

No. H028699

(Santa Clara County Super. Ct. No. 102-CV-813627)

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT**

BARBARY COAST CAPITAL MANAGEMENT,
STEPHEN N. WORTHINGTON,

Third Parties and Appellants,

vs.

MATRIX INITIATIVES, INC., a Delaware corporation,

Plaintiff and Respondent.

Appeal From Order Of The Superior Court For The County Of Santa Clara
(Hon. James P. Kleinberg, Presiding)

APPELLANTS' SUPPLEMENTAL REPLY BRIEF

SHARTSIS FRIESE LLP
ROBERT E. SCHABERG (Bar #081430)
ERICK C. HOWARD (Bar #214107)
One Maritime Plaza, 18th Floor
San Francisco, California 94111-3598
Telephone: (415) 421-6500
Facsimile: (415) 421-2922

*Attorneys For Appellants
Barbary Coast Capital Management And
Stephen N. Worthington*

I.

INTRODUCTION

Pursuant to Rule 13(a)(4) of the California Rules Relating to the Supreme Court and Courts of Appeal, Appellants Barbary Coast Capital Management and Stephen N. Worthington hereby request that the Court accept and file this Supplemental Reply Brief in support of the Appellants' appeal in connection with the above-referenced appeal. The sole purpose of this Supplemental Reply Brief is to advise and inform the Court of a decision by the Delaware Supreme Court issued on October 5, 2005 in the matter entitled *John Doe No. 1 v. Patrick Cahill and Julia Cahill* (No. 266, 2005). The *John Doe No. 1 v. Patrick Cahill* decision was entered two days after Appellants filed their Reply Brief on October 3, 2005. This Court should grant the subject motion to file this Supplemental Reply Brief because the issues decided by the Delaware Supreme Court in *John Doe No. 1 v. Patrick Cahill* are both a matter of first impression in the State of Delaware and directly relevant to the issues presented to the Court in the instant appeal.

Accordingly, Appellants request that this Court grant these Appellants' motion to file this Supplemental Reply Brief.

II.

DISCUSSION

In *John Doe No. 1 v. Patrick Cahill, et al.* (October 5, 2005,

Delaware Supreme Court, No. 266, 2005), the Delaware Supreme Court specifically rejected the good faith test first articulated by a Virginia trial court *In re Subpoena Duces Tecum to America Online, Inc.*, 2000 Va. Cir. LEXIS 20 (VA. Cir. Ct. 2000) , rev'd on other grounds sub nom. *America Online, Inc. v. Anonymous Publicly Traded Co.* 542 S.E.2d 377 (Va. 2001) and specifically held that a defamation plaintiff must satisfy a “summary judgment” standard before obtaining the identity of an anonymous Internet poster (*See Slip-op* at 8-9 attached hereto as **Exhibit A** and incorporated herein by this reference). In specifically rejecting the “good faith basis” test the Delaware Supreme Court stated:

We are concerned that setting the standard too low will chill potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all. A defamation plaintiff, particularly a public figure, obtains a very important form of relief by unmasking the identity of his anonymous critics. The revelation of the identity of an anonymous speaker “may subject [the speaker] to ostracism for expressing unpopular ideas, invite retaliation from those who oppose her ideas or from those who she criticizes, or simply give unwanted exposure to her mental processes.” Plaintiffs can often initially plead sufficient facts to meet the good faith test applied by the Supreme Court, even if the defamation claim is not very strong, or worse, if they do not intend to pursue the defamation action to a final decision. After obtaining the identity of an anonymous critic through the compulsory discovery process, a defamation plaintiff who either loses on the merits or fails to pursue a lawsuit is still free to exchange in extra-judicial self-help remedies; more bluntly, the plaintiff can simply seek revenge or retribution.

Indeed, there is reason to believe that many defamation plaintiffs bring suit merely to unmask the identities of anonymous critics. As one commentator has noted, “[t]he sudden surge in John Doe suits stems from the fact that many

defamation actions are not really about money.” “The goals of this new breed of libel action are largely symbolic, the primary goal being to silence John Doe and others like him.” This “sue first ask questions later” approach coupled with a standard only minimally protective of the anonymity of defendants, will discourage debate on important issues of public concern as more and more anonymous posters censor their online statements in response of the likelihood of being unmasked.

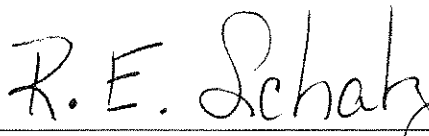
Applying a summary judgment standard to a public figure defamation plaintiff's discovery request to obtain an anonymous identity will more appropriately protect against the chilling effect on anonymous First Amendment Internet speech that can arise when plaintiffs bring trivial defamation lawsuits primarily to harass or to unmask their critics.

We conclude that the summary judgment standard is the appropriate test by which to strike the balance between a defamation plaintiff's right to protect his reputation and a defendant's right to exercise free speech anonymously. We accordingly hold that before a defamation plaintiff can obtain the identity of an anonymous defendant through the compulsory discovery process he must support his defamation claim with facts sufficient to defeat a summary judgment motion.

(Slip-op at 8-9, 14, 16)

RESPECTFULLY SUBMITTED this 10th day of October, 2005

SHARTSIS FRIESE LLP

By 

ROBERT E. SCHABERG

Attorneys for Appellants
BARBARY COAST CAPITAL
MANAGEMENT AND STEPHEN
N. WORTHINGTON

CERTIFICATION

Pursuant to CRC 14(c)(1), counsel for third parties and appellants BARBARY COAST CAPITAL MANAGEMENT and STEPHEN WORTHINGTON, Robert E. Schaberg, certifies that the Appellant's Opening Brief has a word count of 759, including footnotes.

Dated this 10th day of October, 2005.



ROBERT E. SCHABERG

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PROOF OF SERVICE

I, NICOLE A. BIGLEY, declare:

1. I am employed in the City and County of San Francisco, California by Shartsis Friese LLP at One Maritime Plaza, 18th Floor, San Francisco, California 94111.

2. I am over the age of eighteen years and am not a party to the within cause.

3. I am readily familiar with Shartsis Friese LLP's practice for collection and processing of correspondence and documents for mailing with the United States Postal Service, which in the normal course of business provides for the deposit of all correspondence and documents with the United States Postal Service on the same day they are collected and processed for mailing.

4. On October 11, 2005, at Shartsis Friese LLP located at the above-referenced address, I served the attached **APPELLANTS' SUPPLEMENTAL REPLY BRIEF** on the interested parties in said cause by

Personal delivery by messenger service of the document(s) above to the person(s) at the address(es) set forth below:

Placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in accordance with the firm's practice of collection and processing correspondence for mailing to the person(s) at the address(es) set forth below:

Facsimile transmission pursuant to Rule 2008 of the California Rules of Court on this date before 5:00 p.m. (PST) of the document(s) listed above from sending facsimile machine main telephone number (415) 421-2922, and which transmission was reported as complete and without error (copy of which is attached), to facsimile number(s) set forth below:

Consigning the document(s) listed above to an express delivery service for guaranteed delivery on the next business day to the _____ person(s) at the address(es) set forth below:

_____ Electronically delivering the document(s) listed above pursuant to federal and local rules of the court on this date from electronic address sflaw.com, and which transmission was reported as complete and without error, to electronic mail address(es) set forth below:

Mr. Michael B. Reynolds, Esq.
Snell & Wilmer L.L.P.
600 Anton Boulevard, Ste. 1400
Costa Mesa, CA 92626-7689
(714) 427-7000 – phone
(714) 427-7799 – fax

Mr. Frank W. Moskowitz, Esq.
Berk & Moskowitz
A Professional Corporation
5665 N. Scottsdale Rd., Ste. F-100
Scottsdale, AZ 85250
(480) 607-7900 – phone
(480) 607-7300 – fax

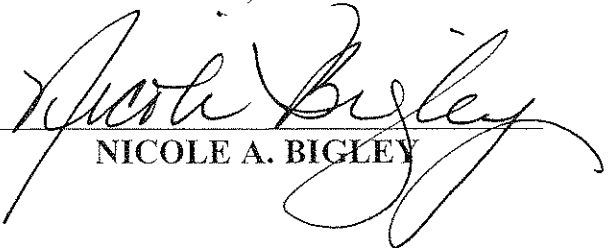
Mr. Kevin J. Parker, Esq.
SNELL & WILMER LLP
One Arizona Center
Phoenix, AZ 85004-2202
(602) 382-6238 – phone
(602) 382-6070 – fax

California Supreme Court
San Francisco Office
350 McAllister Street
San Francisco, CA 94102-7303

Santa Clara County Superior Court
191 N. First Street
San Jose, CA 95113-1090

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 11, 2005 in San Francisco, California.



NICOLE A. BIGLEY