, 466 U.S. at 513.

F. THE APPROPRIATE STANDARD.

1. The *Prima Facie* Case Standard Is Appropriate to Protect The First Amendment Right to Anonymous Speech.

In *Dendrite Intl., Inc. v. Doe No. 1*, 775 A.2d 756 (N.J. Super. A.D. 2001), the New Jersey appellate court recognized that traditional defamation standards were inadequate to analyze a request for disclosure in light of the anonymous speaker's "right of anonymity in the exercise of his right of free speech." *Id.* at 770. It thus held in a non-public figure case that:

> [In] evaluating a plaintiff's request to compel an ISP to disclose the identity of a John Doe subscriber, courts may depart from traditionally-applied legal standards in analyzing the appropriateness of such disclosure in light of the First Amendment implications.

Id. at 771.

Guided by this recognition, the court established a four-part heightened test to "strike[] 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." *Id.* at 760. The four-part test requires (1) an effort to notify the

anonymous posters that they are the subject of a subpoena seeking identity (usually by posting on the same website); (2) identification of the precise statements at issue; (3) sufficient evidence to support a *prima facie* showing as to each element of the cause of action; and (4) balancing the right of anonymity against the strength of the *prima facie* case. *See id.* at 760-61.[4]

The court held that this heightened showing was necessary "as a means of ensuring that plaintiffs do not use discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet." *Id.* at 771.

Other courts have similarly required heightened standards in such circumstances. Recognizing the "fundamental importance" of anonymous speech and that it is "a great tradition that is woven into the fabric of this nation's history," a federal district court recently formulated an even more rigorous test to protect the identity of a non-party witness in an online defamation dispute. *2themart.com, Inc.*, 140 F. Supp. 2d at 1092. In *2themart.com*, the court acknowledged the importance of anonymous Internet speech and the threat to that right posed by normally permissible civil discovery:

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4 *Dendrite* has received a favorable reception among commentators. *See, e.g.*, Jennifer O'Brien, *Putting a Face to a Screen Name: The First Amendment Implications of Compelling ISP's to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 Fordham L. Rev. 2745, 2767-76 (2002); Margo E.K. Reder & Christine N. O'Brien, *Corporate Cybersmear: Employers File John Doe Defamation Lawsuits Seeking the Identity of Anonymous Employee Internet Posters*, 8 Mich. Telecomm. & Tech. L. Rev. 195 (2001).

> The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously. 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. Therefore, discovery requests seeking to identify anonymous Internet users must be subjected to careful scrutiny by the courts.

Id. at 1093. Before disclosure could be permitted, therefore, the court concluded that a subpoenaing party must meet heightened standards. *Id.* at 1096 ("[u]nder the Federal Rules of Civil Procedure discovery is normally very broad . . . But when First Amendment rights are at stake, a higher threshold of relevancy must be imposed"). The court consequently adopted a new legal standard to govern such requests that requires the subpoenaing party to demonstrate, "by a clear showing on the record," that the disclosure request should be granted. *Id.* at 1097.

Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573 (N.D. Calif. 1999), was one of the first decisions to recognize the need to formulate "limiting princip[les] that...apply to the determination of whether discovery to uncover the identity of a defendant is warranted." *Id.* at 578. In *Seescandy*, the plaintiff filed an action for trademark infringement against unidentified individuals because of their alleged use of the web domain names "seescandy.com" and "seescandys.com." *Id.* at 575, 576. The court refused to issue a temporary restraining order, explaining that the plaintiff's ability to seek redress for tortious acts allegedly committed against it

> must be balanced against the legitimate and valuable right to participate in online forums anonymously or pseudonymously. 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. Furthermore, it permits persons to obtain information relevant to a sensitive or intimate condition without fear of embarrassment. 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 identity.

Id. (emphasis added). The court therefore concluded that before an Internet speaker's identity could be disclosed, strict procedural safeguards must be imposed to "prevent use of [civil discovery mechanisms] to harass or intimidate anonymous Internet speakers." *Id.* at 579-80. As in *Dendrite*, the *Seescandy* court concluded that a defamation plaintiff must make a concrete showing sufficient to support each of the elements of its claim before discovery can be permitted. *Id.* at 579 ("[a] conclusory pleading will never be sufficient to satisfy this element").

In *In re: Discovery Order Issued by the Superior Court, Province of Quebec, District of Montreal, Canada*, No. C 02-0151-MISC-WHA, Alsuop, J. (N.D. Ca. Jan 17, 2003), the plaintiff, a pharmaceutical company, in a defamation suit in Canada sought a subpoena in California to compel disclosure of the identities of anonymous posters. After surveying the case law, the District Court held that to obtain information disclosing the identity of anonymous posters,

the plaintiff must had to show "(1) that prior to seeking assistance from the court, it made a diligent effort to obtain the desired information by other means; and (2) that the offending statements are actionable; and (3) that the statements have in fact caused the company actual damage." Slip op. at 5. The District Court denied the request for a subpoena on the ground that, even if the statements were actionable as defamation, the plaintiff had not made any showing as to injury. WL Op. at 6.

Doe recognizes that the *Dendrite* standard is not in its entirety suited to defamation lawsuits brought by public officials. As noted above, such lawsuits require the plaintiffs to prove actual malice as part of their affirmative case. Proving actual malice often requires evidence as to the defendant's conduct and state of mind, evidence that may not be available without discovery from the defendant.

For this reason, Doe respectfully urges the Court to adopt the *Dendrite* standard, but limiting the plaintiff's evidentiary obligation to that necessary to establish a *prima facie* case as to the following elements of the claim: (1) that the statements are actionable as defamation, (2) that the statements are "of and concerning" the plaintiff, (3) that the statements are false, (4) that the statements are not privileged, and (5) that the plaintiff has suffered economic injury.

These standards are consistent with, and build upon, prior case law establishing similar threshold tests before permitting plaintiffs to use judicial subpoenas to unmask traditional anonymous speakers.

See, e.g., National Labor Relations Bd. v. Midland Daily News, 151 F.3d 472, 475 (6th Cir. 1998) (affirming district court's denial of NLRB's motion to force newspaper to identify the party who had placed an anonymous classified ad on ground that the subpoena violated the First Amendment because NLRB sought subpoena before it had developed "any factual support for its action"); *Rancho Publications v. Superior Court*, 68 Cal.App.4th 1538, 1541 (Cal. App. 1999) (declining to permit discovery of identity of anonymous advertisers because plaintiff had failed to demonstrate "compelling need" for the information).[5]

2. The "Good Faith" Standard Does Not Provide Proper Protection for First Amendment Rights.

The Superior Court rejected the *Dendrite* standard, electing to apply instead a "good faith" standard articulated in *In re Subpoena Duces Tecum to America Online, Inc.*, 2000 WL 1210372 (Va. Cir. Ct. 2000), *rev'd on other grounds*, 542 S.E.2d 377 (Va. App. 2001). In that case, not involving a public official or a public figure, the Virginia Circuit Court required only that the plaintiff satisfy a court that he or she has "a good faith basis to contend that [he] may

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5 Requiring such a showing also echoes the well-established requirement, developed in libel cases where the identity of anonymous sources is at issue, that the party seeking such disclosure must introduce substantial evidence to establish that its claim "is not frivolous, a pretense for using discovery powers in a fishing expedition." *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980); *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303, 1310-11 (W.D. Mich. 1996) ("ordering disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted upon the enforcement of state libel laws").

be the victim of actionable conduct," and that the information sought is centrally needed to advance that claim." WL Op. at *8.

The Superior Court, however, interpreted the "good faith" standard set forth in *America Online* as a very minimal standard, being equivalent to the "subjective good faith" standard under Superior Court Civil Rule 11[6], which the Superior Court described as being lower than the standard required to survive a motion to dismiss a claim under Superior Court Civil Rule 12(b)(6). (Opinion at 17 n. 48).

At such, the Superior Court effectively determined that a disclosed defendant not cloaked in any constitutional privilege seeking dismissal under Rule 12(b)(6) is entitled to greater protection and a higher degree of judicial scrutiny than an anonymous defendant protected by the First Amendment. This is the antithesis of the exacting scrutiny required of courts when governmental action threatens to impinge upon the First Amendment right of anonymous speech. *See McIntyre*, 514 U.S. at 345-46. *See also NAACP v. Alabama*, 357 U.S. 449, 461 (1958) (a court order compelling production of individuals' identities in a situation that would threaten the

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6 This Court has not ruled on the correctness of the applicability of the "subjective good faith" standard to Rule 11. The Court of Chancery has rejected this standard, and requires an objective standard. *Price Organization, Inc. v. Universal Computer Services, Inc.*, C.A. No. 12505, 1993 WL 400152, WL Op. at *4, Allen, C. (Del. Ch. Oct. 1, 1993). Similarly, federal courts apply an objective standard. *E.g., Fellheimer v. Charter Tech.*, 57 F.3d 1215, 1225 (3rd Cir. 1995).

exercise of fundamental rights "is subject to the closest scrutiny").[7] Indeed, this "good faith" standard offers neither protection of nor respect for the First Amendment right at issue.

It is also important to note the procedural context of the *America Online* opinion. The original motion for an Order compelling disclosure was issued from a court in Indiana. However, as America Online is based in Virginia, the plaintiff had to take the Order to Virginia in order to obtain a subpoena. As such, the Virginia court was dealing with issues of comity not present here. *See* WL Op. at *8 (noting that Indiana court appeared to validate the merits of the claim).

Finally, it is an important distinction that, unlike *America Online*, this action involves a public official plaintiff, a point which the Superior Court did not address in any way.

Thus, the "good faith" test pays little more than lip service to the First Amendment right to anonymous speech, and is inappropriate.

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7 A court order requiring disclosure, even when issued at the behest of a private party, constitutes state action and so is subject to constitutional limitations. *New York Times*, 364 U.S. at 265; *Shelley v. Kraemer*, 334 U.S. 1 (1948).

II. MR. CAHILL HAS FAILED TO SATISFY THE STANDARD FOR OVERCOMING THE FIRST AMENDMENT RIGHT TO ANONYMOUS SPEECH.

A. SCOPE OF REVIEW.

As this matter involves fundamental First Amendment issues, this Court must undertake independent review *Bose, Inc.*, 466 U.S. at 499-500. Whether a statement is defamatory is a question of law subject to *de novo* review. *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 250 (1st Cir. 2000). Similarly, the sufficiency of evidence is a matter subject to *de novo* review. *Walker Intern. Holdings Ltd. v. Republic of Congo*, 395 F.3d 229, 237 (5th Cir. 2004), *cert. denied*, 125 S.Ct. 1841 (2005).

B. THE STATEMENTS ARE NOT ACTIONABLE.

It is recognized that imputations of mental disorders made in an oblique or hyperbolic manner are not defamatory. *Bratt v. Int'l Business Machines Corp.*, 467 N.E.2d 126, 133 n. 13 (Mass. 1984). This is particularly so in the context of a political debate where there is no verifiable statement of fact demonstrating that an individual is suffering from a debilitating psychological condition. *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 624 (D.C. Cir. 2001).

Similarly, the statement that "[C]ahill is as paranoid as everyone in town thinks he is" (Compl. ¶8), is mere rhetorical hyperbole. Calling someone paranoid, when used in the popular sense (as opposed to a medical diagnosis from a qualified person), is not defamatory. *E.g., Fram v. Yellow Cab Co. of Pittsburgh*, 380 F.Supp. 1314, 1329 (W.D. Pa. 1974); *Capps v. Watts*, 246 S.E.2d 606, 608-09

(S.C. 1978); *Loeb v. Globe Newspaper Co.*, 489 F.Supp. 481, 486 (D. Mass. 1980); *Blouin v. Anton*,. 431 A.2d 489, 490 (Vt. 1981).

Finally, Mr. Cahill asserts (and the Superior Court accepted) that the reference to him as *Ga*hill implies homosexuality and, as a consequence thereof, homosexual marital infidelity. Even assuming that a reasonable reader would interpret "Gahill" as a reference to homosexuality (which itself requires a significant leap of faith), such reference is not defamatory.

In the past, accusations of homosexuality have been deemed to be defamatory, as the accusation implied the commission of the crime of sodomy. *See, e.g., Buck v. Savage*, 323 S.W.2d 363, 369 (Tex. Civ. App. 1959). However, times have changed. For example, the U.S. Supreme Court has declared that state statutes prohibiting consensual sodomy are unconstitutional and "demean[] the lives of homosexual persons." *Lawrence v. Texas*, 539 U.S. 558 (2003). Moreover, courts are recognizing that merely describing an individual as homosexual does not equate to an assertion of the commission of the act of sodomy. *Donovan v. Fiurmara*, 442 S.E.2d 572, 530 (N.C. App. 1994).

It used to be considered defamatory to state that a Caucasian person had African-American ancestry, *see, e.g., Bowen v. Independent Publishing Company*, 96 S.E.2d 564 (S.C. 1957), but now society has evolved in its thinking. *See Thomason v. Times-Journal, Inc.*, 379 S.E.2d 551 (Ga. App. 1989) (refusing to concede that plaintiff may have suffered from social prejudice of others where plaintiff sued over the publication of a false obituary that gave a funeral home

listing that catered to a primarily "black clientel [sic]"). Similarly, it is now inappropriate to institutionalize prejudice against homosexuals by awarding damages in a defamation lawsuit. *Albright v. Morton*, 321 F.Supp.2d 130, 136-39 (D. Mass 2004), *aff'd sub nom. Amrak Productions, Inc. v. Morton*, 410 F.3d 69 (1st Cir. 2005). *See also Lewittes v. Cohen,* No. 03 Civ 189 (CSH), 2004 WL 1171261, WL Op. at *3 n.5, Haight, J. (S.D.N.Y. May 26, 2004) ("[g]iven welcome shifts in social perception of homosexuality, however, there is good reason to question the reliability of these [earlier] precedents").

The Superior Court avoided the issue of whether an assertion of homosexuality is of itself actionable as defamation by concluding that an imputation of homosexuality implies that Mr. Cahill had an extramarital homosexual affair. This inference is unjustified and perpetuates a stereotype of homosexuals as promiscuous. If Mr. Cahill were called a heterosexual, that would not imply that he had committed heterosexual adultery. There should not be a separate standard of presumption as to homosexuals. *See J.E.B. v. Alabama*, 511 U.S. 127, 140 (1994) ("perpetuation of invidious group stereotypes" leads to "the inevitable loss of confidence in our judicial system that the state-sanctioned discrimination in the courtroom engenders").

Finally, the context in this case makes it clear that the none of the statements attributed to Doe are assertions of fact. The statements were made anonymously on an Internet bulletin board, where many people post messages as part of an ongoing, free-wheeling and

animated exchange about events in the Smyrna-Clayton area. The postings overall frequently contain hyperbole, invective short-hand phrases and language not generally found in fact-based documents. (A-22-40[8]). Nothing in the statements indicated that the speaker had sufficient education and training to make a medical or psychological diagnoses, or a factual basis for supposedly implying that Mr. Cahill is gay. As such, they "lack the formality and polish typically found in documents in which a reader would expect to find facts." *Global Telemedia International, Inc. v. Doe 1*, 132 F.Supp.2d 1261, 1267 (C.D. Cal. 2001). *See also In re: Discovery Order Issued by the Superior Court, Province of Quebec, District of Montreal, Canada*, slip op. at 6 ("[t]he statement was posted anonymously on an Internet message board. The tenor of the submitted postings would lead the ordinary reader to regard their contents skeptically"). It is clear from the context that the statements are nothing more than rhetorical hyperbole as part of a political argument. As such, there was no factual statement that Mr. Cahill suffers from a debilitating mental condition or paranoia or is homosexual, and hence no basis for a defamation claim.

C. THERE IS NO EVIDENCE OF FALSITY.

Even assuming, *arguendo*, that the claimed assertions could be interpreted as defamatory under the law, Mr. Cahill did not provide any evidence at all to show, as a prima facie matter, that they are

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8 It is noteworthy that Mr. Cahill has posted on this same website, using his name, to respond to his critics. (A-27, 29).

false. As such, he has failed to meet his burden on this point and is not entitled to unmask Doe.

D. THERE IS NO EVIDENCE OF ECONOMIC HARM.

Requiring proof of substantial economic harm as a prerequisite to breaching anonymity is consistent with the existing trend disfavoring recovery for less tangible harm in defamation cases.

At common law, defamation was a strict liability tort. Once a plaintiff proved the defamatory nature of the communication, the jury could presume falsity, injury to reputation, malice and damages. *Sullivan*, 376 U.S. at 262. Because of a concern with the speech-chilling effect of large defamation verdicts not based on proof, the clear trend in defamation law since *New York Times v. Sullivan* has been to move away from presumed damages and toward requiring plaintiffs to prove more tangible harm. The first steps in this trend were compelled by the U.S. Supreme Court, but additional steps have been taken by state courts on their own initiative.

In *New York Times v. Sullivan*, the U.S. Supreme Court noted that the judgment entered against the newspaper in the lower court was one thousand times greater than the maximum fine provided by the Alabama criminal [libel] statute, and that it was imposed "without the need for any proof of actual pecuniary loss." *Sullivan*, 376 U.S. at 278. The Court also noted that, "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." *Id.* Indeed,

in large part, it was the availability (and the threat to free speech) of large "soft" damage awards that motivated the creation of the new limiting rules in *New York Times v. Sullivan* and the cases that followed.

In *Gertz v. Welch*, a private figure case, the U.S. Supreme Court again discussed the dangers of permitting defamation recovery without proof of actual harm:

> The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the states have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury.

418 U.S. at 349. To address these issues and accommodate the different interests, the U.S. Supreme Court crafted a rule prohibiting recovery for presumed damages unless actual malice is proven. *Id.* If actual malice cannot be proven for any reason, proof of actual harm must be shown. *Id.*

Applying the heightened standard necessary to protect anonymous speech on the Internet, the trial court's ruling must be reversed because Mr. Cahill failed to produce any evidence of actual reputational or other harm, and because Doe's right to communicate political speech anonymously far outweighs the strength of Mr. Cahill's case.

Although harm is unquestionably one of the elements of a *prima facie* defamation case under Delaware law, *see Gannett Co., Inc. v. Kanaga*, 750 A.2d 1174, 1192 n. 16 (Del. 2000) (Chandler, C., dissenting), Mr. Cahill produced no evidence of harm of any kind. *See, e.g., Dendrite*, 775 A.2d at 770 (holding that a motion to dismiss standard alone is inadequate to analyze a request for disclosure and that sufficient evidence supporting each element must be presented in light of the Doe defendant's "right of anonymity in the exercise of his right of free speech"); *2themart*.com, 140 F. Supp. 2d at 1097 (plaintiff must make a "clear showing on the record"); *Seescandy*, 185 F.R.D. at 579 ("[a] conclusory pleading will never be sufficient to satisfy this element"). Requiring proof of damages before anonymity can be breached makes particular sense because the evidence is within the plaintiff's control and can be proffered without disclosure of a defendant's identity. If a plaintiff cannot present such evidence, there is no need to breach the constitutionally protected anonymity of the defendant.

The Superior Court granted Mr. Cahill permission to obtain Doe's identity even though he presented no evidence - let alone substantial

evidence – demonstrating that he had suffered any harm. Absent evidence suggesting that Mr. Cahill sustained any actual harm, the Superior Court should not have permitted him to strip Doe of his fundamental right to anonymity. *See Dendrite*, 775 A.2d at 772 (holding that subpoena requesting disclosure should be quashed because, although plaintiff's defamation claim alleged the necessary elements to state a claim, plaintiff failed to present proof of alleged damages, necessary to establish defamation claim); *Global Telemedia*, 132 F. Supp. 2d at 1270 (dismissing complaint under California anti-SLAPP provision where plaintiffs failed to provide sufficient evidence to demonstrate that defendants' Internet postings caused a decrease in plaintiffs' stock price or any other harm). By failing to require Mr. Cahill to produce evidence of any harm, the Superior Court ignored its obligation to provide adequate protection to Doe's right to anonymous speech.

E. THE SUPERIOR COURT DID NOT PROPERLY WEIGH THE STRENGTH OF PLAINTIFF'S CLAIM AGAINST THE FIRST AMENDMENT RIGHT TO ANONYMOUS SPEECH.

The Superior Court failed to balance Doe's constitutional right to anonymous speech against the strength of Mr. Cahill's claim. *See, e.g., Dendrite*, 775 A.2d at 760-61 ("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"). Balancing these competing interests on a case-by-case basis ensures that a speaker's anonymity will not be

breached - and that the speaker will not suffer any irreparable harm - except in those cases where disclosure is justified - *i.e.*, when there is an overriding state interest. It thus acts "as a means of ensuring that plaintiffs do not use discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet." *Dendrite*, 775 A.2d at 771; *see also Seescandy*, 185 F.R.D. at 578. At the same time, it ensures that if a plaintiff actually has a critical need for immediate disclosure, and the plaintiff's evidence is sufficiently strong, the plaintiff can obtain identifying information. If the plaintiff cannot make this showing, there is no state interest justifying the loss of anonymity. *See, e.g., Missouri ex rel. Classic III Inc. v. Ely*, 954 S.W.2d 650, 659 (Mo. App. 1997) ("[i]f 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").

In this case, even if Mr. Cahill had - or could - produce evidence demonstrating that he suffered actual harm, his claim for relief pales in comparison to Doe's strong arguments for maintaining anonymity. As an elected public official, Mr. Cahill's right to

recover for defamation is already severely limited. *See, e.g., Gertz*, 418 U.S. at 344-45. His claim is based on statements on a web site - not a front-page article in the Delaware State News. Given his position, he could have rebutted the criticism swiftly and effectively, either on the Internet or through traditional media, but he chose not to as to these allegations (although he had used the same website to respond to other criticisms). *See Gertz*, 418 U.S. at 344 (access to channels of effective communication to respond to one's critics is a factor in how vulnerable one is to injury from false statements). On the spectrum of harms that state defamation law is designed to redress, Mr. Cahill's claim for relief is extremely low.

Mr. Cahill's interest is overwhelmingly outweighed by Doe's interest in maintaining his anonymity. Doe's speech is political criticism of an elected official - the core of what the First Amendment protects. Stripping Doe's anonymity for such a weak case will cause a chilling effect on political speech far beyond this case. Indeed, if public official plaintiffs can compel disclosure of the identity of a political critic like Doe, the much-lauded democratizing power of the Internet would be greatly reduced. *See 2theMart.com*, 140 F. Supp. 2d at 1093 ("[i]f Internet users could be stripped of . . . anonymity by a civil subpoena enforced under liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment Rights"); Lidsky, at 861 (the filing of lawsuits simply as a pretext to compel the disclosure of a speaker's identity "threaten[s] not only to deter the

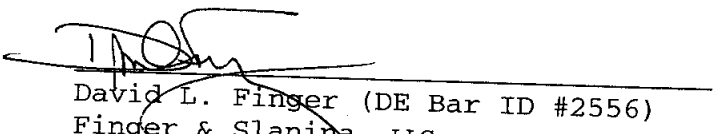
individual who is sued from speaking out, but also to encourage undue self-censorship among the other John Does who frequent Internet discussion fora").

CONCLUSION

In summary, Doe's - and our country's - interest in protecting the right to anonymous political speech outweighs Mr. Cahill's minimal interest in relief, even assuming he could show some evidence of harm. This balancing approach, adopted by courts faced with similar cases, preserves the "breathing space that gives life to the First Amendment." *Bose Corp.*, 466 U.S. at 513; *McIntyre*, 514 U.S. at 357 ("[t]he right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse").

WHEREFORE, for the foregoing reasons, John Doe No. 1 respectfully requests that the Court reverse the decision of the Superior Court, adopt the *prima facie* standard advocated herein, hold that Mr. Cahill has failed to satisfy that standard, and reverse the Order commanding Comcast to disclose the identity of John Doe No. 1.

Respectfully submitted,



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