NOTE

CYBERSMEAR II: BLOGGING AND THE CORPORATE REMATCH AGAINST JOHN DOE VERSION 2.006

ABSTRACT

Blogging, the act of posting a regular journal on the Internet, has quickly become one of the most prevalent methods for obtaining and disseminating decentralized information. In part because the barriers to creating a blog are virtually nonexistent, a person can write about anything, from the weather in Tonga to how Company X's president typically handles a controversial client. Given the lack of limitations in the content of a blog and the increasing number of people who use them, corporations are finally realizing the marketing potential behind this latest technology. Simultaneous to trying to harness the marketing power of blogging, corporations have begun to develop methods to control their constituents' (including employees) use of them.

When a company has been cybersmeared, e-defamed, or virtually abused by someone through a blog, decisions have to be made to determine the most effective way of countering the attack. Where the attack comes from an anonymous source, the company must first tackle the problem of determining who smeared them. This note explains the standards a court may apply when a cybersmeared company seeks to discover the identity of a John Doe. This note also suggests that the summary judgment standard, recently imposed by the Delaware Supreme Court in such cases, clearly, adequately, and most fairly balances the corporation's interest in obtaining relief against John Doe's First Amendment rights.

I. INTRODUCTION

NINA: "And they call it the World Wide Web. You can e-mail anyone!"
JERRY: "What are you, a scientist?!"[1]

When Jerry Seinfeld made this remark as part of the ongoing theme of that episode,[2] the World Wide Web and the Internet had already become as commonplace in the American lexicon as "to Google" something has today.[3] One may wonder if this conversation took place a couple of years from now, would reference to blogging elicit the same comedic reaction? Perhaps the answer is yes.

First, what is a blog and why is blogging such a big deal? A weblog (more commonly referred to as a blog) is a webpage that essentially functions as an online diary or journal "with reflections, comments, and often hyperlinks provided by the writer."[4] Blogging is the act of updating (or reading) blogs.[5] According to the Pew Internet & American Life Project, in the spring of 2006, twelve million adults had created a blog and fifty-seven million had read them, an increase from eight million authors and thirty-two million readers, respectively, in November 2004.[6] Given the

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[1] *Seinfeld: The Betrayal* (NBC television broadcast Nov. 20, 1997).

[2] *The Betrayal*, also known as "the backwards episode," presented each scene in reverse chronological order. In the penultimate scene, "two years earlier," Jerry and his date were presumably discussing what would have been fairly new in 1995, the Internet. *Id.*

[3] Gregory M. Lamb, *The New Gatekeepers*, CHRISTIAN SCI. MONITOR, May 6, 2004, at 14, 14.

[4] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 133 (11th ed. 2005). Given the popularity of blogging, the term "blog" was the most researched definition on Merriam-Webster's online dictionary in 2004. Gayle White, *Ranting for Posterity: As Online Journals Catch On, What's Ok to Say When Millions Might Read It?*, ATLANTA J. & CONST., June 5, 2005, at MS1, *available at* 2005 WLNR 8910758.

[5] *See* Alan R. Nye, *Blog Wars: A Long Time Ago in an Internet Far, Far Away...*, 20 ME. B.J. 102, 102 (2005). For a brief history of blogging, see Konrad Lee, *Anti-Employer Blogging: Employee Breach of the Duty of Loyalty and the Procedure For Allowing Discovery of a Blogger's Identity Before Service of Process is Effected*, 2006 DUKE L. & TECH. REV. 0002, ¶¶ 4-7, *available at* http://www.law.duke.edu/journals/dltr/articles/2006dltr0002.html; and Lev Grossman, *Meet Joe Blog*, TIME, June 21, 2004, at 64 (exploring the development of blogging and its current impact on the media).

[6] Amanda Lenhart & Susannah Fox, *Bloggers: A Portrait of the Internet's New Storytellers*, Pew Internet & Am. Life Project (July 19, 2006), *available at* http://www.ewinternet.org/pdfs/PIP%20Bloggers%20Report%20July%2019%202006.pdf; Lee Rainie, *The State of Blogging*, Pew Internet & Am. Life Project (Jan. 2, 2005), *available at* http://www.ewinternet.org/pdfs/PIP_blogging_data.pdf. Rainie recognizes that despite having "established themselves as a key part of online culture," blogs are only recognized by thirty-eight percent of Internet users, and "[t]he rest are not sure what the term 'blog' means." *Id.*

exponential growth of blogging, businesses have begun to realize the marketing potential.[7] The Internet, however, remains a practically unmonitored modern-day "wild west" frontier.[8] This lack of control leaves a blogger with tremendous discretion regarding the blog's content, and the liberties taken by the blogger may be diametrically opposed to the entity about which he is blogging. When opposition exists in such a stage, whose rights should prevail?

With Internet e-commerce reaching the "mature" (and generally most profitable) phase of the business cycle[9] and its communication sector beginning to boom,[10] corporations have had to adapt by developing an effective online presence while striving to protect the integrity of both this presence and its corporate image.[11] The struggle to protect its corporate image exists, in part, because of the ease in which anyone can post online communications through forums such as blogs. In other words, by virtue of creating an online presence, companies are forced to battle their anonymous critics, sparking a legal boxing match, which pits the critic's First Amendment right to anonymous speech against the company's right to protect its image.[12]

These anonymous critics are typically referred to as "John Does" because of the use of pseudonyms in defamation suits brought against them by the companies they denigrate.[13] John Doe's electronic defamation ("e-

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[7]*See* Steven Levy & Brad Stone, *The New Wisdom of The Web*, NEWSWEEK, Apr. 3, 2006, at 46, 50-52 (discussing the appeal of MySpace, a website designed for "younger people who grew up with a mouse in hand" to "create their own little online treehouses, adding photos, videos, music and blogs" for their network of friends to see). Rupert Murdoch's News Corp. bought MySpace in 2005 for $580 million and the site is projected to surpass Yahoo as the Internet's most visited. *Id.* at 50. *See generally* Charles McCarthy, Comment, *Metatags and the Sale of Keywords in Search Engine Advertising: Confusing Consumer Confusion With Choice*, 9 INTELL. PROP. L. BULL. 137, 139 (2005) (exploring trademark law implications for companies who adjust their website metatags to increase search engine "hits" to their website).

[8]Ronald J. Krotoszynski, Jr., *Defamation in the Digital Age: Some Comparative Law Observations on the Difficulty of Reconciling Free Speech and Reputation in the Emerging Global Village*, 62 WASH. & LEE L. REV. 339, 341 (2005).

[9]Henry Blodget, *Irreplaceable Exuberance*, N.Y. TIMES, Aug. 30, 2005, at A19.

[10]*See* Susannah Fox et al., *The Future of the Internet*, Pew Internet & Am. Life Project (Jan. 9, 2005), *available at* http://www.pewinternet.org/pdfs/PIP_Future_of_ Internet.pdf. *See also* Janna Quitney Anderson & Lee Rainie, *The Future of the Internet II*, Pew Internet & Am. Life Project (Sept. 24, 2006), *available at* http://www.pewinternet.org/pdfs/PIP_Future_of_ Internet_2006.pdf (predicting the evolution and impact of the Internet on social, political, and economic life in 2020).

[11]*See* Laurence H. Midler et al., *Responding to the Anonymous Cyber-Griper*, ACCA DOCKET, May 2002, at 65, 65-66.

[12]*See* Scot Wilson, Comment, *Corporate Criticism on the Internet: The Fine Line Between Anonymous Speech and Cybersmear*, 29 PEPP. L. REV. 533, 582 (2002).

[13]Midler et al., *supra* note 11, at 65-66.

defamation") or criticism has become known as a cybersmear, defined as a "false and disparaging rumor about a company, its management, or its stock that is posted on the Internet."[14] How companies should respond legally to these attacks is debatable, and the available and exercised legal option has been largely limited to defamation litigation.[15]

A company deciding to engage in litigation faces an initial hurdle of determining John Doe's identity. This note suggests that opting for the summary judgment standard provides a straightforward method for a court to apply and the most appropriate means to balance John Doe's First Amendment rights against the company's interest in protecting its image and reputation.

In reaching this conclusion, this note attempts to shed some light on the state of Internet communications today and suggests that businesses may use this developing sector and the evolving case law to their competitive advantage. Particularly, Part II of this note provides background to the rise of blogging as the Internet's newest communication forum. Faced with the protections the First Amendment affords anonymous "John Does," Part III analyzes the evolution of cybersmear case law in terms of what companies seeking to unmask John Does must present to the courts, emphasizing the Delaware Supreme Court's recent foray into this developing legal area. Part IV applies these standards to companies faced with a cybersmear today. Although the fight between John Doe and the cybersmeared company appears to be tightly scored, this note ultimately suggests that the expansion of online blogging communications actually takes the edge away from John Doe in the litigation realm.

II. BACKGROUND: FREE SPEECH AND JOHN DOE COMMUNICATIONS TODAY

The Internet has been referred to as the "information superhighway," although the use of this term has diminished in the past few years.[16] One commentator notes that the Internet has developed into a marketplace of ideas where anyone with online access can become a "publisher of information for First Amendment purposes."[17] Technology has also

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[14]Wilson, *supra* note 12, at 534.

[15]*Id.* at 583.

[16]Jonathan H. Blavin & I. Glenn Cohen, Note, *Gore, Gibson, and Goldsmith: The Evolution of Internet Metaphors in Law and Commentary*, 16 HARV. J.L. & TECH. 265, 269-72 (2002).

[17]Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 895 (2000). *See also* Reno v. ACLU, 521 U.S. 844, 853 (1997) ("Any person or organization with a computer connected to the Internet can 'publish' information.").

reduced the barriers keeping a person from "publishing" their thoughts online. No longer are users limited to posting on message boards; blogs are the newest and most efficient means of disseminating decentralized information.[18] While the Internet has increased the breadth of mediums in which one can convey private thoughts, it has "also increase[d] the capacity to listen."[19] Unlike water cooler conversations where one employee could vent to another and no boss would be the wiser, cyberspace has given companies the ability to understand better its company atmosphere because management can monitor relevant message boards and blogs employees and shareholders may be using.[20] As a result of trying to create accountability for these postings, the cybersmear lawsuit has evolved.[21]

A. *Cybersmearing and the First Amendment*

The ability for the John Doe cybersmearer to remain anonymous perhaps was and still is his[22] greatest advantage. Anonymity allows the less popular view to be expressed without fear of reprisal.[23] For John Doe's readership, the anonymous comments also help foster a perception of reliability or insider knowledge.[24]

When faced with the question of whether the First Amendment included anonymous speech, the Supreme Court held that anonymity had been both "a shield from the tyranny of the majority" and "an honorable tradition of advocacy and of dissent" since the country's inception and is therefore afforded protection under the First Amendment.[25] As applied to the Internet and online communications, the Supreme Court has found "no

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[18]Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing Over Legal Standards*, 83 OR. L. REV. 795, 818 (2004).

[19]Bruce P. Smith, *Cybersmearing and the Problem of Anonymous Online Speech*, 18 COMM. LAW. 3, 4 (2000).

[20]*See id.* at 4-5. *Accord* Adam Cohen, *Click Here for a Hot Rumor About Your Boss: Workers Ranging from Lawyers to Funeral Directors Are Gathering Around the Virtual Water Cooler*, TIME, Sept. 11, 2000, at 48, 48 (contrasting sites that "can be as salacious as a hot rumor whispered over a cubicle divider" with sites geared toward, for example, providing industry salary information to put "pressure on the laggards to pay top dollar").

[21]Smith, *supra* note 19, at 5.

[22]Although this note refers to cybersmearers with masculine pronouns, there is no implication that males or females are any more or less likely to fulfill this role.

[23]Smith, *supra* note 19, at 4.

[24]Vogel, *supra* note 18, at 819.

[25]McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995). The *McIntyre* court cites *The Federalist Papers*, which urged support of the ratification of the Constitution, as the most famous of anonymously published works. *Id.* at 342. *See also* Talley v. California, 362 U.S. 60, 65 (1960) (suggesting that the threat of revealing an anonymous speaker's identity and "fear of reprisal might deter perfectly peaceful discussions of public matters of importance").

basis for qualifying the level of First Amendment scrutiny."[26] Subsequent courts have interpreted this statement to protect anonymous Internet speech.[27]

When "John Doe" uses the First Amendment and the anonymity of the Internet to defame a corporation, however, the boundaries of the First Amendment shield are tested.[28] As discussed in Part III, defining this boundary for purposes of discovering John Doe cybersmearer's identity has turned largely on the context of his statements and the difficulty in proving harm to the company. This, along with the cost of litigating these claims, has fashioned the litigation process.[29]

B. *Punch, Dodge, Profit: The John Doe Cybersmear (version 1.999)*

Manipulation of stock prices is one of the original ways John Does denigrated companies.[30] Early cybersmear litigation cases typically involved some subtle or overt criticism of the company, which may or may not have been designed to influence stock prices or criticize management.[31] John Doe could have been a disgruntled employee or investor trying to turn a quick profit, but just as easily could have been an "industrial saboteur seeking to harm the company for personal gain, vindictive pleasure, or strategic advantage."[32] For example, in *Dendrite International v. John Doe No. 3*,[33] discussed in Part III, an anonymous critic posted nine messages on

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[26]Reno v. ACLU, 521 U.S. 844, 870 (1997).

[27]*See, e.g.*, Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1097 (W.D. Wash. 2001) (holding that the right to anonymous speech extends to the Internet and "must be carefully safeguarded"); Doe v. Cahill, 884 A.2d 451, 456 (Del. 2005) (en banc) ("It is clear that speech over the [I]nternet is entitled to First Amendment protection. This protection extends to anonymous [I]nternet speech.").

[28]*See* Vogel, *supra* note 18, at 831 (positing that the U.S. Supreme Court has recognized that a defamation claim provides a check on the "risk of abuse inherent in the right to speak anonymously"); *McIntyre*, 514 U.S. at 357 (holding that "[t]he right to remain anonymous may be abused when it shields fraudulent conduct").

[29]*See infra* Part III.B-C.

[30]Vogel, *supra* note 18, at 819-21 (describing the effects on short-term stock prices through illicitly promoting thinly-traded companies). *See, e.g.*, SEC v. C. Jones & Co., Litig. Release No. 18,092 (Apr. 16, 2003), *available at* http://www.sec.gov/litigation/litreleases/lr18092.htm (charging four individuals in their alleged participation in a "pump and dump" scheme involving sending between 25 and 35 million unsolicited "spam" emails touting Freedom Golf before selling their stock for profits of over $500,000).

[31]Wilson, *supra* note 12, at 547-551 (describing several online defamation claims and predicting that cybersmear lawsuits will continue to be filed).

[32]Midler et al., *supra* note 11, at 68.

[33]775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

the Yahoo! Dendrite bulletin board, alleging *inter alia* that Dendrite's president had been manipulating its revenue recognition accounting methods to boost earnings.[34] Although the court did not find Dendrite harmed by either this one or the other eight statements,[35] it is clear that such postings have the potential for serious financial consequences.[36] Indeed, it is this potential that prompts a cybersmear lawsuit.[37] Consequently, complaints against John Doe tend to evolve from these message board postings.[38]

C. *The New Soapbox: John Doe's Personal Blog (version 2.006)*

In just a few short years, technological advancements have made it easy for anyone with a computer to create a personal webpage and publish information online. The old message board poster has become the blogger, and blogging has become one of the most popular ways to quickly publish and disseminate information to the general public.[39] Rather than through a series of anonymous postings on a message board, John Does have turned their daily blog into their primary outlet for converting what used to be exclusive to private conversations into a world-wide glimpse of their inner thoughts.[40] With the increasing popularity of blogging pitted against the corporate struggle to determine how to use blogs effectively in marketing campaigns,[41] the blog-based cybersmear and subsequent lawsuits will undoubtedly take a more complex form.

While blog-based cybersmear case law is still in its infancy, issues branching from these cases stem from the same defamation grounds as the older cybersmear lawsuits. For instance, one of the more well-known examples of an employee's blogging content irking his employer came from a Microsoft contract worker's 2003 blog posting. During his regular blog update, Michael Hanscom posted a picture he had taken of Apple computers being delivered to a Microsoft loading dock. Hanscom titled his

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[34]*Id.* at 763.

[35]*Id.* at 772.

[36]*See supra* note 30.

[37]*See* Lidsky, *supra* note 17, at 876-78.

[38]Wilson, *supra* note 12, at 552.

[39]Grossman, *supra* note 5, at 64. As an example of the political weight afforded to bloggers, some bloggers were granted press credentials during the 2004 election. *Id.* at 70.

[40]*See, e.g.*, Milford Prewitt, *Restaurateurs File Lawsuits to Battle Blog-Based Cybersmearing*, NATION'S RESTAURANT NEWS, May 23, 2005, at 8, *available at* 2005 WLNR 8654739 (describing how restaurateurs have had to deal with gripe websites and blogs about the food and service of their various culinary establishments).

[41]Vogel, *supra* note 18, at 819.

entry, "Even Microsoft wants G5s."[42] Subsequently, he was fired from Microsoft for breach of contract.[43] A more recent example of a company dismissing an employee for blogging content comes from a Delta flight attendant who was allegedly fired from the airline for posting "inappropriate" pictures of her in her Delta uniform.[44] Although the former flight attendant has challenged this dismissal on sexual discrimination grounds,[45] the idea that a blog may be grounds for dismissal has obviously continued to gain momentum.[46]

The two examples above came from pseudo-anonymous bloggers who were somewhat candid about their employer.[47] A far larger number of bloggers, on the other hand, are anonymous.[48] As previously discussed, anonymity gives weight to John Doe's credibility; however, the detail found in John Doe's blog, to a careful reader, may help pierce this veil of anonymity.[49]

Beyond the daily entries and their potential for legal liability, John Does are faced with a new problem of creative control. Should the blogger be liable when other John Does comment on his postings, particularly if these new comments add fuel to a fire John Doe has started? One such case

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[42]Michael Hanscom, *Even Microsoft Wants G5s*, ECLECTICISM, Oct. 23, 2003, *available at* http://www.michaelhanscom.com/eclecticism/2003/10/even_microsoft.html (describing his posting, the picture, and the subsequent media whirlwind that followed his dismissal).

[43]*Id. See also* Lee, *supra* note 5, ¶¶ 17-23 (framing Hanscom's case along with other blog-related terminations as justified based on breaches of the employee's duty of loyalty).

[44]Ellen Simonetti, *Queen of Sky Story Summary*, DIARY OF A (FIRED) FLIGHT ATTENDANT, Dec. 21, 2004, *available at* http://queenofsky.journalspace.com/?cmd=displaycomments&dcid=471&entryid=471 (describing her posting and the subsequent actions that followed).

[45]Matthew E. Swaya & Stacey R. Eisenstein, *Emerging Technology in the Workplace*, 21 LABOR LAW. 1, 4 (2005).

[46]Tom Zeller, Jr., *When the Blogger Blogs, Can the Employer Intervene?*, N.Y. TIMES, Apr. 18, 2005, at C1, C4 (suggesting that the vast number of employee bloggers are probably at-will employees with little legal protection).

[47]*See* Simonetti, *supra* note 44 (stating that she never used "Delta's name, nor even the name of my base city (Atlanta) in my blog prior to being fired").

[48]Vogel, *supra* note 18, at 818.

[49]*See* Robert L. Weigel & Lee G. Dunst, *"Suing John Doe": Guidelines for Piercing the Veil of Online Anonymity*, WALLSTREETLAWYER.COM: SECURITIES IN THE ELECTRONIC AGE (Glasser Legal Work, Little Falls, N.J.), Nov. 2001, at 1, *available at* http://www.cybersecuritieslaw.com/GDC/wslsuing.htm. This step will be explored more fully in Part IV. For an example of such a veil piercing, see Adam Liptak, *Mystery of Gossipy Blog on the Judiciary Is Solved*, N.Y. TIMES, Nov. 16, 2005, at A14, which reported that the "popular, gossipy and frivolous" blog, "Underneath Their Robes," which posted a "mixture of judicial celebrity sightings and over-the-top commentary" from the perspective of a woman, turned out to be run by a man. The popularity of the blog among judges and their clerks ultimately led to the discovery of blogger "Article III Groupie['s]" identity, and he has since discontinued the blog. *Id.*

has raised this very question: A non-anonymous blogger that openly criticized a company has been sued over "pretty harsh" comments that readers had posted.[50] Whether any blogger should be liable for third party comments and the resulting First Amendment implications are beyond the scope of this note.[51] Regardless of how the courts will decide this issue, they will certainly give strong consideration to both the blogger's and John Doe's First Amendment rights. While an adverse ruling may leave John Doe searching for a new forum, such as podcasts, to convey his ideas,[52] there should be no question that blogging will continue to have a real effect on targeted corporations.

III. ANALYSIS: VIRTUAL MUDSLINGING AND THE DEFAMATION FIGHT THAT FOLLOWS

Upon receiving notice of an attack, a company may argue that the

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[50]Corilyn Shropshire, *Blogs vs. the Law: Showdown Looms over Bloggers and Their Rights*, PITT. POST-GAZETTE, Oct. 4, 2005, at D1, *available at* 2005 WLNR 16543937. If a blogger has been sued because of comments from their anonymous readers, the question may become whether he should be treated as having the same privileges as "common carriers" and not be held liable for information posted by third parties. *Id.* When the blogger is anonymous, this circumstance would obviously present an additional problematic layer.

[51]One district court has examined this issue and, on the facts of the case, sided with the nonanonymous blogger. *See* Dimeo v. Max, 433 F. Supp. 2d 523 (E.D. Pa. 2006). A similar idea that John Doe bloggers are reporters and are thus entitled to the journalistic privilege has been asserted as a possible defense to these types of cybersmear lawsuits. *Compare* Apple Computer, Inc. v. Doe 1, No. 1-04-CV-032178, 2005 WL 578641, at *1-2 (Cal. Super. Ct. Mar. 11, 2005) (avoiding this defense in a motion to block a subpoena granted to Apple to discover the identities of the sources who provided several online websites with "specific, trade secret information" by stating that the California "shield law" prevents journalists from refusing to disclose information relating to a crime such as theft of trade secrets), *and* William E. Lee, *The Priestly Class: Reflections on a Journalist's Privilege*, 23 CARDOZO ARTS & ENT. L.J. 635, 635 (2006) (recognizing the growing idea that bloggers may have the same privileges as reporters and the problems a court faces with such an extension) *with* Free Flow of Information Act of 2005, H.R. 581, 109th Cong. (2005) (creating a media shield law), *and* Mark Fitzgerald, *Shield Law Sponsor Lugar: Bloggers "Probably Not" Considered Journos*, EDITOR & PUBLISHER, Oct. 10, 2005, *available at* http://www.libertypost.org/cgi-bin/readart.cgi?ArtNum=112488 (quoting the co-sponsor of the Free Flow of Information Act as saying that bloggers would "probably not" qualify as journalists and obtain a journalistic privilege under "proposed federal shield law").

[52]See Robert J. Ambrogi, *Could Podcasting be CLE's New Wave?*, 57 BENCH & B. MINN. 4, Apr. 2005, at 16, 16, and Nye, *supra* note 5, at 106, which both describe how bloggers have begun to use podcasting (the recording of Internet radio programs) as the newest way to disseminate information. Podcasters can record and distribute their written ideas as an audio broadcast online. Websites such as MySpace, YouTube, and Wikipedia have also begun to aggregate and organize individual Internet users and bloggers in order to form a more collaborative "Living" Internet. *See* Levy & Stone, *supra* note 7, at 48.

John Doe posting can reach millions of people.[53] Given the potentially devastating effects a vindictive critic can wage through online discourse, litigation against John Doe is the natural "knee-jerk" response.[54] As such, balancing the First Amendment rights of John Doe and the right to protect corporate image has evolved over the past five years. In determining a legal solution to the cybersmearing problem, courts have developed a rather stringent standard for a party seeking to discover the identity of the John Doe cybersmearer.[55]

A. *John Doe Takes One on the Chin: The "Good Faith" Standard of* America Online

In 2000, a Virginia state court first tackled the problem of compelling disclosure of an anonymous critic's identity.[56] The plaintiff, an

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[53]Lidsky, *supra* note 17, at 864. Because the statement may be republished *ad infinitum*, the potential for repeated harm is great. *Id. See also* Lee Rainie & John Horrigan, *A Decade of Adoption: How the Internet Has Woven Itself into American Life*, Pew Internet & Am. Life Project, TRENDS 2005, 58 (2005), *available at* http://www.pewinternet.org/pdfs/Internet_Status_2005.pdf (estimating that 128 million Americans use the Internet, and on any given day, 70 million will engage in online activities).

[54]Nicole B. Cásarez, *Dealing with Cybersmear: How to Protect Your Organization from Online Defamation*, PUBLIC RELATIONS QUARTERLY, Summer 2002, at 40, 40. *See also* Krotoszynski, *supra* note 8, at 341-43 (discussing the international choice of law problems that arise as a result of the reach of e-commerce and the Internet). Krotoszynski hits on a good point that cybersmeared companies face: Given the ease of accessing blogs and other online remarks, "[d]etermining the place of publication and the appropriate choice of law applicable to an Internet posting constitute rather squirrelly questions." *Id.* at 341.

[55]Part of a company's decision to file a defamation suit against the person who did the posting rather than the potentially deeper pocket of the Internet service provider (ISP) stems from the ISP's broad immunity from lawsuits. *See* 47 U.S.C.A. § 230(c)(1) (2001). *But see* Michael L. Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335, 339 (2005) (suggesting that Congress should impose a limited duty of care in such tort cases since the ISP is in the best position to mitigate damages). If a court grants the discovery motion, the company can learn John Doe's identity from the ISP's records. *Id.* at 400.

[56]*In re Subpoena Duces Tecum* to America Online, Inc., No. 40,570, 2000 WL 1210372, at *8 (Va. Cir. Ct. Jan. 31, 2000), *rev'd on other grounds sub nom.* America Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001). Arguably, *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), first addressed the standards a court may use in determining whether a plaintiff may discover an anonymous defendant's identity, although *Seescandy.com* dealt with a trademark infringement. That court held that in order to obtain a John Doe identity, the plaintiff had the burden of identifying the missing party with "sufficient specificity . . . [to show that the] defendant is a real person," *id.* at 578, illustrating the good faith steps it had taken in trying to locate this defendant, showing that the suit could survive a motion to dismiss, *id.* at 579, and explaining why the discovery request will lead to the identifying information. *Id.* at 580. The *America Online* court distinguished *Seescandy.com* on the "procedural propriety of allowing discovery before service of process was effected." *America Online*, 2000 WL 1210372, at *5 n.11.

anonymous publicly-traded company, sought to discover the identities of five John Does who had allegedly published "certain defamatory material misrepresentations and confidential material insider information" in an online chatroom.[57] In weighing the First Amendment's right to anonymity against the dangers of misusing this right through the Internet's relative ease of use,[58] the court applied the reasoning that "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox."[59] Therefore, John Doe's identity could be discovered if the pleadings conveyed a "good faith basis to contend that [the plaintiff] may be the victim of conduct actionable in the jurisdiction where suit was filed" and "the subpoenaed identity information is centrally needed to advance that claim."[60] Although this court failed to define "good faith," the *America Online* court found that the chatroom discussions[61] here satisfied the plaintiff's burden and denied the motion to quash the subpoena.[62] Although this standard appeared to be relatively generous for a cybersmeared company, the "good faith" approach has failed to be recognized by any other appellate court.[63]

B. *John Doe Jabs Back:* Dendrite*'s "Sufficient Evidence" Approach*

Shortly after the *America Online* decision, New Jersey appellate courts were faced with a similar appeal involving anonymous cyber-critics who had posted allegedly defamatory messages about publicly-traded companies on an online message board.[64] Specifically, John Doe No. 3, under the pseudonym "xxplrr," posted nine comments on the Yahoo! Dendrite bulletin board, implying that the company was not competitive; its president was unsuccessfully "shopping" the company as a result; and while doing so, he purposely manipulated earnings through creative

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[57]*America Online*, 2000 WL 1210372, at *1.

[58]*Id.* at *6.

[59]*Id.* (quoting Reno v. ACLU, 521 U.S. 844, 870 (1997)).

[60]*Id.* at *8.

[61]Neither the circuit decision nor the subsequent appeal listed the contents of the allegedly defamatory statements, in part because the defamed company proceeded as an anonymous plaintiff "because disclosure of its true company name will cause it irreparable harm." America Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377, 379-80 (Va. 2001).

[62]*America Online*, 2000 WL 1210372, at *8.

[63]The *America Online* approach was adopted with regard to a public figure plaintiff in the memorandum trial court opinion of *Cahill v. John Doe-Number One*, 879 A.2d 943 (Del. Super. Ct. 2005), *rev'd en banc*, 884 A.2d 451 (Del. 2005). The Delaware Supreme Court reversed and established their own standard. Doe v. Cahill, 884 A.2d 451, 468 (Del. 2005) (en banc). This case will be discussed in Part III.C.

[64]Dendrite Int'l v. John Doe No. 3, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001).

accounting procedures.[65] Dendrite contended these statements contained elements of "breaches of contract, defamatory statements and misappropriated trade secrets."[66] Although the *Dendrite* court acknowledged the *America Online* decision, it set forth a four-part test to apply when balancing the rights of an anonymous poster against a claim of defamation by the poster's target.[67]

Particularly, the *Dendrite* court required the plaintiff to "notify the anonymous posters that they are the subject of a subpoena" and identify for the court "the exact statements purportedly made by each anonymous poster that [allegedly] constitutes actionable speech."[68] The complaint must also be able to survive a motion to dismiss by a showing of "sufficient evidence supporting each element of its cause of action, on a prima facie basis."[69] The *Dendrite* court also required a balancing of "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."[70] Although the trial court lacked the benefit of this new standard, the *Dendrite* court felt the trial court's analysis of the competing interests involved in the case adequately ensured that plaintiffs were not filing suits against John Doe "in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet."[71]

In the lower court's decision, the judge denied Dendrite's request for discovery, reasoning they failed to make a prima facie case of defamation against John Doe No. 3 by failing to demonstrate any harm from the posted messages.[72] On appeal, Dendrite argued that by requiring more evidentiary support than what has traditionally been required in motions to dismiss, the "liberality and generosity" courts give to these pleadings is replaced with a "de facto summary judgment standard."[73] The *Dendrite* court disagreed

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[65]*Id.* at 763.

[66]*Id.*

[67]*See id.* at 771. The trial court in *Dendrite* had applied the *Seescandy.com* approach to the case. *Id.* at 766-67; *see also supra* note 56 (discussing the *Seescandy.com* standard). The *Dendrite* court reviewed *Seescandy.com*'s approach and modified it as its own as explained in this Part. *See Dendrite*, 775 A.2d at 771.

[68]*Dendrite*, 775 A.2d at 760.

[69]*Id.*

[70]*Id.* at 760-61.

[71]*Id.* at 771. *See also* Lidsky, *supra* note 17, at 872-76 (suggesting that the "tremendous obstacles to recovery" imply that defamation actions may not really be about money).

[72]*Dendrite*, 775 A.2d at 764.

[73]*Id.* at 769.

with this argument in light of the First Amendment implications.[74] Although Dendrite's claims would have survived a "traditional motion to dismiss,"[75] the unique Internet medium as an outlet for free speech requires heightened standards.[76] Thus, applying this new "sufficient evidence" standard, the *Dendrite* court examined the harm Dendrite claimed had stemmed from the postings, and concluded that the stock price fluctuations during the time period of the postings could not have been attributed conclusively to the "xxplrr" postings.[77]

On the same day it decided *Dendrite*, the New Jersey appellate court applied its sufficient evidence standard in a suit brought by Immunomedics, Inc.[78] There, Immunomedics filed a suit against Jean Doe, who had posted messages under the pseudonym "moonshine_fr" on the Yahoo! Immunoedics message board.[79] Her messages, unlike the general ones "xxplrr" posted about Dendrite, indicated that she was an employee with knowledge that the company was "out of stock for diagnostic products in Europe," which would affect sales, and further, the European manager was going to be fired.[80] As a result, Immunomedics alleged Jean Doe's comments made her liable under "breach of contract, breach of loyalty, and negligently revealing confidential and proprietary information."[81] Applying the *Dendrite* sufficient evidence standard, the *Immunomedics* court found that the statements established "a prima facie cause of action for breach of the confidentiality agreement" and upheld the subpoena compelling Jean Doe's

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[74] *Id.* at 760.

[75] *Id.* at 771.

[76] *Dendrite*, 775 A.2d at 767. *See also* Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 575 (N.D. Cal. 1999) (arguing that the "legitimate and valuable right to participate in online forums anonymously or pseudonymously" requires additional safeguards when an injured party seeks redress); *In re Subpoena Duces Tecum* to America Online, Inc., No. 40,570, 2000 WL 1210372, at *6 (Va. Cir. Ct. Jan. 31, 2000), *rev'd on other grounds sub nom.* America Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001) (arguing that "[t]he protection of the right to communicate anonymously must be balanced against the need to assure that those persons who choose to abuse the opportunities presented by this [Internet] medium can be made to answer for such transgressions"); Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001) (holding that John Doe's identity should be revealed only "in the exceptional case where the compelling need for the discovery sought outweighs the First Amendment rights of the anonymous speaker").

[77] *Dendrite*, 775 A.2d at 760, 772. Dendrite's stock value, according to the court, experienced a net change of plus 3 5/8 during the time period John Doe No. 3 posted his messages. *Id.*

[78] Immunomedics, Inc. v. Doe, 775 A.2d 773 (N.J. Super. Ct. App. Div. 2001).

[79] *Id.* at 774.

[80] *Id.*

[81] *Id.* The breach of contract and loyalty claims were based on the theory that Jean Doe was an employee of the company, in part because her messages suggested her as such, and, therefore, the postings were a breach of her fiduciary duties to the company. *Id.* at 774 n.2.

identity.[82] In affirming the lower court's ruling, the appellate court further explained its reasoning for allowing discovery of the anonymous poster: "Individuals choosing to harm another or violate an agreement through speech on the Internet cannot hope to shield their identity and avoid punishment through invocation of the First Amendment."[83] The *Immunomedics* court focused its holding on the clear breach of the confidentiality agreement as authority for compelling disclosure, and refused to grant Jean Doe "an advantageous position" simply because she chose to breach anonymously and online.[84] Concisely, *Dendrite* single-handedly redefined online defamation jurisprudence for compelling identity disclosure of John Does who use the anonymity of the Internet in their attacks.[85]

C. *John Doe Uppercuts:* Cahill*'s "Summary Judgment" Standard*

In 2005, the Delaware Supreme Court examined the John Doe discovery standard[86]—the first time an appellate court had done so since *Dendrite*.[87] In *Cahill*, a John Doe defendant had posted statements about the plaintiff Cahill, a city councilman in the city of Smyrna, Delaware, on an Internet website run by the local newspaper. The anonymous statements suggested that Cahill had "an obvious mental deterioration" and that "Gahill [sic] is as paranoid as everyone in the town thinks he is."[88] Cahill subsequently filed suit asserting defamation and invasion of privacy

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[82]*Immunomedics*, 775 A.2d at 777.

[83]*Id.* at 777-78.

[84]*Id.* at 778. *See generally* Cásarez, *supra* note 55, at 42 (recognizing that *Immunomedics* considered more heavily the violation of the employee contract than the First Amendment implications).

[85]Margo E.K. Reder & Christine Neylon O'Brien, Comment, *Corporate Cybersmear: Employers File John Doe Defamation Lawsuits Seeking the Identity of Anonymous Internet Posters*, 8 MICH. TELECOMM. TECH. L. REV. 195, 217 (2002), *available at* http://www.mttlr.org/voleight/Reder.pdf. The fact that an infinitely large number of people can view the allegedly defamatory messages initially drives the lawsuit, not necessarily the actual number of people who view them. *See supra* note 53.

[86]Doe v. Cahill, 884 A.2d 451, 454 (Del. 2005) (en banc).

[87]*See* Vogel, *supra* note 18, at 811. This case also represented the first time a state supreme court had addressed this issue. *Cahill*, 884 A.2d at 457. Since that decision, the Wisconsin Supreme Court has analyzed the concerns expressed in *Cahill*, also in a public-figure defamation context, with its majority concluding that the Wisconsin pleading rules for defamation claims already addressed First Amendment concerns. Lassa v. Rongstat, 718 N.W.2d 673, 686-87 (Wis. 2006). *Cf. id.* at 710-11 (Prosser, J., dissenting) (suggesting that the trial court's order to compel disclosure may yet have had the effect of chilling anonymous speech).

[88]*Cahill*, 884 A.2d at 454 (emphasis omitted).

claims.[89]

The trial court adopted *America Online*'s "good faith" standard to determine whether Cahill had articulated "a legitimate basis for claiming defamation in the context of [his] particular [circumstance]."[90] With regard to the statements about Cahill's mental state, the court found the statements could give harm to his reputation, as an elected city official.[91] Similarly, the court felt that referring to Cahill as "Gahill" could be reasonably interpreted to imply he is a homosexual, which could be actionable in certain situations.[92] Therefore, the trial court held that Cahill met the "good faith" standard, and ordered discovery on the grounds the identity of John Doe was essential to the defamation claim and the identity could not be discovered by other means.[93] John Doe subsequently appealed to the Delaware Supreme Court.[94]

The Delaware Supreme Court, sitting en banc, reversed, concluding that the "good faith" standard inadequately protected John Doe's First Amendment rights.[95] As in *America Online*, the *Cahill* court recognized both the First Amendment protections with regard to Internet speech and the fact that these protections do not extend to defamatory speech.[96] The discovery standard, as explained in both *America Online* and *Dendrite*, must balance the right to speak anonymously against the right to protect one's reputation.[97] Setting the bar too low, as the "good faith" standard does, allows a defamation claimant who loses on the merits or withdraws the lawsuit "free to engage in extra-judicial self-help remedies; more bluntly, the plaintiff can simply seek revenge or retribution [because he has the identity of John Doe]."[98] In evaluating both *America Online* and

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[89] *Id.* Although *Cahill* involves a public-figure plaintiff fighting an anonymous John Doe posting, this analysis reads the case to apply to any defamation plaintiff, not simply to public figures. A corporation faced with a cybersmear today could argue for the court to apply either the *Dendrite* or *Cahill* standard, the latter being suggested as more appropriate in Part IV.

[90] *Cahill v. John Doe-Number One*, 879 A.2d 943, 954 (Del. Super. Ct. 2005), *rev'd en banc*, 884 A.2d 451 (Del. 2005).

[91] *Id.* at 955.

[92] *Id.*

[93] *Id.* at 955-56.

[94] *Cahill*, 884 A.2d at 455.

[95] *Id.* at 454.

[96] *Id.* at 456. *See* discussion in Part II.A.

[97] *Cahill*, 884 A.2d at 456.

[98] *Id.* at 457. Ironically, the court's prediction came true despite refusal to compel discovery. *See* Alison Kepner, *Mayor, Councilman Feud Flares Again; Smyrna Neighbors—Modern-Day Hatfields and McCoys—Have Been at Odds for Years*, NEWS J. (WILMINGTON, DE), Oct. 7, 2005, at A1 (reporting that Cahill and his wife were arrested twice in the span of two days after the Supreme Court issued its ruling). The Cahills threatened their neighbors (the mayor and

Dendrite, the *Cahill* court believed *Dendrite*'s analysis was more appropriate given the potential threat a low standard would impose on future bloggers.[99] To adequately balance the competing rights of John Doe and the cybersmeared plaintiff, *Cahill* stands for the proposition that a plaintiff must support his claim "with facts sufficient to defeat a summary judgment motion."[100]

The *Cahill* court modified the four-part *Dendrite* test, reasoning that the second and fourth parts were redundant and "needlessly complicated the analysis," given the summary judgment standard.[101] In explaining this reasoning, the *Cahill* court suggested that the summary judgment standard implicitly requires the plaintiff to state the exact defamatory statements (*Dendrite* step 2) and balance the defendant's First Amendment rights against the plaintiff's prima facie case (*Dendrite* step 4).[102] Thus, in defamation cases, "the plaintiff must make reasonable efforts to notify the defendant and must satisfy the summary judgment standard."[103]

The *Cahill* court also explained why a summary judgment standard does not impose an inappropriate burden on the party seeking relief. In defamation claims, such as the cybersmear lawsuit, the plaintiff carries the burden of proof and "must introduce evidence [at trial] creating a genuine issue of material fact for all elements of a defamation claim within the plaintiff's control."[104] The *Cahill* court emphasized that the summary judgment standard was not limited to postings on the Internet, although it recognized that the context of and medium for the posting should be taken

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his family) based on their belief they were the John Does who had posted the disparaging comments. *Id.* The feud recently settled out of court after the Cahills hired an independent computer expert to trace John Doe's IP address for the party's criminal terrorism and harassment trial, which led to the mayor's daughter admitting to making the comments about the Cahills under aliases. J.L. Miller, *Smyrna Lawmakers' Defamation Case Settled: Mayor's Stepdaughter Admitted to Web Posts*, NEWS J. (WILMINGTON, DE), June 23, 2006, at B5.

[99]*Cahill*, 884 A.2d at 459-60. *See also* Lidsky, *supra* note 17, at 890 (arguing that the easier one can expose the identities of John Does, the more likely it will "chill the use of the Internet as a medium for free-ranging debate and experimentation with unpopular or novel ideas").

[100]*Cahill*, 884 A.2d at 460.

[101]*Id.* at 461. *Cf.* Dendrite Int'l v. John Doe No. 3, 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001) (as discussed in Part III.B).

[102]*Cahill*, 884 A.2d at 461.

[103]*Id.* The court added that in Internet cybersmear cases, the plaintiff must post a message notifying John Doe of the discovery request on the same message board where Doe posted the initial defamatory message. *Id.*

[104]*Id.* at 463 (emphasis omitted). The court recognized that in the context of public figure plaintiffs, there exists a requirement to show that the statement was made with actual malice. Because this element is beyond the plaintiff's control at this stage of the proceeding, *Cahill* held that the plaintiff was not required to produce evidence on that element. *Id.* at 464.

into consideration in the court's analysis.[105] With the primary requirement in a defamation claim being a defamatory statement, the court turned to John Doe's online rant to determine whether the statements would survive a summary judgment motion.[106]

In analyzing the "mental deterioration" statement, the *Cahill* court held that no reasonable person would have interpreted the statements as anything other than opinion and pointed out that the blog itself was dedicated to "opinions about issues in Smyrna."[107] Furthermore, another anonymous poster had responded to the very post at issue, suggesting that Doe's statement was nothing "more than unfounded and unconvincing opinion."[108] The court also found that "Gahill" could have implied that Cahill was involved in a homosexual relationship just as easily as the "G" could have been a typographical error.[109] Given the forum where the statements were found and its context, the *Cahill* court held that Cahill could not produce prima facie proof of a factual basis for the statements that would support his defamation claim, and reversed and remanded the case to the trial court with instructions to dismiss.[110]

Cahill's summary judgment standard adequately and succinctly balances the First Amendment rights of a John Doe cybersmearer and the right of a company to protect its reputation that John Doe's posting may have harmed. Part IV elaborates on the benefits of this standard as applied to the corporate context and those who blog for or against it.

IV. EVALUATION: SCORING THE FIGHT BETWEEN JOHN DOE AND THE CYBERSMEARED COMPANY

A. *Using the* Cahill *Summary Judgment Standard as the Referee*

Although the test espoused in *Dendrite* undoubtedly clarified the rights of the anonymous posters compared to those of the companies seeking to combat cybersmear attacks, the *Cahill* summary judgment standard provides for better judicial efficiency. Prior to the *Dendrite* decision, corporate plaintiffs defamed by John Does could counter

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[105] *Id.* at 465.

[106] The court noted that in order to recover for a statement posted online, the plaintiff must prove that the "statement is factually based and thus capable of a defamatory meaning." *Cahill*, 884 A.2d at 467-68 n.78.

[107] *Id.* at 467 (emphasis omitted).

[108] *Id.*

[109] *Id.*

[110] *Cahill*, 884 A.2d at 467-68.

cybersmear campaigns and silence critics simply by filing suit.[111] These lawsuits were designed to frighten and suppress John Does from contributing to the public discourse.[112] The resulting threat to the Internet as a powerful medium for public discussion led the courts to enact tougher standards.[113] Commentators argued that *Dendrite* "struck an appropriate balance between the rights of adversaries in Internet anonymous speech cases."[114] The *Dendrite* decision was also declared "a tremendous victory for free speech" because of the stricter standards protecting anonymity.[115] Indeed, it has been suggested that *Dendrite* brought about a significant reduction in lawsuits against John Doe Internet posters.[116]

Despite the reduction in lawsuits, however, the Internet has continued to be "a bully pulpit from which the disgruntled broadcast their frustrations to the world at large."[117] As millions continue to use the Internet, both Congress and the states have struggled to regulate it.[118]

The *Dendrite* ruling has not been immune from this evolution; it has drawn some criticism that its "sufficient evidence" standard, while protective of John Doe's First Amendment rights, is nonetheless unclear.[119] The Delaware Supreme Court consequently held that the summary

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[111]Lidsky, *supra* note 17, at 888.

[112]Kevin Wain, Dendrite v. Doe: *A New Standard For Protecting Anonymity on Internet Message Boards*, 42 JURIMETRICS J. 465, 477 (2002).

[113]*Id.*

[114]Jennifer O'Brien, Note, *Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 FORDHAM L. REV. 2745, 2769 (2002).

[115]Mary P. Gallagher, *Court Erects Roadblocks to Flagging Cyberspammers on the Internet: Four-Step Process must Be Followed Before Forcing ISP to Disclose*, 165 N.J. L.J. 203, 203 (July 16, 2001) (quoting Paul Levy of the Public Citizen interest group).

[116]Vogel, *supra* note 18, at 812. *See also* Margaret McHugh, *Lawsuit Seeks to Identify Message Poster—Apartment Owner Suspects His Competitor*, STAR-LEDGER (Newark, NJ), Jan. 6, 2005, at 27, *available at* 2005 WLNR 6504791 (quoting Paul Levy of the Public Citizen interest group as saying that the number of cybersmear lawsuits has dropped since the *Dendrite* ruling).

[117]Thomas G. Ciarlone Jr. & Eric W. Wiechmann, *Cybersmear May Be Coming to a Website Near You: A Primer for Corporate Victims*, 70 DEF. COUNS. J. 51, 64 (2003).

[118]*Compare* Internet Tax Freedom Act § 1101, 47 U.S.C.A. § 151 (2005) (reinstating and extending the moratorium on Internet taxes until Nov. 1, 2007), *with Internet's Days as Tax-Free Sales Venue Are Numbered*, BALT. SUN, Aug. 17, 2005, at 1D, *available at* 2005 WLNR 12940268 (positing that "[t]he Internet's days as a rootin', tootin', libertarian tax haven, a virtual Cayman Islands in a modem, are coming to an end" because states, despite this ban, are imposing sales taxes on Internet sales). *But cf.* Granholm v. Heald, 544 U.S. 460, 475 (2005) (removing state imposed restrictions on interstate wine sales).

[119]Wein, *supra* note 112, at 476. *Cf.* Midler et al., *supra* note 11, at 71 (arguing that "[a] standard that requires plaintiff to provide evidence in support of each element of its claim sufficient to withstand a summary judgment motion before John Doe will be revealed would have the benefit of being clear, straightforward to apply, and predictable").

judgment standard is more appropriate and predictable for such defamation lawsuits.[120] Accordingly, future litigants and courts should consider adopting the *Cahill* standard when deciding these motions.

By adapting a summary judgment standard as the appropriate procedural requirement for trial courts to apply when faced with a "John Doe defamation suit," plaintiff companies have the benefit of easily predicting the probability of a successful discovery motion and subsequent lawsuit.[121] Although this standard heightens the generally liberal standards imposed by pleading rules,[122] it follows from the higher standard of proof the court requires when individual interests at stake are both important and more considerable than the loss of money.[123] Further, the plaintiff's burden is really no different than under *Dendrite*: he has to prove to the court that the statement is actionable, meaning it is based in fact rather than opinion, which, ultimately, is a matter of law.[124] By forcing the plaintiff to meet this burden at the onset of the case, *Cahill*'s summary judgment standard adequately protects John Doe's First Amendment rights.[125]

B. *The Effects of Blogging on the John Doe Fight*

Unlike the series of postings a John Doe defendant may put on a message board, the sheer content in John Doe's blog differentiates the potential lawsuits that may follow. Recall the case of Michael Hanscom and the photograph he posted for the world to observe.[126] If John Doe posted the same picture anonymously on a message board under the same headline and nothing else,[127] he may be protected; the forum and resulting

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[120]Doe v. Cahill, 884 A.2d 451, 460 (Del. 2005) (en banc).

[121]*See* Midler et al., *supra* note 11, at 77. *Cf.* Vogel, *supra* note 18, at 857 (arguing that the wide scope of discretion given to the trial judges to dismiss claims may impinge the plaintiff's rights of due process and trial by jury).

[122]*See, e.g.*, FED. R. CIV. P. 8(a) ("A pleading . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . .").

[123]Wein, *supra* note 112, at 477.

[124]Midler et al., *supra* note 11, at 78.

[125]*See generally* Lidsky, *supra* note 17, at 945-46 (arguing that John Doe defamation cases require the court to respond to such actions on a case-by-case basis and favor John Doe when the statements "do not imply assertions of objective facts"). *See also* Wein, *supra* note 112, at 477 (suggesting that such a heightened requirement "will permit corporations to seek redress for truly libelous speech while avoiding the chilling effect of dubious efforts to silence on-line critics through litigation").

[126]*See supra* Part II.C.

[127]In Hanscom's original post, he captioned the photo, "I took this shot on the way into work on the loading dock (MSCopy, the print shop I work in, is in the same building as MS's shipping and receiving)." Hanscom, *supra* note 42. Such a caption probably would put Microsoft's request in this hypothetical square with the motion in *Immunomedics* and would

discussion would probably resemble "informal gossip" and not "rational deliberation."[128] If Microsoft subsequently files a defamation suit alleging harm to the company and seeks discovery of his identity, the *Dendrite* and *Cahill* standard would make it difficult for them to win this motion. *Cahill*, however, would result in a more expeditious disposal of the case. Not only would Microsoft have to show that the post harmed them, they would have to show that the forum on which Doe posted supported their claim that his message was "factually based" and "defamatory."[129] Although the photo may imply Doe was an employee with access, similar to the postings that suggested Jean Doe was an employee in *Immunomedics*, Microsoft likely would still have to point to other postings to bolster its claim of an actionable grievance. Even if Doe posted other messages about Microsoft, as was done in *Dendrite*, Microsoft would not survive a motion for summary judgment without more definitive postings. A lawsuit based on Doe's message board posting, in this hypothetical, would likely be unsuccessful.

If Microsoft stumbled onto Doe's anonymous blog, however, surviving a summary judgment motion should be easier. When filing the complaint, Microsoft could point to any post in the blog that could be construed as actionable. If Doe vented about a sour meeting he had with the boss one day, mentioned a project he and co-workers were developing, or posted "catty, cranky and sometimes crass accounts" of his daily routines, Microsoft may have a claim of action on a breach of fiduciary duty.[130] This claim will likely have adequate grounds to survive a motion for summary judgment, and Microsoft would be permitted to discover Doe's identity. Depending on the content of the blog, Microsoft may have additional actionable claims based on defamation, breach of contract or confidentiality agreements, trademark or trade secret violations, and laws against hate speech, just to name a few.[131] Unlike the message board

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probably be successful in its discovery motion under a breach of employee contract claim rather than defamation. In the hypothetical post here, however, no such caption was given to the photograph other than "Even Microsoft wants G5s."

[128]Lidsky, *supra* note 17, at 893.

[129]Doe v. Cahill, 884 A.2d 451, 467 n.78 (Del. 2005) (en banc).

[130]White, *supra* note 4, at MS1. Companies suing employees for such breaches of duty are nothing new. *See, e.g.*, Swaya & Eisenstein, *supra* note 44, at 10 (briefly examining a case where an employer had filed a civil breach of contract suit against its former employee for allegedly "stealing trade secrets and using them to benefit a competitor").

[131]Cásarez, *supra* note 55, at 40. Discovery requests may be more readily granted when it appears to be an employee posting "confidential and proprietary information in violation of their employment contracts." *Id.* at 42. *See also* Swaya & Eisenstein, *supra* note 44, at 3-4 (suggesting that the personal and off-duty nature of blogging may present a barrier to employers seeking legal remedies notwithstanding the time and expense required to find and monitor these anonymous

postings, the blog's content (and perhaps additional evidence of readership, such as posted responses to entries) will inevitably yield a means for Microsoft to pierce John Doe's veil of anonymity and survive a summary judgment motion.

While a blog potentially gives a company seeking to discover John Doe's identity a higher probability of success, legal action may not always be the most practical and worthwhile solution.[132] The crucial first step in putting out a cybersmear fire is attempting to quash it at its source. The notification provision required by *Cahill* may result in an improved public Internet discourse, particularly because other readers can see that defamatory speech has consequences.[133] Where a blog clearly contains defamatory or other actionable content, however, the summary judgment standard benefits the plaintiff seeking legal redress.[134]

C. *Protecting Against the John Doe Blogger-Employee*

Much like companies had to determine their policies regarding email,[135] companies will inevitably be required to do the same for blogs and blogging. Companies applying team-based strategies for corporate projects may turn to company-sponsored blogs as a more efficient means of brainstorming ideas,[136] just as the use of instant messaging programs has become a real-time inexpensive solution to geographically displaced employees and workplace teams.[137] Recognizing the potential value blogs

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blogs); White, *supra* note 4, at MS1 (suggesting that "the possible legal ramifications to blogging may not be established for years").

[132]*See* Cásarez, *supra* note 55, at 44 (discussing possible PR responses to a cybersmear campaign); Ciarlone & Wiechmann, *supra* note 117, at 62-64 (presenting alternatives to litigation); Wilson, *supra* note 12, at 574-82 (discussing the practical matters companies face with a cybersmear campaign and non-litigation solutions).

[133]*Cahill*, 884 A.2d at 461; Lidsky, *supra* note 17, at 887.

[134]*See supra* note 119. *Cf.* Lee, *supra* note 5, ¶ 53 (calling for Congress to amend the Rules of Civil Procedure to allow for a straightforward pre-service discovery of an anonymous blogger's identity).

[135]*See, e.g.*, Micalyn S. Harris, *Is Email Privacy an Oxymoron? Meeting the Challenge of Formulating a Company Email Policy*, 16 ST. JOHN'S J. LEGAL COMMENT. 553, 558-60 (2002) (discussing the importance of educating employees regarding company email policies).

[136]*See* Zeller, *supra* note 46, at C1 (pointing out that Microsoft and Sun Microsystems are two companies actively encouraging their employees to use blogs).

[137]*See, e.g.*, Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1676 (2003) (stating how the judges of the D.C. Circuit use instant messaging to communicate with each other and their clerks during oral argument and how such technology has enhanced the quality of their deliberations because it provides more opportunity for discussion). *Cf.* Swaya & Eisenstein, *supra* note 44, at 5-6 (suggesting that the use of instant messaging can be a distraction and hindrance to employee productivity when used

may have in increasing productivity in an office, employers will need to be able to communicate to their employees that blogging has the effect of placing private thoughts into the public marketplace. Employees also should be made to realize that blogging, even anonymously, may inadvertently create a perception of insider knowledge that could be out of sync with the company line.[138] Commercializing their blog by selling advertising also may become an issue if the employee-blogger's advertisers conflict with company policies or contracts.[139] While this note leaves the creation of such policies to the appropriate committees, companies should address the blogging issue in advance of a blogging-based lawsuit in order to give them additional legal footing.[140] With such a policy to rely on, surviving the *Cahill* summary judgment standard would not be unduly burdensome on the company facing cybersmear from a John Doe blogger.

V. CONCLUSION

With blogs quickly becoming the Internet's newest and most consumer-friendly vehicle for individuals to post their opinions online, corporations will continue to face issues of cybersmears and e-defamation. When a John Doe blog openly criticizes a company or posts an entry as a concerted effort to manipulate stock prices to his advantage, companies will have to give considerable time in deciding to pursue legal action. Unlike the sporadic or concentrated series of postings on the message board, the blog itself provides the cybersmeared plaintiff-company a much stronger basis in terms of making its case. When deciding the motion to compel discovery of John Doe's identity, courts may apply either a sufficient evidence or summary judgment standard.

The summary judgment standard used in *Cahill* allows a trial judge to determine quickly and aptly whether or not the smeared company may proceed to discover John Doe's identity. Although it differs only slightly from the *Dendrite* standard, the *Cahill* standard allows a trial court to

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for personal purposes). With seven billion instant messages sent in 2004, Swaya and Eisenstein suggest that employers need to implement policies controlling instant messenger use if they have not already. *Id.*

[138]Zeller, *supra* note 46, at C1 (stating that corporations invest millions of dollars on marketing and branding and have no "obligation to tolerate threats" from people who identify themselves with their brand, even if the person does so online).

[139]*See* Grossman, *supra* note 5, at 70 (recognizing that commercializing blogs through advertising is a growing trend).

[140]*See* Swaya & Eisenstein, *supra* note 44, at 5 (suggesting that a blogging policy may have the effect of preventing "employees from making disparaging comments about the company's products and from revealing any proprietary information").

dismiss trivial claims more effectively and assure plaintiffs with legitimate claims their day in court. Adopting this standard more adequately balances John Doe's First Amendment rights against the plaintiff's opportunity for redress in seeking to protect its image from cybersmear and also gives the company a legal edge in its pending fight against a John Doe blogger.

Charles B. Vincent