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

APPELLANT'S REPLY BRIEF

Christopher Berry, Esq. - #015385
BERRY AND ASSOCIATES, PLLC
101 North First Avenue, Suite 1800
Phoenix, Arizona 8503

Charles Lee Mudd, Jr.
LAW OFFICES OF CHARLES LEE MUDD, JR.
3344 North Albany Avenue
Chicago, Illinois 60618

Co-Counsel for **Defendants/Appellants**

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT'D)

TABLE OF CITATIONS

Cases **Page**

TABLE OF CITATIONS (CONT'D)

Cases **Page**

TABLE OF CITATIONS (CONT'D)

Cases **Page**

TABLE OF CITATIONS (CONT'D)

Cases **Page**

Statutes **Page**

Other Authorities Cited

ARGUMENT

Through its Answering Brief, the Plaintiff/Appellee Mobilisa ("Mobilisa") demonstrates its failure to understand the facts, issues and law involved in this action. First, Mobilisa fails to recognize that the email sent by John Doe and the contents therein – including John Doe's commentary – ("John Doe Email") have given rise to this action in Arizona and form the basis of determining the standard to be employed to determine whether to disclose John Doe's identity. Second, Mobilisa fails to recognize that the standard articulated in *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) (the "*Cahill* Standard") (or, if not *Cahill*, the standard articulated in *Dendrite Int'l., Inc. v. Doe*, 342 N.J. Super. 134, 775 A.2d 756, 760 (N.J. App. 2001) (the "*Dendrite* Standard") urged by Amici) represents the most equitable standard for determining whether and when to compel the disclosure of the identity of an individual who engaged in anonymous communications. Finally, Mobilisa fails to recognize that it has presented no evidence sufficient to survive summary judgment on an essential element in each of its claims as required under the *Cahill* standard. Thus, this Court should affirm the lower court's adoption of the *Cahill* standard and reverse the trial court's application of *Cahill's* summary judgment standard to the claims in Mobilisa's complaint.[1]

---

[1] Inexplicably, Mobilisa questions whether John Doe is a party to this appeal and, if not, whether The Suggestion Box, Inc. ("TSB") has standing to bring this appeal. Answering Br. at p. 8, n.5. As to John Doe, the Notice of Appeal clearly states that

I. THE JOHN DOE EMAIL GIVES RISE TO THIS ACTION IN ARIZONA

Mobilisa fails to recognize that the John Doe Email represents the anonymous communication giving rise to this action in Arizona. After filing suit in the State of Washington, Mobilisa brought this action in Arizona solely to obtain from The Suggestion Box, Inc. ("TSB"), a corporation doing business in Arizona, the identity of the individual who sent the John Doe Email. The sole involvement of TSB (and therefore Arizona) arises from the use of TSB's anonymous email services by John Doe to send the John Doe Email.

John Doe and TSB each appeal the trial court's rulings. See R. 38, Notice of Appeal. Moreover, John Doe's First Amendment and privacy interests remain at the heart of this dispute. Indeed, the trial court clearly invited John Doe to file an opposition to Mobilisa's discovery motion. R. 15, December 28, 2005 Rulings, p. 3. (Contrary to Mobilisa's characterization, John Doe filed his memorandum in opposition within twenty (20) days of being notified and on the same day – March 1, 2006 - the trial court filed its February 27, 2006 ruling. See Opening Brief at pp. 31-32; R. 25; R. 26.) Clearly, John Doe has standing to appeal as his First Amendment and privacy interests remain at the heart of this dispute and were affected by the lower court's rulings. *See In re Gubser*, 126 Ariz. 303, 614 P.2d 845 (1980) ("An appeal may be taken by any party aggrieved by the judgment.").

As to TSB, the case cited by Mobilisa is inapplicable. In that case, the court found the appellants to lack standing because no relationship existed between the appellants and the individuals for whom First Amendment protection was sought. *Matrixx Initiatives, Inc. v. Doe*, 138 Cal. App. 4th 872, 880-881 (Cal. Ct. App. 2006). As the *Matrixx* Court stated, the facts in *Matrixx* differed significantly from cases in which a "challenge to the subpoena was made by an entity [eg Internet Service Providers such as AOL and Verizon] with a sufficiently close relationship to the anonymous user that judicial consideration was warranted." Id.

A. John Doe Email Focus of Inquiry

Mobilisa became upset when an individual sent an anonymous email (the John Doe Email) to Mobilisa employees criticizing Mobilisa with the subject heading, "Is this a Company you want to work for?" R. 9, Mem. Opp. Leave Conduct Discovery, p. 3. Perhaps more upsetting to Mobilisa's CEO, Nelson Ludlow, the John Doe Email included contents of a personal email from Ludlow to Shara Smith demonstrating infidelity to his wife, another Mobilisa executive (the "Sensitive Email"). Thus, John Doe, through the John Doe Email, expressed implicit criticism of Ludlow for his apparent infidelity and explicit criticism of Mobilisa for employing Ludlow given the information revealed in the Sensitive Email. As such, the John Doe Email contains speech and expression – pure expression - original to John Doe critical of Mobilisa and, implicitly, Ludlow.

The John Doe Email represents the only evidence that reflects John Doe engaged in any conduct for which Mobilisa can complain. Thus, Mobilisa seeks the identity of who sent the John Doe Email.[2] By recognizing that the individual who sent the John Doe Email may not be the same individual who obtained the Sensitive Email, Mobilisa implicitly acknowledges that the focus of inquiry at this stage represents the John Doe Email and their effort to determine who sent it – not

[2] Indeed, TSB cannot identify who allegedly obtained unauthorized access to Mobilisa's computers. Rather, it would only be able to identify who sent the John Doe Email.

who may have obtained the Sensitive Email or who may have allegedly obtained unauthorized access to its computers. See R. 23, Mobilisa Resp. to Supp. Decl. and Supp. Aff. of Charles Lee Mudd, Jr., pp. 1-2.

In this respect, the instant case differs from that in *General Bd. of Global Ministries of the United Methodist Church v. Cablevision Lightpath, Inc., et al.* In *United Methodist Church*, the petitioner determined that someone had obtained unauthorized access to and sent emails through its computer system.[3] *General Bd. of Global Ministries of the United Methodist Church v. Cablevision Lightpath, Inc., et al.*, No. 06-3669, 2006 U.S. Dist. LEXIS 86826, *1-6 (E.D.N.Y. November 30, 2006). In contrast to the instant case, the petitioner obtained direct evidence that the intrusion had occurred, including the Internet Protocol ("IP") address associated with the computer through which the anonymous individual obtained unauthorized access to its computer systems ("Intruding IP Address"). *Id.* at *2-3. It then sought information from the Internet Service Provider ("ISP") who owned the Intruding IP Address about the individual to which the ISP had assigned the Intruding IP Address on particular dates and times. *Id.* at *1-6. Thus, in *United Methodist Church*, the information and identity sought by the plaintiff directly related to use of the IP address that obtained unauthorized access to its computers.

[3] Like the instant case, *General Bd. of Global Ministries of the United Methodist Church v. Cablevision Lightpath, Inc., et al.* involved a claim under the Stored Communications Act, 18 U.S.C. § 2701.

In contrast, the information and identity sought by Mobilisa relates solely to who sent the John Doe Email. Consequently, the John Doe Email represents the speech – the pure expression – that has given rise to this action in Arizona and the need to determine whether to compel the disclosure of the identity of the individual who sent the John Doe Email through TSB's services.

B. Mobilisa's Diversionary Tactics Are Unavailing

Despite the foregoing, Mobilisa makes every effort to focus this Court's attention away from the John Doe Email and to the alleged intrusion of its computers in determining the standard to be used in considering whether to compel the disclosure of the identity of the individual who sent the John Doe Email.[4] Appellee's Answering Brief ("Answering Br.") at p. 13. Of course, Mobilisa's efforts are not surprising given that the claims in the complaint have little or nothing to do with speech or pure expression. By ignoring the speech and pure expression inherently contained within the John Doe Email, Mobilisa seeks to avoid the standards that have been applied to anonymous communications

[4] Mobilisa demonstrates its clear misunderstanding of the issues and analyses involved in this type of case by claiming "[t]he nature of what Doe "said" by sending the purloined email is irrelevant to Mobilisa's claims." Answering Br., p. 20. While the contents of Doe's email may be irrelevant to the claims in Mobilisa's Complaint, the speech involved in the sending and the content of the John Doe Email represents the very heart of the speech to be considered in determining which standard to employ.

involving pure expression, the First Amendment, and privacy concerns, and that have direct relevance to this action.

Moreover, Mobilisa's efforts to divert attention away from the John Doe Email blur the distinction between the stages involved in the proper analysis before the trial court and this Court. For, the initial focus must be on the conduct that has given rise to the ability to obtain the anonymous individual's identity. Here, there would arguably be no action in Washington or Arizona without the John Doe Email. Clearly, however, there would be no action in Arizona to obtain from TSB the identity of the individual who sent the John Doe Email anonymously through TSB's services. Thus, the standard to be employed by the trial court must be determined based upon the John Doe Email and its contents – not the claims underlying the complaint. Once the proper standard has been adopted in relation to the conduct in which the anonymous individual engaged that would allow for disclosure of his identity – this case speech and pure expression, the court *then* examines the plaintiff's claims in the context of the adopted standard.

The Arizona federal district court recently recognized this distinction. In *Best Western Int'l v. Doe*, the court first determined the standard to be employed in determining whether to compel disclosure of the anonymous defendant's identity. *Best Western Int'l v. Doe*, No. CV-06-1537-PHX-DGC, 2006 U.S. Dist. LEXIS 56014 (D. Ariz. July 25, 2006) ("Best Western I"). In doing so, it examined the

nature of the conduct giving rise to the ability to obtain the anonymous individual's identity (eg communications containing pure expression for which the author's identity was being sought). *Id.* After adopting the *Cahill* standard, the court later examined whether the plaintiff's claims for breach of contract and covenants of good faith and fair dealing would survive summary judgment. *Best Western Int'l, Inc. v. Doe*, No. CV-06-1537-PHX-DGC, 2006 U.S. Dist. LEXIS 77942, *15-16 (D. Ariz. October 24, 2006) (Best Western II).

C. Conclusion: John Doe Email Is Focus in Determining Standard

Here, again, the John Doe Email and the identity of the individual who sent it give rise to this action in Arizona. Thus, the nature and contents of the John Doe Email and related factors form the basis for determining what standard the Court should employ in determining whether to compel TSB to disclose the identity of the individual who sent the John Doe Email. These factors include the pure expression contained within the John Doe Email, the anonymous nature of the John Doe Email and its author, the sole involvement of TSB in providing anonymous email services through which the John Doe Email was sent, the First Amendment concerns related thereto, and the applicable privacy concerns arising from the Arizona Constitution. Given these factors, the trial court properly adopted the *Cahill* Standard.

II. THE TRIAL COURT PROPERLY ADOPTED THE *CAHILL* STANDARD

Given that Mobilisa seeks the identity of John Doe for purposes of identifying the individual who sent the John Doe Email anonymously through TSB's service, the trial court properly adopted the *Cahill* Standard.

A. Mobilisa Has Waived Cross-Issues Attacking Adoption of *Cahill*

Despite failing to file a cross-appeal, Mobilisa contends that it has not waived its ability to attack the judgment of the trial court adopting the *Cahill* Standard. Answering Br. at p. 15. In *Larkin v. State ex rel Rottas*, this Court made clear the distinction between arguing in support of a judgment and arguing in support of "the ultimate disposition on grounds that would attack the judgment." *Larkin v. State ex rel. Rottas*, 175 Ariz. 417, 424-425, 857 P.2d 1271, 1278-1279 (Ct. App. Ariz. 1992)) (emphasis added). While the former is permitted, the latter is not. *Id.*

Here, by seeking to attack and reverse the trial court's adoption of *Cahill*, Mobilisa seeks to support the ultimate disposition (providing for disclosure of John Doe's identity) rather than supporting the judgment (that Mobilisa would survive summary judgment). As such, Mobilisa has waived the cross-issues argued in its Answering Brief attacking the trial court's adoption of *Cahill*, the urging of any alternative standard, and whether it could satisfy any such alternative standard. *Id.* Despite Mobilisa's waiver, Defendants-Appellants respond to the cross-issues

solely to preserve their arguments should the Court be inclined to consider Mobilisa's cross-issues.[5]

B. *Cahill* Not Limited to Defamation or Public Officials

In its Answering Brief, Mobilisa erroneously contends that the application of the *Cahill* Standard should be limited to actions involving public officials and defamation. *Cahill* may have involved public officials, but nowhere does the *Cahill* Court limit its application to cases involving public officials. See generally *Cahill*, 884 A.2d 451. In fact, the language of *Cahill* expressly defies such a characterization. *Id.* at 465. Moreover, it has not been so limited in its application by other courts. *Best Western Int'l*, 2006 U.S. Dist. LEXIS 56014; *Best Western Int'l, Inc.*, 2006 U.S. Dist. LEXIS 77942, *15-16.

Although *Cahill* involved claims of defamation, *Cahill*'s application (or that of the *Dendrite* Standard) is not so limited. Rather, *Cahill* should be applied to any case where a party seeks the identification of an individual who made anonymous communications. Arizona's own federal district court recognized this when it adopted the *Cahill* standard for determining whether a plaintiff may obtain the identity of a defendant engaged in anonymous speech, *Best Western Int'l*, 2006 U.S. Dist. LEXIS 56014 at *6-15, and later applied the *Cahill* summary judgment

[5] However, Defendants-Appellants do not intend to waive their argument that this Court should decline consideration of Mobilisa's cross-issues.

standard to claims of breach of contract and covenant of good faith and fair dealing – not defamation. *Best Western Int'l, Inc.*, 2006 U.S. Dist. LEXIS 77942 at *15-18.

As discussed above, the determination of which standard should apply must not be focused on the claims that may arise from or out of the anonymous communications. For, depending on the creativity of one's counsel, any number of claims may arise from the electronic communications for whom identity of the author is sought. See Vincent, Charles, Cybersmear II: Blogging and the Corporate Rematch Against John Doe Version 2.006, 31 DEL. J. CORP. L. 987, 1006-1007 (2006) (discussing possible "breach of contract or confidentiality agreements, trademark or trade secret violations, ..."); *Best Western Int'l*, 2006 U.S. Dist. LEXIS 56014 at *1; *Best Western Int'l*, 2006 U.S. Dist. LEXIS 77942 at *15-18. Rather, the focus in cases applying *Cahill* has been on anonymous communications involving pure expression and the First Amendment issues arising therefrom. In this case, the trial court also specifically identified the privacy interests at issue under the Arizona Constitution. R. 15, Under Advisement Ruling, p. 2. Mobilisa cannot work its way around the applicability of the *Cahill* Standard in this instance by pursuing claims that do not involve speech components.[6]

[6] While it's comforting to note that Mobilisa has indicated that a claim for defamation would not be viable because the contents of the John Doe Email are true and that a claim for public disclosure of private facts would not be viable

C. Cases Declining Adoption of *Cahill* Distinguishable

The recent cases that Mobilisa contends have declined adoption of *Cahill* can be distinguished. In *Lassa v. Rongstad*, the Court shared the concerns raised by *Cahill* and believed them to be "fully applicable to the case at bar." *Lassa v. Rongstad*, 718 N.W.2d 673, 687 (Wis. 2006). However, the *Lassa* Court rejected a summary judgment standard and adopted a motion to dismiss standard. *Id.* Mobilisa brings this to the Court's attention (as did Defendants-Appellants in their Opening Brief). Answering Br. at p. 18. However, Mobilisa fails to further convey to the Court the explicit context and basis upon which the *Lassa* Court reached this conclusion. Id. Specifically, the *Lassa* Court concluded that Wisconsin's motion to dismiss standard would be sufficient because Wisconsin's fact-pleading system provided sufficient protection akin to the protection imposed by the *Cahill* Court. *Lassa*, 718 N.W.2d at 678. The Court specifically stated:

> the [*Cahill*] court emphasized that one of the most important aspects of testing a defamation claim by summary judgment is that the claim must be "capable of a defamatory meaning" in order to survive summary judgment. This, of course, is the same inquiry that is the focus of a motion to dismiss a claim for defamation in Wisconsin.
>
> Accordingly, we determine that under Wisconsin law, requiring the circuit court to decide a motion to dismiss before compelling disclosure and imposing sanctions best addresses the concerns expressed in *Cahill*.

---

because the parties who received the contents of the John Doe Email knew the facts stated therein, this does not vitiate the applicability of the *Cahill* Standard to the instant facts. See Answering Br., pp. 26, n.10.

Id. at 678 (emphasis added).

In contrast to *Lassa*, a motion to dismiss standard would be insufficient under Arizona's notice-pleading system. *Anserv Ins. Servs., Inc. v. Albrecht*, 192 Ariz. 48, 960 P.2d 1159, 1160 (Ariz. 1998) (a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief" and adopting the federal interpretation of "short and plain statement" under Fed. R. Civ. P. 8(a)(2)); *Builders Fin. Co. v. Holmes*, 89 Ariz. 157, 158-9, 359 P.2d 751, 752 (Ariz. 1961) (holding that a "short and plain statement of the claim [showing] that the pleader is entitled to relief" is sufficient to survive a motion to dismiss). Thus, *Lassa* is clearly distinguishable. *Id.*; *Lassa*, 718 N.W.2d at 687.

As to *McMann v. Doe*, Mobilisa correctly states that the Massachusetts federal district court identified concerns it had with the summary judgment standard espoused in *Cahill* and *Best Western*. *McMann v. Doe*, No. 06-11825-JLT, 2006 U.S. Dist. LEXIS 80112, *16-20 (D. Mass. October 31, 2006). However, the *McMann* Court did not reject the standard as Mobilisa so hastily suggests. Rather, the Court stated:

> While there may therefore be problems with the mechanics of a summary judgment test, it is reasonable to apply some sort of a screen to the plaintiff's claim before authorizing the subpoena. In this case, a preliminary screening of Plaintiff's assertions show that not only could they not pass summary judgment, but that they fail to state a claim.

Id. at *20 (emphasis added). Mobilisa noticeably omits the final sentence quoted above. In essence, the *McMann* Court highlighted concerns it had with the summary judgment standard but ultimately did not adopt one standard over the other. *Id.* Indeed, the *McMann* Court found that plaintiff's privacy (under Massachusetts and common law) and defamation claims could not meet either standard after applying a heightened analysis comparable to that employed in *Lassa.* Id. at *20, 24-27. Consequently, Mobilisa's characterizations of the *McMann* ruling go too far.

As to *Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., Inc.*, the court disavowed adoption of any new standards in determining whether to disclose the identity of anonymous defendants. *Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., Inc.*, 2006 Phila. Ct. Com. Pl. LEXIS 1, *25-26 (Phila. Com. P. LEXIS 2006) (citing Vogel, Michael S., Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing over Legal Standards, 83 OREGON L. REV. 795, 801 (2004)). Rather, the *Klehr*-Vogel approach would have an anonymous defendant first argue the complaint should be dismissed (which would obviously involve briefing akin to a motion to dismiss) and then, if unsuccessful, argue – still anonymously - that the claims cannot withstand a motion for summary judgment (which would obviously involve briefing akin to a

motion for summary judgment). *Id.* Indeed, this "defensive" summary judgment standard:

> would permit discovery of a defendant's identity when the plaintiff had evidence supporting all elements of its claim, or at least all elements which should be in the plaintiff's, rather than the defendant's possession. This standard would, therefore, provide an effective check that would tend to limit discovery to those cases where the plaintiff had a bona fide claim.

Id. Finally, an anonymous defendant could also seek to limit discovery on protective order grounds. *Id.* While the *Klehr*-Vogel approach may not advocate all three efforts, it clearly infers this possibility. *Id.* It seems a great waste of resources to require the parties to brief, argue, and await ruling on three separate motions to obtain a decision that could be more expeditiously and efficiently resolved under one standard. In any case, the *Klehr* decision to which Mobilisa refers has been reversed. *Klehr v. JPA Dev.*, 898 A.2d 1141 (Pa. Super. Ct. 2006).

For the foregoing reasons, Mobilisa cites no case that has overtly rejected the *Cahill* Standard.[7]

D. *Sony* and *Seescandy* Distinguishable and Inapplicable

Given this perspective, the cases and standards urged on this Court by Mobilisa have no relevance to the instant facts. *Sony Music Ent't v. Does 1-40* is

---

[7] For these reasons and the fact that *Cahill* was decided in 2005, as opposed to 1999 for *Seescandy* and 2004 for *Sony*, Mobilisa's argument that *Cahill* represents a minority position should not be given any weight. Moreover, unlike *Seescandy* or *Sony*, the principles and standards in *Cahill* have not been outright rejected by any opinion that has not been reversed.

not applicable because the underlying conduct giving rise to the claims for copyright infringement involved the sharing of electronic files (e.g. uploading and downloading).[8] See generally *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004). As such, *Sony* did not involve issues of pure expression or speech in which one expressly conveys opinions and thoughts. *Id.* Indeed, the *Sony* court held:

> In contrast to many cases involving First Amendment rights on the Internet, a person who engages in P2P file sharing is not engaging in true expression. Such an individual is not seeking to communicate a thought or convey an idea. Instead, the individual's real purpose is to obtain music for free.
>
> Arguably, however, a file sharer is making a statement by downloading and making available to others copyrighted music without charge and without license to do so. Alternatively, the file sharer may be expressing himself or herself through the music selected and made available to others. Although this is not "political expression" entitled to the "broadest protection" of the First Amendment, the file sharer's speech is still entitled to "some level of First Amendment protection."
>
> I conclude, accordingly, that the use of P2P file copying networks to download, distribute, or make sound recordings available qualifies as

---

[8] That being said, an argument exists that *Sony* is not as incompatible with *Cahill* as Mobilisa suggests. Sony required "a concrete showing of a prima facie claim of actionable harm . . . ," among other elements. *Sony Music Ent't v. Does 1-40*, 326 F. Supp. 2d 556, 564-565 (S.D.N.Y. 2004). Some courts have construed this demonstration of a *prima facie* claim to require demonstration that claims would survive summary judgment. See *Cahill*, 884 A.2d 451, 459-60; *Best Western Int'l*, 2006 U.S. Dist. LEXIS 56014 at *14. To the extent *Sony*'s requirement is so interpreted, it comports with *Cahill*. And, consequently, Mobilisa could not survive application of the *Sony* standard.

> speech entitled to First Amendment protection. That protection, however, is limited, and is subject to other considerations.

Sony Music Entm't Inc., 326 F. Supp. 2d at 564 (citations omitted).[9]

Similarly, *Columbia Insurance Co. v. Seescandy.com* did not involve pure expression and can be distinguished from the case at bar because the underlying conduct involved the registration of Internet domain names that used the plaintiff's trademark.[10] See generally *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D.

---

[9] Of the 13 cases that cite *Sony* as of January 6, 2007, six (6) cite it in brief passing without commenting on the issue at hand; one (1) adopts it in the context of P2P file-sharing cases (*Elektra Entm't Group, Inc. v. Does 1-9,* 2004 U.S. Dist. LEXIS 23560 (S.D.N.Y. Sept. 7, 2004)); one (1) cites *Sony* as requiring a "real evidentiary basis" and holds a motion to dismiss standard to be generally insufficient in this context (*Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005)); three (3) adopt a motion for summary judgment standard (*Cahill, Best Western I* and *Best Western II* (concluding a prima facie case means a motion for summary judgment standard)). Of the remaining two cases, one applies *Sony* in the context of identifying the individual who used a particular IP address tied to intrusions into the petitioner's computer system (as opposed to one who sent an email) (*General Bd. of Global Ministries of the United Methodist Church v. Cablevision Lightpath, Inc.*, CV 06-3669, 2006 U.S. Dist. LEXIS 86826 (E.D.N.Y. Nov. 30. 2006)). The final case citing *Sony* applies New York law in a pure expression context to determine the statements are reasonably capable of defamatory meaning and thereafter concludes the *Sony* factors have been met (*Public Relations Socy. of Am., Inc. v. Road Runner High Speed Online*, 2005 NY Slip Op 25227 (N.Y. Misc. 2005) (engaging in the heightened analysis akin to Lassa).

[10] Of the 24 cases that cite *Seescandy* as of January 6, 2007, eleven (11) cite it in brief passing without commenting on the issue at hand; five (5) disagree with *Seescandy* or hold a motion to dismiss standard to be generally insufficient in this context (*Cahill, Dendrite, Highfields* (2), and *In re Baxter*, 2001 U.S. Dist LEXIS 26001 (W.D. La. December 19, 2001)); one (1) holds that a higher standard than *Seescandy* is required when seeking information about non-party witnesses (*Doe v. 2theMart.com, Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001)); one (1) cited

573 (1999). This conduct, the registration of domain names, has limited protection under the First Amendment. See, e.g. *Sony Music Entm't Inc.*, 326 F. Supp. 2d at 562 ("Parties may not use the First Amendment to encroach upon the intellectual property rights of others.") (citing *In re Capital Cities/ABC, Inc.*, 918 F.2d 140, 143 (11th Cir. 1990)). Additionally, since *Seescandy*, the Northern District of California has held that a 12(b)(6) motion to dismiss standard was not sufficient and engaged in an evidentiary analysis of the claims at issue. See *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969, 974-977 (N.D. Cal. 2004).

Unlike the circumstances in *Sony* and *Seescandy*, this case involves pure expression of an idea(s) and pure speech. Thus, it can be distinguished. See

---

Seescandy in the context of *Dendrite* but disagreed with "new" standards altogether (*Klehr Harrison,* 2006 Phila. Ct. Com. Pl. LEXIS 1); three (3), in the context of conduct involving either copyright or trademark infringement, cite *Seescandy* for the requirement of showing a prima facie case; (*Sony* and *Elektra Entm't Group, Inc., Alvis Coatings, Inc. v. John Does 1-10*, 2004 U.S. Dist. LEXIS 30099 (W.D.N.C. 2004)); one (1) concluded in a single sentence reference that the plaintiff had failed to meet the three "limiting standards" of *Seescandy* in the context of a summary judgment motion (*Watson v. Standpoint Police Dep't*, No. CV05-218-N-EJL, 2006 U.S. Dist. LEXIS 65653 (D. Idaho September 13, 2006). The remaining two cases cite *Seescandy* approvingly in cases of pure expression. However, the first was decided in 1999 prior to *Dendrite* or *Cahill*. *Stewart v. FBI*, No. CV-97-1595-ST, 1999 U.S. Dist. LEXIS 18784 (D. Oregon October 13, 1999). The second actually applied a factual analysis to the claims of defamation to determine whether the alleged statements were defamatory. *Rocker Mgmt. LLC v. John Does 1 Through 20*, 2003 U.S. Dist. LEXIS 16277, 2 (N.D. Cal. 2003). Moreover, as indicated above, the Northern District of California has since held that a 12(b)(6) standard is insufficient. *Highfields Capital*, 385 F. Supp.2d at 974-977. Thus, arguably, only one court has adopted the *Seescandy* analysis in a pure expression case in a ruling issued prior to *Dendrite* or *Cahill*. Therefore, *Seescandy* cannot be said to be the standard bearer.

generally *Best Western Int'l*, 2006 U.S. Dist. LEXIS 56014. Here, John Doe sent an electronic communication through the Internet to employees of Mobilisa implicitly asking them whether they want to work for a company in which the CEO engaged in extra-marital relations. The subject of the John Doe Email contained the query "Is this a company you want to work for?" and the body of the John Doe Email contained the contents of the Sensitive Email. Therefore, *Sony* and *Seescandy* are distinguishable and inapplicable to the case at bar.

E. Conclusion: Trial Court Properly Adopted the *Cahill* Standard

As this case clearly involves pure expression contained in the subject line and body of the John Doe Email, and clearly invokes the First Amendment concerns in *Cahill*, the *Cahill* Standard clearly applies. Consequently, this Court should affirm the trial court's adoption of the *Cahill* Standard.

III. JUDGE DAVIS ABUSED HIS DISCRETION BY FAILING TO REQUIRE MOBILISA TO PRESENT SOME EVIDENCE ON THE ESSENTIAL ELEMENT OF UNAUTHORIZED ACCESS TO MOBILISA'S COMPUTERS

Despite Mobilisa's pervasive misstatements of the law and overt blindness to the weightlessness of its own evidence, the record clearly demonstrates that Mobilisa did not and cannot satisfy the *Cahill* Standard in this case. Thus, the trial court erred as a matter of law in its application of the *Cahill* Standard to the claims in Mobilisa's Complaint. Specifically, the trial court failed to recognize that unauthorized access to Mobilisa's computers represented an essential element to each of Mobilisa's claims and, consequently, failed to require Mobilisa to present some evidence demonstrating that unauthorized access to its computers occurred. In its efforts to disguise these failures, Mobilisa confuses the Parties' burdens, ignores the absence of evidence with respect to unauthorized access to its computers.

A. Petitioners Do Not Have Burden to Negate Element But Mobilisa Does Have Burden to Present Supportive Evidence of the Claims in the Complaint

Despite Mobilisa's argument to the contrary, neither TSB nor John Doe has the burden to introduce evidence demonstrating how John Doe *actually* obtained the Sensitive Email.[11] As the Arizona Supreme Court has made clear, a "party

[11] Mobilisa makes much of the claimed inadmissibility of the Affidavit and Declaration of Charles Lee Mudd Jr. as being fatal to Defendants-Appellants' arguments. Defendants-Appellants have argued elsewhere why, under the