IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MOBILISA, INC., a Washington corporation, Plaintiff/Appellee, vs. JOHN DOE 1 and THE SUGGESTION BOX, INC., Defendant/Appellants.	**Court of Appeals** **Division One** **No. 1 CA-CV 06-0521** **Maricopa County** **Superior Court** **Cause No. CV2005-012619**

APPELLANTS' OPENING BRIEF

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JURISDICTIONAL STATEMENT

I. THE PARTIES

Appellee Mobilisa, Inc. ("Mobilisa") is a Washington corporation in the software development business, specializing in applications for mobile devices. Nelson Ludlow ("Ludlow") is the President of Mobilisa.

Appellant John Doe is an anonymous party that allegedly obtained unauthorized access to Mobilisa's computer system and obtained a copy of a personal e-mail from the system.

Appellant The Suggestion Box, Inc., ("TSB") is an Arizona Corporation that offers anonymous electronic mail services to individuals, corporations, and organizations. Appellant John Doe used TSB's services to send a copy of the personal e-mail to various third parties.

II. FACTUAL BACKGROUND

On June 21, 2005, Nelson Ludlow sent a personal email to his girlfriend Shara Smith from his corporate Mobilisa email address (referred to herein as the "Ludlow Email"). See Index on Appeal, item number 10 (hereinafter references to documents included in the Index on Appeal shall be referred to Index _____, with the item number following). October 11, 2005 Ludlow Declaration, attached thereto, at ¶ 2. He also sent copies of the Ludlow Email to two other places: an account which then forwarded the message to his own cellular phone and his own personal e-mail account.[1] *Id.* The contents of the Ludlow Email contained intimate, personal communications from Mr. Ludlow to Ms. Smith. *Id.* at ¶ 7.

[1] For the privacy of those concerned, the actual email addresses have not been included.

On June 27, 2005, John Doe, a subscriber of TSB's anonymous email service, sent an anonymous electronic communication to at least one individual at Mobilisa with the subject line "Is this a company you want to work for?" (referred to herein as "Anonymous Email"). The body of the Anonymous Email contained the contents of the Ludlow Email. *Id.* ¶ 2.

Upset that the Ludlow Email had been published to others at Mobilisa, Ludlow had an extensive review of Mobilisa's computer system conducted. This review found no evidence of an intrusion in, or that John Doe had obtained the Ludlow Email from, Mobilisa's computer systems. *Id.* at ¶ 6; and see, Transcript of December 2, 2005 Proceedings, attached as Index 21 at pp. 18-29 ("It is true that Mr. Ludlow said we can't find in our investigation any intrusion that we can pin this on.").

III. PROCEDURAL BACKGROUND

Without any evidence that anyone had obtained unauthorized access to its computer system, Mobilisa filed a Complaint for Damages and Injunctive Relief in the Superior Court of the State of Washington in July of 2005, naming John Does 1-10 as Plaintiffs (referred to herein as "the Washington case"). Index 1. The Washington case, in essence, alleged that an anonymous party trespassed and violated two Federal laws by obtaining unauthorized access to its computer system and wrongfully accessing information therein.

In August of 2005, still without any evidence of unauthorized access to its computer system, Mobilisa filed an Application for Subpoena in the Arizona Superior Court seeking to conduct discovery to determine the identity of the sender

of the Anonymous Email. Index 1. TSB objected. Index 4. The matter was briefed and Respondent Judge Davis issued an initial, three page minute entry on December 28, 2005 (referred to herein as "Under Advisement Ruling"). Recognizing that forcing TSB to reveal the identity of the person who sent the anonymous email might violate both the United States and Arizona Constitutions and that there was no controlling law in Arizona, the trial court adopted the standard employed by the Delaware Supreme Court in *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) ("*Cahill* Standard), the only State Supreme Court case to have addressed the issue at the time. Index 15.

The *Cahill* Standard establishes two prerequisites to discovery intended to uncover the name of an anonymous speaker: (1) the plaintiff must make reasonable efforts to notify the anonymous speaker and (2) the plaintiff must establish that it would survive summary judgment.

In spite of its adoption of the *Cahill* Standard, the trial court ordered TSB to notify the sender of the Anonymous Email of the pending discovery request. The trial court also provided the sender an opportunity to object. Index 15. TSB notified John Doe of the pending discovery request, and John Doe objected to it. Index 26.

In its Under Advisement Ruling, the trial court also concluded that "there is not sufficient verified evidence provided to the Court at this point for the Court to find that the underlying claim would survive a motion for summary judgment." Index 15. Rather than deny Mobilisa's motion, the trial court invited the parties to further brief the issue in light of its adoption of the *Cahill* Standard.

As requested by the trial court, Mobilisa filed additional memoranda in support of its request to conduct discovery. Index 17, 20 and 23. TSB and John Doe also filed additional memoranda objecting to the requested discovery. Index 18, 19 and 26.

On February 27, 2006, despite Mobilisa producing no evidence that unauthorized access or intrusion had occurred in or to its computer system, the Court found that the Plaintiff "established enough material facts through its initial and supplemental affidavits that, given reasonable inferences that could be drawn from those facts, a finder of fact could conclude that the email information in question, was, more probably than not, wrongfully obtained," and therefore allowed Mobilisa to conduct discovery to ascertain the identity of the sender of the anonymous email. Index 25.

Appellants filed a Petition for Special Action on April 14, 2006. Without reaching the merits raised in the Petition for Special Action, this Court declined to accept special action jurisdiction. See this Court's Order dated May 10, 2006.

STATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion by improperly applying the *Cahill* Standard to the claims in Mobilisa's complaint by disregarding essential elements in each of these claims - particularly, unauthorized access to Mobilisa's computer systems - for which Mobilisa failed to produce any evidence in the record warranting the trial court's conclusion that Mobilisa could survive summary judgment and order requiring TSB to disclose John Doe's identity?

2. Whether the trial court abused its discretion by imposing the burden to notify Petitioner John Doe of the proceedings under the *Cahill* Standard on TSB?

3. Whether the trial court abused its discretion by issuing its ruling prior to the deadline having passed for Petitioner John Doe to have filed a Memorandum in Opposition?

ARGUMENT

This appeal squarely focuses on whether the trial court erred in applying the *Cahill* Standard it adopted for determining when a court may compel disclosure of an anonymous speaker's identity. As the *Cahill* Standard requires a plaintiff to demonstrate it would survive summary judgment, a plaintiff seeking disclosure of an anonymous speaker's identity must therefore produce *some* evidence that supports each essential element of *at least one* of the claims alleged in its complaint. Although the trial court properly adopted a summary judgment standard, it failed to enforce the accompanying summary judgment burden against Mobilisa. In reviewing the record, the trial court erroneously focused on whether it appeared the Ludlow Email had been obtained wrongfully. This was misguided. For, in doing so, the trial court completely ignored the requisite essential element for all of Mobilisa's claims – unauthorized access to Mobilisa's computer system. The record simply does not contain any evidence supporting this element required of each of Mobilisa's claims. Consequently, the trial court erred in applying *Cahill* and concluding Mobilisa could satisfy a summary judgment standard. For this reason, this Court should reverse the trial court's February 27, 2006 Ruling granting Mobilisa's Motion for Leave to Conduct Discovery, order the lower court to deny Mobilisa's Motion for Leave to Conduct Discovery, and order the lower court to preclude discovery of John Doe's identifying information.

I. STANDARD OF REVIEW

Generally, a trial court's discovery rulings will not be disturbed absent an abuse of discretion. *Blazek v. Superior Court In and For the County of Maricopa*,

177 Ariz. 535, 537, 869 P.2d 509, 511 (App. 1994). It is always an abuse of discretion, however, when the trial court misapplies the law. *Brown v. Superior Ct.,* 137 Ariz. 327, 332, 670 P.2d 725, 730 (1983); *Grant v. Arizona Public Service Co.,* 133 Ariz. 434, 456, 652 P.2d 507, 529 (1982) (Abuse of discretion where a judge commits an "error of law ... in the process of reaching [a] discretionary conclusion").

The United States and Arizona Constitutions both create privileges that allow anonymous free speech. Whether an evidentiary privilege exists is a question of law, and this Court is not bound by the trial court's conclusions of law on such matters. *City of Tucson v. Superior Ct.,* 167 Ariz. 513, 809 P.2d 428 (1991).

II. THE LAW OF FORCING THE DISCLOSURE OF THE IDENTITY OF ANONYMOUS SPEAKER

The advent of electronic communications has required courts to apply long-standing constitutional principles to new technologies and communications media. In this case, courts have long recognized that the First Amendment of the United States Constitution protects anonymous speech. Courts have applied these same principles to electronic communications. Particularly, Courts have been required to apply these principles to situations where a Plaintiff seeks to discover information that would identify an anonymous speaker. Recently, the Supreme Court of Delaware issued the first opinion from a State Supreme Court to address this specific issue in *Doe v. Cahill*, 884 A.2d 451 (Del. 2005).[2]

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[2] On July 13, 2006, the Supreme Court of Wisconsin issued the second opinion from a State Supreme Court to address this specific issue. *See,* Lassa v. Rongstad, 718 N.W.2d 673 (Wisc. 2006). In *Lassa*, the Wisconsin

A. Protection of Anonymous Speech

The First Amendment protects the right to speak anonymously. *Buckley v. Am. Constitutional Law Found,* 525 U.S. 182, 200 (1999); *Talley v. California*, 362 U.S. 60, 65 (1960). The Supreme Court has stated that "[a]nonymity is a shield from the tyranny of the majority," that "exemplifies the purpose" of the First Amendment: "to protect unpopular individuals from retaliation . . . at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 357 (1995) (holding that 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"). Consequently, courts must "be vigilant . . . [and] guard against undue hindrances to political conversations and the exchange of ideas." *Buckley*, 525 U.S. at 192. This vigilant review "must be undertaken and analyzed on a case-by-case basis," where the court's "guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue." *Dendrite Int'l, Inc. v. Doe No. 3,* 775 A.2d 756, 760-61 (N.J. Super. A.D. 2001).

B. Privileged Speech Applied to Anonymous Electronic Communications

The principles protecting anonymous speech have been extended to the Internet and electronic communications. *Reno v. ACLU*, 521 U.S. 844, 870 (1997)

Supreme Court discussed and adopted the concerns raised by *Doe v. Cahill*, 884 A.2d 451 (Del. 2005). However, the *Lassa* court concluded that a motion to dismiss standard would satisfy these concerns in Wisconsin because, unlike Delaware, Wisconsin requires particularity in pleading the claims at issue. *Id.* at 687. Because Arizona is a notice pleading state (like Delaware), *see*, *Anserv Ins. Servs., Inc. v. Albrecht*, 192 Ariz. 48 (Ariz. 1998), *Lassa* is inapplicable to this appeal. In addition, it should be noted that a motion for reconsideration has been filed with the Wisconsin Supreme Court in *Lassa*.

(there is "no basis for qualifying the level of First Amendment protection that should be applied to" the Internet). As the First Amendment protects the right to speak anonymously and this right extends to electronic communications, any discovery device seeking anonymous speakers' names and addresses is subject to a qualified privilege. Consequently, courts must consider this qualified privilege before authorizing discovery in such cases. *See, Sony Music Entertainment v. Does,* 326 F.Supp.2d 556, 565 (S.D.N.Y. 2004) ("Against the backdrop of First Amendment protection for anonymous speech, courts have held that civil subpoenas seeking information regarding anonymous individuals raise First Amendment concerns."). In so doing, the courts addressing these issues have made efforts to balance the interests of the anonymous speakers against the plaintiff's need for the subpoenaed information. *See, e.g., Cahill*, 884 A.2d 451; *Doe v. 2theMart.com*, 140 F.Supp.2d 1088 (W.D. Wash. 2001); *Dendrite*, 775 A.2d at 771; *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal.1999).

As these courts have recognized, an inherent problem arises in such cases because, at the outset of litigation, plaintiffs typically rely upon mere allegations of wrongdoing. However, a privilege is generally not overcome by mere allegations. Indeed, a serious chilling effect on anonymous speech would result if Internet speakers knew they could be identified by persons who merely allege wrongdoing, without necessarily having any intention of carrying through with actual litigation. *See, e.g., Seescandy.com*, 185 F.R.D. at 578 ("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."); *see also, 2theMart.com*, 140 F.Supp.2d at 1093 ("If Internet users could be stripped of . . . 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 subject to careful scrutiny by the courts.").

Consequently, courts have employed standards and imposed strict requirements upon plaintiffs that must be met prior to authorizing the discovery of information identifying anonymous speakers. *See, e.g.*, *Cahill*, 884 A.2d at 460-461; *2theMart.com*, 140 F.Supp.2d 1088; *Dendrite*, 775 A.2d at 771; *Seescandy.com*, 185 F.R.D. at 578.

C. EMERGENCE OF THE *CAHILL* STANDARD

In October 2005, the Delaware Supreme Court addressed the issue of what standard should be applied to determine when the disclosure of an anonymous speaker's identity could be obtained through discovery. In so doing, it thoroughly analyzed the various standards employed by other courts in similar circumstances. The *Cahill* court concluded that the most effective standard would be a synthesized version of the standard adopted in *Dendrite Int'l, Inc. v. Doe No. 3,* 775 A.2d 756, 760-61 (N.J. Super. A.D. 2001).

Essentially, the standard employed by *Cahill* requires the *Plaintiff* seeking discovery of an anonymous speaker's identity to (a) "undertake efforts to notify the anonymous poster that he is the subject of a subpoena or application for an order of

disclosure, and to withhold action to afford the anonymous defendant a reasonable opportunity to file and serve opposition to the application" and (b) demonstrate that it would survive a summary judgment motion. *Cahill*, 884 A.2d at 460-461. With respect to the notification requirement, the Court held that:

> The notification provision imposes very little burden on a [] plaintiff while at the same time giving an anonymous defendant the opportunity to respond. When *First Amendment* interests are at stake we disfavor *ex parte* discovery requests that afford the plaintiff the important form of relief that comes from unmasking an anonymous defendant.

Id. As to the summary judgment requirement, the Court concluded that requiring a plaintiff to demonstrate it would survive a summary judgment provides the most effective balance between a plaintiff's rights and those of the defendant anonymous speaker. *Id.* The *Cahill* opinion represents the first State Supreme Court opinion to address these issues. Recently, the United States District Court for the District of Arizona agreed with *Cahill* and concluded that "a summary judgment standard should be satisfied before [a party] can discover the identifies of [an anonymous defendant]." *Best Western International, Inc. v. Doe*, No. CV-06-1537-PHX-DGC, 2006 U.S. Dist. LEXIS 56014, *11 (D. Ariz. July 25, 2006).

III. TRIAL COURT ABUSED ITS DISCRETION

The trial court abused its discretion by (a) improperly applying the *Cahill* motion for summary judgment standard to the claims in Mobilisa's complaint by disregarding essential elements in each of these claims - particularly, unauthorized access to Mobilisa's computer systems - for which Mobilisa failed to produce any evidence in the record warranting the trial court's conclusion that Mobilisa could

survive summary judgment and order requiring TSB to disclose John Doe's identity, (b) improperly imposing the burden on TSB to notify Petitioner John Doe of the proceedings, and (c) improperly failing to consider John Doe's opposition by issuing its ruling prior to the deadline having passed for Petitioner John Doe to have filed an opposition memorandum.

A. JUDGE DAVIS IMPROPERLY APPLIED THE LAW IN DISREGARDING ESSENTIAL ELEMENTS OF MOBILISA'S CLAIMS – PARTICULARLY, UNAUTHORIZED ACCESS TO MOBILISA'S COMPUTERS – FOR WHICH MOBILISA FAILED TO PRODUCE ANY EVIDENCE.

Initially, the trial court correctly determined that a summary judgment standard, such as that in *Cahill*, should be used to determine whether Mobilisa was entitled to conduct discovery that would require TSB to identify John Doe.[3] Specifically, the *Cahill* Standard requires that a plaintiff produce evidence that it would withstand a summary judgment motion as a prerequisite to conducting such discovery. *Cahill*, 884 A.2d at 460-461. Although the Court correctly adopted such a standard, it misapplied the standard to the claims in the Plaintiff's Complaint.

In its February 27, 2006 Order granting the Plaintiff's Motion for Leave to Conduct Discovery, the Court merely found that "a finder of fact could conclude that the email information in question was, more probably than not, wrongfully obtained." Index 25 at p. 2. The trial court incorrectly limited the scope of

[3] For this reason, TSB does not appeal the Court's adoption of this standard and, because Appellee has not filed a separate appeal on this issue, this question is not squarely before the Court. It should be noted, however, that the *Cahill* Standard represents but a baseline for protecting the constitutional rights of anonymous speakers. For, *Cahill* does not impose an additional element requiring a balance of the harms. Appellants would not object to this Court adopting a more stringent standard than that established in *Cahill*.

Plaintiff's burden under the *Cahill* Standard to production of evidence that the email was wrongfully obtained. It completely failed to address an essential element in each of Mobilisa's claims - unauthorized access to Mobilisa's computers. In fact, Mobilisa should have been required to produce some evidence that John Doe wrongfully obtained the Ludlow Email *from its computers* to meet its burden under the *Cahill* Standard. The record clearly demonstrates the absence of ANY such evidence.

In addition, the trial court misapplied the *Cahill* Standard by failing to address two additional elements required of Mobilisa under the federal statutes - intent and damages. TSB challenged the evidentiary support on both of these elements arguing that Mobilisa had failed to provide any evidence supporting them. Index 19. Thus, the Court also misapplied the *Cahill* Standard by failing to address these issues.

1. The Court Properly Adopted a Standard Requiring Plaintiff to Show It Would Overcome a Motion for Summary Judgment

As part of the *Cahill* Standard, a plaintiff seeking disclosure of an anonymous speaker's identity must demonstrate that it would survive a summary judgment motion brought against the claims in its complaint. *Cahill*, 884 A.2d at 462. The trial court properly adopted this standard. Index 25 at p. 1. Consequently, Mobilisa had the burden of producing evidence demonstrating that it would survive a motion for summary judgment challenging each of the four claims in its Complaint.

2. Summary Judgment Standard

Summary judgment is appropriate if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. Rule 56(c); *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (Ariz. 1990). Summary judgment should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim." *Id.* Importantly here, because the *Cahill* Standard required the Plaintiff to demonstrate that it would overcome summary judgment, the burden of coming forward with evidence to support its various claims was Plaintiff's. *Id.* at 310, 802 P.2d 1009.

A party moving for summary judgment need make only a prima facie showing that no genuine issue exists on an essential element of each claim. *See Dobson v. Grand Int'l Bhd. Of Locomotive Eng'rs.*, 101 Ariz. 501, 505, 421 P.2d 520, 524 (1966). Indeed, a party moving for summary judgment need merely point out by specific reference to the relevant discovery that no evidence existed to support an essential element of the claim. *Id.* Once a movant has made such a prima facie showing, the nonmovant has the burden to produce sufficient evidence to show that there is a genuine issue. The nonmovant "cannot defeat a motion for summary judgment and require a trial by a bare contention that an issue of fact exists." *Id.* Rather, it "must show that evidence is available which would justify a trial of the issue." *Id.*

3. The Trial Court Erred in Disregarding an Essential Element in Each of Mobilisa's Claims – Unauthorized Access to Mobilisa's Computers

The trial court erroneously limited its ruling to deciding whether a question of fact existed as to whether the Ludlow Email had been obtained wrongfully. This ruling disregards a critical essential element that exists in each of the claims in Mobilisa's Complaint – intrusion into *its* computer system. This error is material. For, Mobilisa provided no evidence that John Doe intruded into its computer system in any of its various memoranda. In fact, Mobilisa's own evidence suggests he did not do so. Given the absence of any evidence supporting this essential element and considering the plethora of alternative theories that could explain how John Doe obtained the Ludlow Email, Mobilisa could not withstand a summary judgment motion on any of its claims.

a. Each of Mobilisa's Claims Require as an Essential Element Unauthorized Access to Mobilisa's Computers

In its Complaint, Mobilisa alleged violations of the Stored Communications Act, 18 U.S.C. §2701 (Count I); the Computer Fraud and Abuse Act, 18 U.S.C. §§1030 (a)(4), (a)(5) (Counts II and III); and, trespass to chattels (Count IV). All four of these claims include as an element that John Doe obtained *unauthorized access to Mobilisa's computers*. Indeed, Mobilisa pled John Doe's unauthorized access to its computers in each cause of action in its Complaint.

i. Stored Communications Act, 18 U.S.C. §2701

The Stored Communications Act ("SCA"), 18 U.S.C. §2701, prohibits one from intentionally accessing "without authorization a facility through which an

electronic communication service is provided." 18 U.S.C. §2701 (a)(1). Further, the SCA prohibits an individual from intentionally exceeding an authorization to access a facility and "thereby [obtaining] . . . access to a wire or electronic communication while it is in electronic storage in such system."[4] 18 U.S.C. §2701 (a)(2).

For an otherwise criminal statute, Section 2707 of the SCA provides for a civil remedy. Pursuant to §2707, Mobilisa seeks a civil remedy for John Doe's unauthorized use of Mobilisa's computers and computer systems and Mobilisa's "mobilisa.com" email accounts.

ii. Computer Fraud and Abuse Act, 18 U.S.C. §§1030

Mobilisa has alleged as separate counts violations of §1030(a)(4) and §1030(a)(5)(iii) of the Computer Fraud and Abuse Act, 18 U.S.C. 1030, *et seq.* 18 U.S.C. §1030(a)(4) prohibits anyone from "knowingly and with intent to defraud, access[ing] a protected computer without authorization, or exceed[ing] authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than $5,000 in any 1-year period." 18 U.S.C. §1030(a)(4). Similarly, 18 U.S.C. §1030(a)(5) prohibits anyone from intentionally accessing "a protected computer without

[4] This would not apply to a situation where an authorized user provides a third party with access to the authorized user's account. *See Sega Enters. v. MAPHIA*, 948 F. Supp. 923, 930 (D. Cal. 1996).

authorization, and as a result of such conduct, causes damage" where such conduct causes at least $5,000 in damages. 18 U.S.C. §1030(a)(5)(A)(iii) and (B)(i).

Again, for an otherwise criminal statute, Section 1030(g) of the Computer Fraud and Abuse Act provides for a civil remedy. Pursuant to §1030(g), Mobilisa seeks a civil remedy for John Doe's unauthorized use of Mobilisa's computers and computer systems and Mobilisa's "mobilisa.com" email accounts. Index 1 at ¶¶ 1, 7. 14, 18. Indeed, in its Complaint, Mobilisa alleges that John Doe "knowingly and with intent to defraud, accessed Mobilisa's protected computer system, without authorization and/or in excess of authorized access." Index 1 at ¶¶ 14, 18.

iii. Trespass to Chattels

Arizona has adopted the Restatement (Second) of Torts with respect to the tort of trespass to chattels. *Koepnick v. Sears Roebuck & Co.,* 158 Ariz. 322, 330-31, 762 P.2d 609, 617-18 (1988) ("The Restatement provides that the tort of trespass to a chattel may be committed by intentionally dispossessing another of the chattel or using or intermeddling with a chattel in the possession of another"). Mobilisa alleges that the Defendants have "knowingly, intentionally and without authorization used and intentionally trespassed upon Mobilisa's property." Index 1 at ¶ 24. This property, Mobilisa alleges, consists of its computers, computer networks, and email accounts. Index 1 at ¶¶ 22-24.

b. The Record Contains No Evidence Demonstrating that the Ludlow Email was Obtained by Unauthorized Access to Mobilisa's Computers

The Court below failed to require Mobilisa to produce some evidence that John Doe obtained the Ludlow Email through unauthorized access *to Mobilisa's*

computers, an essential element for each of the claims in its Complaint. For, the record clearly demonstrates the apparent and obvious absence of evidence demonstrating, or even suggesting, this occurred.[5]

In its Under Advisement Ruling, the Court concluded that "there is not sufficient verified evidence provided to the Court . . . for the Court to find that the underlying claim [sic] would survive a motion for summary judgment." Index 15. Mobilisa has presented no evidence since that ruling demonstrating that John Doe obtained the Ludlow Email through unauthorized access *to Mobilisa's computers, computer networks, or "mobilisa.com" email accounts*. Indeed, apart from the fact that John Doe had possession of the Ludlow Email, Mobilisa has provided absolutely no evidence that John Doe obtained the Ludlow Email wrongfully or, more importantly for summary judgment, that John Doe wrongfully obtained the Ludlow Email *through unauthorized access to Mobilisa's computers.*

In fact, Mobilisa's own evidence demonstrates that John Doe *did not* obtain the Ludlow Email from any Mobilisa computer, computer networks, or "mobilisa.com" email accounts. Nelson Ludlow, Chief Executive Officer and founder of Mobilisa, Inc., in his first declaration states that Mobilisa's computer systems are protected by a password system and a firewall. Index 1, see Ludlow Declaration, attached thereto, at ¶ 5. Indeed, he states "Mobilisa secures its computer and email systems in order to prevent the release of confidential or

[5] Whether by failing to address the proper question before the Court, or reaching an erroneous conclusion on the proper question, TSB contends the Court failed to recognize the clear absence of evidence on this issue.

classified information." *Id.*, see Ludlow Declaration at ¶ 3. He further states that Mobilisa, a high-tech company servicing government contracts:

> conducted searches of its computer systems . . . [which] included investigating the anonymous email and attempting to determine how the sender(s) had accessed Mobilisa's email storage systems and distributed the [email]. ***It was unable to identify the security breach. Mobilisa's Network Administrator and owner of the recipients network could not discover how the email was obtained.***

Id., see Ludlow Declaration at ¶ 6 (emphasis added). The inability of a corporation that provides "wireless and mobile systems, including infrastructure, applications, and support, to government and military entities" to find any unauthorized access to its systems is significant and telling. *Id.*, ¶ 2. The most able people to determine whether someone obtained unauthorized access to Mobilisa's systems found no evidence that this occurred.

At oral argument, Plaintiff's counsel admitted and conceded this point. Index 21, see transcript attached thereto, p. 18, lines 17-19 ("It is true that Mr. Ludlow said we can't find in our investigation any intrusion that we can pin this on."). In fact, Plaintiff's counsel admitted that "we don't even know who did it, let alone how they did it, when they did it." *Id.,* p. 29, lines 19-21. Consequently, there simply does not exist any evidence supporting Mobilisa's theories. Mobilisa's allegations merely represent insufficient guesswork.

Despite receiving an opportunity to supplement the record, Mobilisa failed to provide any evidence, verified or not, that further supported its allegations regarding unauthorized access to Mobilisa's computers. While the unsworn declarations of Nelson Ludlow and Shara Smith dated February 1, 2006 and

January 30, 2006, respectively, suggest that John Doe may have obtained the Ludlow Email without their knowledge or consent, the declarations and the statements therein do not further Mobilisa's instant claims. Indeed, Nelson Ludlow provides additional support tending to discount the possibility John Doe obtained the Ludlow Email from Mobilisa's computers. He states:

> 4. Mobilisa provides wireless and mobile systems to government and military entities. Accordingly, it pays high attention to the security of its computer and email systems in order to prevent the release of confidential or classified material.
>
> * * * * *
>
> 6. Mobilisa's Network Administrator has been unable to determine how the email was obtained by the anonymous sender. The email was on a Mobilisa system that contained sensitive but unclassified information and the system was protected by a password and firewall.

Index 17, see Ludlow Declaration attached thereto. Mr. Ludlow's statement that "Mobilisa's Network Administrator has been unable to determine how the email was obtained by the anonymous sender" from Mobilisa's computers begs the question. In fact, if Mobilisa, through its expertise, could not find any evidence of unauthorized access or exceeded authorization to *its* computers, it likely did not occur at all. Although some questions may exist regarding how John Doe obtained the Ludlow Email, the record clearly demonstrates the absence of any genuine issues of material fact as to whether John Doe, or anyone else, obtained the Ludlow Email *through unauthorized access to Mobilisa's computers*.

Additionally, Mobilisa's second and third supplemental memoranda added no relevant evidence to the record. Its second memorandum made much of the fact

that John Doe had not filed an opposition memorandum. As is explained further below, *infra*, Section III.A.3., Mobilisa's arguments in their second memorandum became moot when John Doe filed an opposition memorandum after receiving notification. *See infra*, Section III.A.3. Most importantly, however, the second memorandum added no evidence to the record.

Similarly, Mobilisa's third supplemental memorandum failed to add any evidence to the record. In fact, in its third supplemental memorandum, Mobilisa exposed its own perceived weakness in the evidentiary record. Rather than focus on evidence demonstrating John Doe accessed Mobilisa's computers without authorization, it focused on the possibility that "someone close to John Doe . . . illegally obtain[ed] the e-mail from [Plaintiff] and provided that e-mail to John Doe who then sent it to [Plaintiff's] employees through [TSB's] services." Index 23, at page 2, lines 1-3. By proposing such a possibility, Mobilisa defeats the essential element to each of its claims against Doe requiring *that Doe himself obtained unauthorized access to Mobilisa's computers*. Indeed, such a novel and convoluted hypothetical assumption merely affirms the absence of any evidence supporting Mobilisa's original assumptions found in its Complaint. Because of this, there exists no means by which Mobilisa could survive summary judgment on any of its claims against John Doe.

Mobilisa also attempted, in its third supplemental memorandum, to cloud the issue by arguing a question of fact exists as to how John Doe obtained the Ludlow Email. *Id.*, at p. 3, line 16 to p. 4 line 13. As explained herein, the issue before the Court is not *how* John Doe obtained the Ludlow Email. Rather, the issue is

whether a genuine issue of material fact exists that John Doe obtained the Ludlow Email *by unauthorized access into Mobilisa's computer systems.* In an attempt to comport its claims with the trial court's rulings, Mobilisa has argued that the distinction between "wrongfully obtained" and "wrongfully obtained from Mobilisa's computer systems" is a "distinction without a difference." This argument is preposterous. In fact, Mobilisa's successful effort to hide this distinction is at the heart of the trial court's error. For Mobilisa to have standing with respect to its claims, the Ludlow Email must have been obtained through unauthorized access to Mobilisa's computers. *See, supra* III.A.3. Consequently, the distinction between "wrongfully obtained" and "wrongfully obtained from Mobilisa's computer systems" is significant; it represents the difference between surviving or succumbing to summary judgment on the claims in Mobilisa's Complaint.

Mobilisa clearly failed to provide any evidence demonstrating that John Doe obtained the Ludlow Email through unauthorized access *to its computers, computer networks, or "mobilisa.com" email accounts.* As explained above, Mobilisa's evidence tends to demonstrate the impossibility of this having occurred. If any facts exist apart from a "belief" or "guess" that support Mobilisa's claims on this issue, they "have so little probative value" that a reasonable person "could not agree with the conclusion advanced." *See, Baker ex rel. Hall Brake Supply, Inc. v. Stewart Title & Trust of Phoenix, Inc.*, 197 Ariz. 535, 540, 5 P.3d 249, 254 (App. 2000). Thus, Mobilisa would not survive summary judgment on this issue and,

consequently, its claims.[6] *Id.* Because the Court below abused its discretion in failing to require evidence on or even address this essential element required by each of Mobilisa's claims, its ruling that Mobilisa had demonstrated it would survive a motion for summary judgment on the claims in its Complaint is clearly erroneous. Therefore, the Court's February 27, 2006 Ruling granting Mobilisa's Motion for Leave to Conduct Discovery should be reversed.

c. Alternative Theories Exist That More Likely Explain How Doe Obtained the Ludlow Email

Although the Defendants did not and do not have the burden to demonstrate more likely alternative theories of how John Doe could have obtained the Ludlow Email, *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (Ariz. 1990), it's not difficult to do.

Nelson Ludlow sent the Ludlow Email from his Mobilisa email account to Shara Smith's 3dNorth email account. Ludlow Declaration, ¶ 2. He also sent the email to his personal att.net email account and to his mobile phone as a text message through his vtext.com account. *Id.* Although he boldly states he "did not, however, send a copy of that email to anyone else or to any other email address," he involved not two but five separate providers of communications services: Mobilisa, 3dNorth, att.net, his mobile phone provider, and vtext.com. *Id.*; Index 17, see Declaration of Shara Smith attached hereto at ¶ 5. In addition, both Nelson Ludlow and Shara Smith each printed one copy of the Ludlow Email. Smith Declaration at ¶ 3 and Ludlow Declaration, also attached, at ¶ 5.

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[6] It should also be noted that this discussion does not even address the statements of John Doe through his counsel that he did not obtain the Ludlow Email through Mobilisa's computers, computer networks, or email accounts.

As Mobilisa's own evidence demonstrates, unauthorized access to Mobilisa's computers cannot be the method through which Doe obtained the Ludlow Email. However, it's possible that Mobilisa's theory of "unauthorized access" occurred through 3dNorth. Unfortunately, Mobilisa produces no evidence exploring these possibilities. Rather than produce a declaration from 3dNorth or an expert who consulted with 3dNorth's technicians, Mobilisa produces only the declaration of Shara Smith who states that 3dNorth could no longer find the Ludlow Email on its servers. *Id.*, Smith Declaration at ¶ 5. Mobilisa does not produce declarations of any technicians from 3dNorth, att.net, vtext.com, or Ludlow's mobile phone declaring that unauthorized access to their computers did not occur from outside their companies. In any case, these would not constitute unauthorized intrusions or access to Mobilisa's computes.

The same absence applies to what might have occurred inside their companies. Mobilisa fails to introduce any declaration from these communications providers attesting similarly to that which Ludlow states about Mobilisa's information technology department:

> While members of Mobilisa's IT department have access to the Mobilisa email system for maintenance and trouble shooting purposes, their access is limited to those functions—i.e., they are not authorized to view, copy or distribute email messages contained in Mobilisa email accounts not assigned to them.

Id., Ludlow Declaration at ¶ 6. This leads to a myriad of possibilities. It's possible that any customer service person, any IT technician, or anyone else with clearance to access, view, and copy the contents of an email stored on their server could have distributed the Ludlow Email. It's even possible that someone at these providers

exceeded the scope of their access. Once again, these possibilities remain unexplored. The record contains no evidence regarding the security measures employed by these service providers. Once again, these would not constitute unauthorized intrusions or access to Mobilisa's computers.

At this point, it should also be noted that the discussion thus far has omitted the possibility of additional service providers and computer networks through which the Ludlow Email may have traveled from Ludlow's Mobilisa email account to the three destinations to which he sent it. For, the Internet represents "an interconnected system of networks that connects computers around the world via the TCP/IP protocol." www.answers.com/internet&r=67 (last visited on September 26, 2006). It could be that administrators or personnel at these additional service providers or computer networks accessed the Ludlow Email. There also exists the possibility that the Ludlow Email had been intercepted while in transit through the use of "sniffer" or other related technology. In fact, this becomes all the more possible if the email had been sent by Nelson Ludlow through an unencrypted Wi-Fi network. Again, Mobilisa fails to discount these possibilities. Once again, these possibilities would not constitute unauthorized intrusions or access to Mobilisa's computers.

Additionally, neither Ludlow nor Smith has stated how thoroughly they deleted the email from the multiple accounts to which it had been sent. Did they simply delete it from the Inbox? Had they configured their personal computers to delete the email from the servers upon accessing or downloading the email? Did they use "scrubbing" software to "permanently" delete the data contained in the

email? Did they subsequently wipe the free space on their hard drives? This information is important because a file or email is not permanently erased merely because someone deletes the email from their inbox or email program altogether. It is possible the email remained on any one of these servers in a "deleted" but still accessible form. It is possible that someone accessed this "deleted" data and used it to reconstruct or distribute the Ludlow Email. In fact, the information could have remained on the hard drives of their computers. Someone with access to their computers – which they again avoid discussing – could have searched for specific keyword text ("Ludlow" "Shara") in the raw data and reconstruct the Ludlow Email. Once again, these possibilities remain unexplored. Once again, these would not constitute unauthorized intrusions or access to Mobilisa's computers.

Additionally, it's possible that, although Ludlow did not provide anyone with access to the email, he may have previously provided someone with the means to access his att.net email account remotely by sharing his password. His declaration does not preclude this possibility. This person could have obtained access to his att.net email account between the time the email had been sent and the time Ludlow "deleted' the email. The record contains no evidence of access logs for any of the three accounts to which Nelson Ludlow sent the Ludlow Email that could demonstrate the times and dates an individual, authorized or not, gained access to the accounts. Once again, these possibilities remain unexplored. Once again, these would not constitute unauthorized intrusions or access to Mobilisa's computers.

Although Ludlow and Smith indicate they "destroyed" the printed copies of the Ludlow Email, they do not explain how such destruction occurred. Neither Nelson Ludlow nor Shara Smith state whether they shredded the printed copies of the email, threw them away, or burned them. *Id.*, see Ludlow Declaration at ¶5 and Smith Declaration at ¶3. If merely thrown away, there could be countless individuals who obtained the copy from the garbage. Particularly, if Nelson Ludlow "destroyed" his copy at work, individuals with access to his wastebasket or that of his secretary or that of the office trash bins could have obtained the printed email. Even the interest of the maintenance engineers could have been piqued as the crumpled email poured from the garbage can to their trash cart. A competitor of Mobilisa could have scoured through the garbage in dumpster-diving reconnaissance. Even if shredded, an industrious (though misguided) individual could potentially reconstruct the paper copies. And where did Shara Smith "destroy" her copy? How many people had access to her garbage can? Once again, these possibilities remain unexplored. Once again, these would not constitute unauthorized intrusions or access to Mobilisa's computers.

The foregoing discussion identifies countless alternative possibilities to how Doe obtained the Ludlow Email. Although Mobilisa has previously complained of such a discussion on the basis that "unsworn and unproven assertions of counsel in memoranda are not facts admissible in evidence" and "[u]nsubstantiated assertions, improbable inferences and unsupported speculation are not competent summary judgment evidence," Pl.'s Supp. Mem., p. 8, Defendants have not intended to produce these alternatives here as evidence. Indeed, the Defendants do not have

the burden to demonstrate more likely alternative theories of how John Doe could have obtained the Ludlow Email. *See, Orme School*, 166 Ariz. at 309, 802 P.2d at 1008. They need not affirmatively establish the negative of the element. *Id.* at 310, 802 P.2d at 1009. Rather, the effortless recitation of alternative possibilities above exposes the weakness in the Mobilisa's claims as but mere "unsubstantiated assertions, improbable inferences, and unsupported speculation." Although a question may exist as to how Doe came into possession of the Ludlow Email, the record, consisting primarily of Mobilisa's *own* evidence, demonstrates with poignant clarity the absolute absence of any question on whether Doe obtained the Ludlow Email from unauthorized access to Mobilisa's computers; he did not.

d. Failure to Address Essential Element of Unauthorized Access to Mobilisa's Computers Led to Court's Erroneous Ruling

The foregoing discussion clearly demonstrates that, by disregarding the essential element of unauthorized access to Mobilisa's computers required in each of Mobilisa's claims, the trial court reached an erroneous conclusion that Mobilisa would withstand a summary judgment motion. Clearly, no evidence exists suggesting John Doe obtained the Ludlow Email through unauthorized access to Mobilisa's computers. Mobilisa's own evidence demonstrates that this did not and could not have occurred. For this reason, Mobilisa could not withstand proper application of the *Cahill* standard. Consequently, the trial court's ruling was clearly erroneous and an abuse of discretion.

4. The Court Below Erred in Failing to Address Additional Elements of Claims Challenged by TSB as Lacking Evidentiary Support.

The Court below also failed to address additional elements of Mobilisa's claims challenged by TSB for which there exists no evidentiary support.

a. Intent

The Court did not address the issue of Mobilisa's complete lack of evidence of intent. Mobilisa has not, and still cannot, provide any evidence supporting the requirement of intent under the Stored Communications Act. Mobilisa has also failed to provide any evidence tending to even suggest an "intent to defraud" or intent to wrong a person in property rights or "secret information" by dishonest methods or schemes, which is required under the Computer Fraud and Abuse Act. *See, Shurgard Storage Ctrs. v. Safeguard Self Storage, Inc.*, 119 F. Supp. 2d. 1121, 1126 (W.D. Wash. 2000).

Because the Court below failed to address the issue of intent, the Court's February 27, 2006 Ruling granting Mobilisa's Motion for Leave to Conduct Discovery should be reversed.

b. Damages

The trial court also failed to address Mobilisa's lack of evidence on the issue of damages. Both claims asserted by Mobilisa under the Computer Fraud and Abuse Act require proof of damages. Mobilisa has failed to provide any evidence that the information allegedly obtained (the Ludlow Email) had a value of more than $5,000, a requisite under 18 U.S.C. §1030(a)(4) and 1030(a)(5)(B)(i). *See generally, Chance v. Ave. A, Inc.*, 165 F. Supp. 2d 1153, 1160 (D. Wash. 2001)

(affirming judgment for defendant where there existed absence of evidence that each alleged act caused $5,000 of damage or loss in context of §1030(a)(5)); 18 U.S.C. §1030(a)(4) and 1030(a)(5)(B)(i).

Again, because the Court below failed to address the issue of damages, the Court's February 27, 2006 Ruling granting Mobilisa's Motion for Leave to Conduct Discovery should be reversed.

B. TRIAL COURT IMPROPERLY SHIFTED THE BURDEN OF NOTIFYING JOHN DOE

The trial court improperly shifted the burden of notifying John Doe of the pending litigation from Mobilisa, where it belonged, onto TSB. In its Under Advisement Ruling, the Court adopted the *Cahill* Standard, which imposes the burden on the *plaintiff* in an action seeking disclosure of an anonymous speaker's identity to make reasonable efforts to notify the anonymous speaker of the litigation. Specifically, as the Court below noted, the *Cahill* Standard requires that:

> The Plaintiff must, to the extent reasonably practicable under the circumstances, undertake efforts to notify the anonymous speaker that the speaker is the subject of a subpoena or application for order of disclosure, and plaintiff must also withhold action to afford the anonymous Defendant a reasonable opportunity to file and serve opposition to the discovery request.

Index 15, p. 2; *see also, Cahill*, 884 A.2d at 460-461 (emphasis added). The case upon which *Cahill* relied also made this clear. *Dendrite Intl., Inc*, 775 A.2d at 760.

In its order, the Court went on to find that:

> . . . there has been no effort to have *the email service* contact the sender of the email as to the pending discovery request and no opportunity for the anonymous sender to file and serve opposition to the request.

Id. (emphasis added). The Court thereafter appropriately concluded that the notification burden under the *Cahill* Standard had not been met. *Id.* Inexplicably, it then ordered TSB to "make an effort to personally notify the email sender of the pending discovery request within ten days." *Id.*, at p. 3. By shifting the notification burden from Mobilisa to TSB, the trial court misapplied *Cahill.*

As the trial court recognized, the Plaintiff never made reasonable efforts to notify John Doe of the underlying litigation. *Id.*, at p. 2. Moreover, Mobilisa, the party with whom the notification burden properly rests, still has not done so. For this reason, the trial court's ruling should be reversed with an order that it deny Mobilisa's Motion for Leave to Conduct Discovery.

C. TRIAL COURT IMPROPERLY FAILED TO CONSIDER JOHN DOE'S OPPOSITION

The trial court improperly failed to consider John Doe's opposition memorandum. In its Under Advisement Ruling, the trial court provided that John Doe could file an opposition memorandum within twenty (20) days of being notified. *Id.* at p. 3. John Doe did not receive notification of the pending litigation until February 9, 2006. Index 24. By counsel, John Doe informed the Court on February 13, 2006 that he had not received notification until February 9, 2006 and that he reserved the right to file an opposition memorandum pursuant to the Court's Under Advisement Ruling. *Id.* at ¶¶ 6, 8, 16.

On March 1, 2006, within twenty (20) days of being notified of the litigation, John Doe filed an opposition memorandum. Index 26.

Despite notification of the date John Doe received notice and of John Doe's intention to file an opposition memorandum, the Court issued its ruling granting Mobilisa's Motion for Leave to Conduct Discovery on February 27, 2006, prior to the expiration of the period in which John Doe could file an opposition memorandum. Consequently, the Court failed to consider John Doe's opposition memorandum in violation of its own prior ruling.

John Doe's opposition memorandum contains significant responses to Mobilisa's multiple supplemental memoranda and demonstrates that no evidence exists that John Doe obtained the Ludlow Email from Mobilisa's computers. Because the Court failed to consider John Doe's opposition memorandum prior to issuing its ruling, the Court's February 27, 2006 ruling granting Mobilisa's Motion for Leave to Conduct Discovery should be reversed and Mobilisa's Motion for Leave to Conduct Discovery should be denied.

CONCLUSION

For the foregoing reasons, Defendants The Suggestion Box, Inc. and John Doe respectfully request this Court reverse Judge Davis' February 27, 2006 Ruling granting Mobilisa's Motion for Leave to Conduct Discovery, order the lower court to deny Mobilisa's Motion for Leave to Conduct Discovery, and order the lower court to preclude discovery of John Doe's identifying information.

Dated this 27th day of September 2006.

LAW OFFICES OF CHARLES LEE MUDD JR.

By

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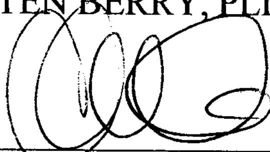
By 

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MOBILISA, INC., a Washington corporation, Plaintiff/Appellee, vs. JOHN DOE 1 and THE SUGGESTION BOX, INC., Defendant/Appellants.	**Court of Appeals** **Division One** **No. 1 CA-CV 06-0521** **Maricopa County** **Superior Court** **Cause No. CV2005-012619** **CERTIFICATE OF FILING AND SERVICE**

I hereby certify that an original and six copies of the Appellant's Opening Brief and Notice of Errata was delivered to the United Postal Service addressed to the of the Arizona Court of Appeals, Division One on September 27, 2006 and two copies were mailed to counsel for the Plaintiff/Appellee at:

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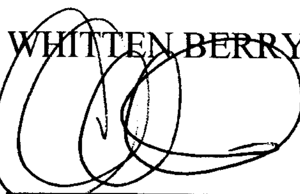
Dated this 27th day of September 2006.

WHITTEN BERRY



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