

6th Civ. No. H028699

**In the Court of Appeal
of the State of California
Sixth Appellate District**

Barbary Coast Capital Management and Stephen N. Worthington,
Defendants and Appellants,

vs.

Matrixx Initiatives, Inc.,
Plaintiff and Respondent.

Santa Clara County Superior Court Case No. CV813627
Honorable James Kleinberg

**Matrixx Initiatives, Inc.'s Response to
Appellants' Supplemental Reply Brief**

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Per this court's order dated October 19, 2005, respondent Matrixx Initiatives, Inc. submits this supplemental reply brief limited to discussing the Delaware Supreme Court's decision in *Doe v. Cahill* (Del. 2005) ___ A.2d ___, 2005 WL 2455266.

Cahill provides no basis to reverse the trial court's order either factually or legally.

First, the setting in which *Cahill* arose is factually distinguishable. The *Cahill* court emphasized that the case involved "political criticism of a public figure"—an elected city councilman—and that it "involve[d] a *public figure* and *political speech*." 2005 WL at 2455266 at *4, *8 (emphasis in original). Political speech, of course, implicates core First Amendment concerns. In such a situation, the court said, "A defamation plaintiff, particularly a public figure, obtains a very important form of relief by unmasking the identity of his anonymous critics." *Id.* at *3. As the court went on, exposing an anonymous speaker in such a situation may subject the poster to "ostracism for expressing unpopular ideas, invite retaliation from those who oppose her ideas or from those whom she criticizes or simply give unwanted exposure to her mental processes." *Id.* (quoting L. Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 Duke L.J. 855, 890 (2000)). Indeed, unmasking the critic is often the only relief the plaintiff in political speech cases genuinely cares about because in such cases, the plaintiff may "engage in extra-judicial self-help remedies." 2005 WL 2455266 at *3.

This case does not involve political speech of any kind where these considerations would play a role. Instead, an anonymous poster seeks to cause financial harm to a corporation and its officers and directors and concomitant financial gain for himself or herself. Unlike political speech,

nothing about these postings involves “popularity” or “unpopularity”—only truth or falsity—which is precisely what Matrixx’s lawsuit is designed to illuminate. Here, unlike the case where there is a plaintiff-politician, Matrixx has no extra-judicial remedies. A suit for damages is its only remedy. Outside the area of core political speech, the “good faith” standard provides sufficient protection to the anonymous poster.

Moreover, *Cahill* did not involve any interjurisdictional concerns. The lawsuit and the motion to compel the identity of the anonymous poster were pending in the same jurisdiction. The *Cahill* court did not consider the burden on a discovery court where the ultimate validity of the underlying cause of action is based on an action pending in another state and subject to that state’s law. In those situations—which is the case here—applying a good faith standard will ease the burden on discovery courts, while still providing appropriate protection to the anonymous poster.

Second, even if this court were to adopt *Cahill*’s “summary judgment” standard, Matrixx has cleared that hurdle here. In *Cahill*, the Delaware Supreme Court ultimately denied relief because it concluded that the statements about the plaintiff-city councilman were not defamatory as a matter of law. The court looked at the postings and concluded that “no reasonable person could have interpreted these statements as being anything other than opinion.” *Id.* at *13. As such, the plaintiff had not “plead[ed] an essential element of his claim [and therefore] he *ipso facto* cannot produce *prima facie* proof of that first element of a libel claim, and thus, cannot satisfy the summary judgment standard” *Id.* A California trial court cannot eviscerate an Arizona action in this same way.

Part II.B. of Matrixx’s respondent’s brief shows that it has alleged defamation against both gunnallenlies and veritasconari and that the

postings are defamatory per se, not nonactionable statements of opinion as was the case in *Cahill*. [See RB at 13-25.] While *Cahill* pointed to the “cacophony of an internet chat-room” to support its conclusion that the postings there were opinion (*Id.* at *11), simply because a posting is in a chat room does not immunize it. And, as Matrixx pointed out in its respondent’s brief, the poster here specifically claimed investigatory knowledge of a factual basis for his or her statements. [RB at 24 (citing AA 96, 102).] Thus, even under the *Cahill* summary judgment standard, the trial court’s order should be affirmed.

Finally, *Cahill* was limited to identifying potential *defendants*. Its test does not speak to the situation—nor could it—where a plaintiff is attempting to identify an anonymous poster who may not be a defendant, but who is a link in the chain to identifying the defendant. Thus, even if this court were to adopt the *Cahill* test, it must be careful to leave open a method for a plaintiff to identify witnesses, not just defendants.

In short, in *Cahill*, plaintiff had no case whatsoever against the anonymous poster because the postings were core political speech, were not defamatory because they were opinion, and were not otherwise actionable. It is not surprising the *Cahill* court reached the conclusion it did. *Cahill* provides no justification to vacate the trial court’s order here.

Dated: October 24, 2005

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Proof Of Service

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, California 92626-7689.

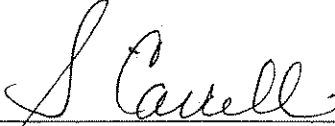
On October 24, 2005, I served, in the manner indicated below, the foregoing document described as **Matrixx Initiatives, Inc.'s Response to Appellants' Supplemental Reply Brief** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

Please see attached Service List

- BY REGULAR MAIL: I caused such envelopes to be deposited in the United States mail at Costa Mesa, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested to (C.C.P. § 1013(a)).
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 24, 2005, at Costa Mesa, California.



Sandy Cairelli

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The Honorable James P. Kleinberg

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