**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**
**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**
**CIVIL TRIAL DIVISION**

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|---|---|
| KLEHR HARRISON HARVEY BRANZBURG & ELLERS, LLP | : MARCH TERM, 2004 |
| Plaintiff, | : No. 0425 |
| v. | : (Commerce Program) |
| JPA DEVELOPMENT, INCORPORATED, BDGP, INCORPORATED a/k/a CLAYBAR DEVELOPMENT LP, JERRY PANTELIDIS a/k/a GERASIMOS O. PANTELIDIS, INSTANT WEBSPAWNER, LTD., and APOLLO HOSTING, INC. | : |
| Defendants. | : Superior Court Docket No. 2836 EDA 2005 |

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**O P I N I O N**

**Albert W. Sheppard, Jr., J. …… January 4, 2006**

This Opinion is submitted relative to the appeal of JPA Development, Inc. ("JPA") and Jerry Pantelidis a/k/a Gerasimos O. Pantelidis ("Pantelidis") (collectively "defendants") of this court's Order of September 22, 2005. That Order denied defendants' Motion for a Protective Order with respect to discovery requests propounded on behalf of Klehr Harrison Harvey Branzburg & Ellers, LLP ("plaintiff") upon JPA seeking the disclosure of the identities of anonymous posters to the Internet.[1]

For the reasons discussed, this court respectfully submits that its Order should be affirmed.

[1] This court submits that based on the circumstances and timing surrounding the contents of the Website postings, a reasonable inference can be drawn that Pantelidis either was the author of the posts and/or directed that the entries be posted to the Website. However, since this fact has not been proven, this court will refer to "posters" rather than "poster".

## BACKGROUND

This Complaint asserts a Defamation claim against all defendants (Count I), a Civil Conspiracy claim against JPA, Claybar and Pantelidis (Count II), and seeks a Preliminary and Permanent Injunction against all defendants (Count III).[2] Second Amended Complaint, ¶¶ 35-70. The lawsuit involves two websites which this court has found, and the Superior Court agrees, contain material that is defamatory *per se*.[3]

JPA owned and/or controlled the content of the two websites which contained the defamatory posts. N. T. July 15, 2005 at 16, 20, 27, 32-33, 39.[4] The homepage of one of the websites included the following two captions:

> Klehr Harrison Attorneys Theft and Fraud to Help Michael Karp Steal the Barclay
>
> . . . .
>
> Klehr Barclay Fraud Docket

The first of these captions was linked to a webpage containing a copy of Claybar's First Amended Complaint in the Claybar/Klehr Suit.[5] Pantelidis admitted that he wrote the descriptions of the pleadings and the two Claybar cases. *Id*. at 32. He also testified that Jim Watson, his employee, placed those descriptions on the website. *Id*.

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[2] The Superior Court reversed this court's Order of August 27, 2004 granting plaintiff's special injunction petition. *Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Development, Inc.*, Superior Court Docket No. 2095 EDA 2004 (December 21, 2005).

[3] *Id*. at p. 6.

[4] The addresses of the websites were www. michaelkarpbytes.com and www.webspawner.com/users/jpantel.

[5] In 1999 Claybar Development, L.P. ("Claybar") and JPA Development, Inc. filed suit against Independent Mortgage Company ("IMC") and Michael Karp. Pantelidis is the sole shareholder of JPA and sole owner of Claybar. N.T. July 15, 2004 at 7. Klehr Harrison represents IMC and Michael Karp. This litigation is currently ongoing before the Honorable Darnell C. Jones, II.

Claybar also filed suit against Klehr Harrison. This matter has been placed in deferred status pending the outcome *JPA Development, Inc. v. IMC.*

Furthermore, Pantelidis admitted that Calvin Ross, another employee, scanned the pleadings into the website. *Id*.

One of the websites included a link to a "Guest Book". *Id*. at 39. Pantelidis testified that he was the administrator of the Guest Book site. *Id*. at 40. As administrator, Pantelidis controlled the content of the Guest Book. *Id*. at 39-40. The following are examples of Guest Book entries:

> Rona Rosen is too smart to not know what went on. For a long time she certainly has had information to clearly see the Karp fraud as well as Forman's, Tiberian's [sic] and Harvey's roles in support of that fraud. Rosen is now aiding and abetting the continuation of that fraud, and is grossly negligent to her responsibilities to the Court by knowingly lying to the Judge regarding facts known to her directly and personally.[6]
>
> These cases should be consolidated – the law firm is obviously an instrumentality of the fraud. Their culpability may be even greater than Karp's given they are the drafting lawyers and ignored the explicit language of their own contract. Did Karp rely on their advise [sic] to interpret the documents: or did he suck them in?
>
> Klehr Harrison and Michael Karp. Wow! A match made in their respective heavens: Money hungry, without ethics, f**k everybody, eat my partner, backstabbing . . . Wow! A perfect match.
>
> . . . it sure sounds like he suckered the all-too-willing lawyers at Klehr Harrison on this one . . . and it cost them plenty. Is there a pool as to which one is going to be disbarred first? Sign me up for Forman.
>
> Klehr Harrison attorneys are THE lowest of the low among attorneys, and could not be held in lower regard among their peers when it comes to their complete disregard for ethical practices, AND their abuse of judicial proceedings.
>
> Karp knows [sic] how to screw his lawyers. Bob Fiebach is going to fry the thieves at Klehr Harrison.
>
> Fiebach is in for Klehr, not Karp. The Klehr Harrison boys stopped working the phones for Karp a while ago and are busy covering their own butts for Forman's and Tiberian's [sic] screw ups. Give a monkey enough rope to climb on and you'll soon be looking at its glorious red rash butt.

[6] Rosen, Forman, Tiberian and Harvey are attorneys at the plaintiff's law firm.

> Shehan [sic] Tiberian [sic], a Klehr Harrison partner, has been attempting to defraud the Philadelphia Board of Revision of Taxes on behalf of Michael Karp for the past several months. Tiberian's [sic] partners know of this ongoing attempt at fraud and are doing nothing to stop it.
>
> Shehan [sic] Tiberian [sic] is a sleazebag who lies (including to the Court in hearings/pleadings) on regular [sic] basis. His mentor at Klehr was the lawyer who killed himself by jumping out the 10th floor window of Klehr's offices under suspicious circumstances. He's only a soldier, but well trained in deceit, especially w/that ridiculous fake English accent (he went to St. Joe's, but wants you to think Oxford) His nickname is Kakahan, or Kaka for short, likely for his lingering BO . . . probably due to his frequent descents into the sewer.
>
> Shehan [sic] Tiberian is the protégé of Michael Forman, the Klehr Harrison partner who stole the money. It sounds like Teberian is helping his mentor in fraud, Forman, in trying to cover up the criminal conduct. They should both be in jail, along with whichever other Klehr partners knew, should have known (Bill Harvey) or turned a blind eye to the theft and fraud (Rona Rosen).
>
> Shehan [sic] Tiberian is the protégé of Michale [sic] Forman, the Klehr Harrison partner who stole the money. Shehan [sic] Teberian has been covering up this criminal conduct for Michael Forman, his mentor in fraud. They should both be in jail. As should all Klehr partners who knew or should have known of Michael Forman's theft and fraud (such as Bill Harvey) and those Klehr Harrison Partners who learned about it but failed to properly report it to ethics and law enforcement) such as Rona Rosen, Randy Rubin, and/or other Klehr Harrison Partners and associates who, apparently, for a long time have been aware of the fraud, or should have been aware of the fraud by Michael Forman and Shehan [sic] to take remedial action pertaining to the Klehr Harrison theft and fraud would be similarly situated. This much is clear. This website is a useful forum for opinion, protected free speech as well as service to the public.

Defendants, JPA and Pantelidis submitted a Motion for Protective Order with respect to discovery requests propounded on behalf of the plaintiff upon all defendants. Defendants seek to preclude the production of information and documentation related to all areas of inquiry regarding the identities of those persons who posted anonymous messages on the websites. Defendants argue that the identities of the anonymous posters

would infringe upon their First Amendment and Pennsylvania Constitutional right to anonymous free speech.[7]

## DISCUSSION

### I. Introduction.

Some eight years ago the United States Supreme Court in *Reno v. American Civil Liberties Union* described the origin and growth of the Internet:

> The Internet is an international network of interconnected computers. It is the outgrowth of what began in 1969 as a military program called "ARPANET", which was designed to enable computers operated by the military, defense contractors, and universities conducting defense-related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war. While the ARPANET no longer exists, it provided an example for the development of a number of civilian networks that, eventually linking with each other, now enable tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is "a unique and wholly new medium of world wide human communication."
>
> The Internet has experienced "extraordinary growth." The number of "host" computers -- those that store information and relay communications -- increased from about 300 in 1981 to approximately 9,400,000 by the time of the trial in 1996. Roughly 60% of these hosts are located in the United States. About 40 million people used the Internet at the time of trial, a number that is expected to mushroom to 200 million by 1999.

521 U.S. 844, 849-850, 138 L. Ed. 2d 874, 117 S.Ct. 2329, 2334 (1997).

Certainly, the Internet constitutes one of the biggest and most exciting technological breakthroughs in recent memory and has revolutionized the manner in which we conduct our daily lives. "The main attraction of this medium has been the ease

[7] Klehr not only served discovery requests upon JPA and Pantelidis seeking the identity of the anonymous posters, Klehr also served discovery requests seeking the same information, upon the other parties to this action, Instant Webspawner, Ltd. ("Webspawner") and Apollo Hosting, Inc. ("Apollo"). Webspawner and Apollo provided hosting and other services to defendants with respect to the websites. Webspawner produced documents related to their website. However, these documents are in the possession of defendants and have not been turned over to Klehr. Plaintiff's Response and Memorandum of Law in Opposition to the Motion for Protective Order of Defendants JPA Development, Inc. and Jerry Pantelidis, p. 8.

with which online users can communicate with each other and view information." David L. Sobel, *The Process that "John Doe" Is Due: Addressing the Legal Challenge to Internet Anonymity*, 5 Va. J.L. & Tech. 3, para. 1 (2000), at http://www.vjolt.net/vol5/symposium/v5ila3-Sobel.html.

In fact, the Delaware Supreme Court lauded the democratizing power of the Internet:

> The internet is a unique democratizing medium unlike anything that has come before. The advent of the internet dramatically changed the nature of public discourse by allowing more and diverse people to engage in public debate. Unlike thirty years ago, when "many citizens [were] barred from meaningful participation in public discourse by financial or status inequalities and a relatively small number of powerful speakers [could] dominate the marketplace of ideas" the internet now allows anyone with a phone line to "become a town crier with a voice that resonates farther than it could from any soapbox." Through the internet, speakers can bypass mainstream media to speak directly to 'an audience larger and more diverse than any the Framers could have imaged."

*Doe v. Cahill*, 2005 Del. LEXIS 381, * 7, *citing Reno*, 521 U.S. at 896-897, *also citing* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855, 895, n.7 (2000)

However, the immense power and utility of the internet comes at a price. Consider:

> If John Doe is unscrupulous or merely reckless . . . he can use the power the internet gives him to inflict serious harm on the corporation. He can pollute the information stream with defamatory falsehoods . . . Moreover, once the defamatory information enters the information stream, it may have a greater impact than if it had appeared in print. Because the defamatory statements can be copied and posted in other Internet discussion fora, both the potential audience and the subsequent potential for harm are magnified. And, as the persistent of Internet hoaxes demonstrates, once a rumor takes hold in cyberspace, it may be almost impossible to root out.

Lidsky, *supra* at 884-885.

Information often is disseminated over the Internet "without any editorial filter." Jennifer O'Brien, Note, *Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 Fordham L. Rev. 2745, 2765 (2002). Furthermore, because posters to internet fora typically post anonymously, the internet provides "not just the ability to put on a mask; it also [provides] the ability to hide absolutely who one is." *Id*. at 2758.

Faced with the problems and benefits of Internet, courts have arrived at differing standards for determining whether to allow disclosure of an anonymous internet user's identity when the user is sued for making defamatory statements over the Internet.

## II. The Dendrite Standard (New Jersey).

In *Dendrite*, a public corporation brought a defamation action against numerous John Doe defendants for messages posted on an Internet bulletin board. *Dendrite International v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (2001). The posted statements accused Dendrite and its president of altering accounting methods to overstate revenue and secretly shopping the company for sale because it was no longer competitive. *Id*. at 760-761, 763. Dendrite sought an order to show cause why it should not be granted leave to conduct limited discovery for the purposes of ascertaining all of the John Does' identities.

The New Jersey Superior Court denied the discovery request, using a standard first articulated in *Seescandy.com*.[8] This standard requires a defamation plaintiff seeking the identities of anonymous internet subscribers to: (1) demonstrate that they have undertaken efforts to notify the anonymous posters that they are the subject of an

[8] *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999).

application for an order of disclosure, (2) identify to the court statements made by the posters, and (3) establish a prima facie cause of action for defamation against the posters by producing evidence sufficient to support each element of the claim. *Dendrite*, 342 N.J. Super. at 141. Finally, if the court concludes that the plaintiff has presented a prima facie cause of action, "the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to proceed." *Id*. at 142.

In adopting this standard, the *Dendrite* court accepted the core challenge raised by John Doe to the discovery of his or her identity - - what the court described as the "well-established First Amendment right to speak anonymously." *Id*. at 141.

## III. The *Doe v. Cahill* Standard (Delaware).

In a decision authored by the first State Supreme Court to address this issue, the Delaware Supreme Court held that a summary judgment motion standard should be applied to cases in which plaintiff seeks to discover the identity of anonymous posters to the Internet.

Patrick Cahill, a City Councilman, and Julia Cahill filed suit against four John Doe defendants asserting defamation and invasion of privacy claims. *Doe v. Cahill*, 2005 Del. LEXIS 381 (Del. 2005). Calling himself "Proud Citizen", one of the John Doe defendants posted statements on a blog[9], an internet weblog, impugning the Councilman's leadership abilities and his "obvious mental deterioration". *Id*. at *2-3.

[9] A blog is an internet website where users interested in a particular topic can post messages for other users interested in the same topic to read and respond if they wish.

After the Cahills' obtained Doe's IP address through pre-service discovery [10], the court ordered Comcast, the owner of Doe's IP address, to disclose Doe's identity.

As required by 47 U.S.C. 551(c) (2), when Comcast received the discovery request, it notified Doe.[11] Doe filed an "Emergency Motion for a Protective Order" seeking to prevent the Cahills from obtaining his identity from Comcast. *Id*. at *4-5. The trial court issued a memorandum opinion denying Doe's Motion for a Protective Order.

The Superior Court adopted a "good faith" standard for determining when a defamation plaintiff can compel the disclosure of the identity of an anonymous poster. This good faith standard required the Cahills to establish:

> (1) that they had a legitimate, good faith basis upon which to bring the underlying claim, (2) that the identifying information sought was directly and materially related to their claim; and (3) that the information could not be obtained from any other source.

*Id*. at *5.

Applying this standard, the Delaware Superior Court held that the Cahills could discover Doe's identity. Doe appealed this decision to the Supreme Court of Delaware asserting that the good faith standard was not adequate to protect his First Amendment rights.

The Delaware Supreme Court initially acknowledged that:

> It is [ ] clear that the First Amendment does not protect defamatory speech. "It is well understood that the right of free speech is not absolute at all times and under all circumstances."[12] Certain classes of speech, including defamatory and libelous speech, are entitled to no Constitutional protection. "It has been well observed that such utterances are no essential

[10] An IP address is an electronic number that specifically identifies a particular computer using the internet. *Id*. at *4.

[11] 47 U.S.C. 551(c)(2) requires a court order to a cable ISP and notice to the ISP subscriber before an ISP can disclose the identity of its subscriber to a third party. *Id*. at. *5.

[12] *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572, 86 L. Ed. 1031, 62 S. Ct. 766 (1942).

> part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[13]

*Id*. at * 10.

The high Court then expressed a concern that allowing the revelation of identities of posters too easily would "chill potential posters from exercising their First Amendment right to speak anonymously." *Id*. at * 11.

> The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all. A defamation plaintiff, particularly a public figure, obtains a very important form of relief by unmasking the identity of his anonymous critics. The revelation of identity of an anonymous speaker "may subject [that speaker] 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 process."

*Id*. at *11-12; *citing* Lidsky, *supra* at 890.

The Court was also concerned that if the anonymous posters' identities were too easily available, "a defamation plaintiff who either loses on the merits or fails to pursue a lawsuit is still free to engage in extra-judicial self-help remedies; more bluntly the plaintiff can simply seek revenge or retribution." *Id*. at *12. The Court warned that "there is reason to believe that many defamation plaintiffs bring suit merely to unmask the identities of anonymous critics." *Id*. at *12-13.

The *Cahill* court began its analysis by studying the *Dendrite* standard.[14] But it went in a somewhat different direction, holding that a "summary judgment standard is the appropriate test by which to strike the balance between a defamation plaintiff's right to

[13] *Id*.

[14] *See* Section II of this Opinion.

protect his reputation and a defendant's right to exercise free speech anonymously". *Id*. at *21.

Specifically, the *Cahill* court retained the notification provision of the *Dendrite* test as well as the provision that requires plaintiff to set forth a prima facie cause of action against the anonymous poster. The Court held that in order for a plaintiff to obtain the identity of an anonymous defendant through the compulsory discovery process "he must support his defamation claim with facts sufficient to defeat a summary judgment motion." *Id*. at *21-22. However, mindful that public figures in a defamation case must prove that the defendant made the statements with actual malice, an element impossible to prove without the disclosure of the identity of the poster, the *Cahill* court held that "a public figure defamation plaintiff must only plead and prove facts with regard to elements of the claim that are within his control." *Id*. at 33.

## IV. ***Melvin v. Doe*** **(Pennsylvania).**

The Pennsylvania Supreme Court was asked to decide whether to overturn a Court of Common Pleas decision that forced defendants, John Doe *et al*., to reveal their identities in an internet-defamation situation. *Melvin v. Doe*, 575 Pa. 264, 836 A.2d 42 (2003).

In *Melvin*, the plaintiff, a Pennsylvania Superior Court Judge, commenced a defamation action against several Doe defendants based upon statements posted on a webpage. The statements included an allegation that plaintiff had engaged in "misconduct" by lobbying the former Pennsylvania Governor's administration for the appointment of a specific attorney to a vacancy on the Allegheny County Court of Common Pleas.

Plaintiff propounded discovery seeking the defendants' identities. Defendants filed a Motion for Protective Order, as well as a Motion for Summary Judgment, alleging that their First Amendment right to engage in anonymous political criticism shielded them from having to reveal themselves unless plaintiff, a public official, could prove actual economic harm. The trial court denied defendants' Motion for Summary Judgment and defendants' Motion for Protective Order, ordering that defendants reveal their identities subject to a confidentiality order.

The defendants filed an appeal with our Superior Court. Superior Court quashed the appeal on the basis that defendants' Motion for Summary Judgment was not a collateral order.[15] The Superior Court also held that the trial court's order directing defendants to disclose their identities was not a collateral order as it "directly [related] to and is intertwined with the actual claim, and thus can not be considered collateral." *Melvin v. Doe*, 789 A.2d 696, 699 (2001).

Our Supreme Court held that under the collateral order doctrine, defendants, in seeking to enforce their First Amendment rights, were entitled to appellate review of the trial court's order requiring disclosure of defendants' identities. *Melvin*, 575 Pa. at 269. The Supreme Court began its analysis by studying two United States Supreme Court cases that involved prior restraints of free speech. In *Talley v. California*, the United States Supreme Court, for the first time, expressly invalidated a local ordinance requiring handbills to disclose the names of their author and distributor. 362 U.S. 60, 4 L.Ed. 2d 559, 80 S. Ct. 536 (1960). In *McIntyre v. Ohio Elections Board*, the United States Supreme Court invalidated an Ohio statute that prohibited the distribution of anonymous campaign literature. 514 U.S. 334, 131 L.Ed. 2d 426, 115 S. Ct. 1511 (1995). The

[15] The Supreme Court agreed with the Superior Court on this issue. *Melvin* 575 Pa. at 268.

*McIntyre* court reasoned that Ohio's interest in regulating the voting process did not justify the statue because "the ordinance plainly applies even when there is no hint of falsity or libel." *Id*. at 344. The Court explained that the blanket anonymity prohibition compared unfavorably with the state's existing regulation of fraud and libel in an election, and, "to the extent those provisions may be underinclusive, [state] courts [may] also enforce the common-law tort of defamation." *Id*. at 351 n. 13.

The *Melvin* court, like the Delaware Supreme Court in *Cahill*, noted that while there is a right to anonymous free speech, "the States have justifiable interests in preventing certain evils." *Melvin*, 575 Pa. at 276.

> The legitimate state interest underlying the law of libel is the compensation of individuals for harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.

*Id., citing Rosenblatt v. Baer*, 383 U.S. 75, 92, 15 L.Ed. 2d 597, 86 S. Ct. 669 (1966) (concurring opinion).

However, citing *New York Times Co. v. Sullivan*[16], the *Melvin* court noted that it is important to keep in mind that "the United States Supreme Court has stated that neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of *official conduct* . . ." *Id*. at 277. (Emphasis added). The Court then remanded the case to Superior Court for consideration of defendants' constitutional

[16] 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964).

question, namely, "whether the First Amendment requires a public official defamation plaintiff to establish a prima facie case of actual economic harm." *Id*. at 278.

Here, although the defendants acknowledge that the *Melvin* decision does not set out a standard by which Pennsylvania courts must analyze the issue whether to allow defamation plaintiffs to unmask anonymous detractors, the defendants assert that the foregoing direction to the Superior Court from the Pennsylvania Supreme Court provides insight regarding the level of scrutiny the courts of our Commonwealth will require in deciding such issues. Memorandum of Law in Support of JPA Development, Inc. and Jerry Pantelidis' Motion for Protective Order, p. 10. Defendants go further, suggesting that this question put to the Superior Court by the Supreme Court "foreshadows an adoption of the *Dendrite* standard." *Id*.

This court disagrees with defendants' prediction, and submits that a more sensible interpretation of the *Melvin* court's instruction is that the Supreme Court merely directed the Superior Court to examine defendant's constitutional argument.

## V. Existing Procedural Rules are Adequate to Protect Anonymous Poster's First Amendment Rights. Therefore, No New Standards are Required.

This court agrees with one commentator's concerns regarding the current wave of new standards courts have promulgated respecting the revelation of John Does' identities:

> Though well intentioned, the rush to apply new standards [to discovery issues related to anonymous posters to the Internet] should be slowed. The threat to core First Amendment free speech rights from too readily identifying anonymous speakers is real, and should be taken seriously by the courts. At the same time, however, the new standards offer little real protection for anonymous speech beyond what the courts can provide under existing rules. In exchange for this limited benefit, however, the grafting of new tests onto existing rules threatens to compromise the values protected by other constitutional provisions, including due process,

> equal protection, and the right to a trial by jury. In particular, application of an out-come determinative heightened discovery standard singles out one class of plaintiffs who are systematically deprived of the litigation procedures, specifically discovery and trial, that are available to other plaintiffs, including plaintiffs with claims that are similar in all regards except that they allege harm by plaintiffs who did not act anonymously.

Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing over Legal Standards*, 83 Oregon L. Rev. 795, 801 (2004).[17]

Addressing those apprehensions of courts sitting in our sister jurisdictions - - that without heightened standards for the unmasking of anonymous Internet posters "there is reason to believe that many defamation plaintiffs bring suit merely to unmask the identities of anonymous critics"[18]- - Mr. Vogel suggests that a John Doe may oppose the discovery of his/her identity on the ground that the complaint should be dismissed. "[E]stablishing that a complaint shall not survive a motion to dismiss should defeat discovery because the [John Doe's] identity would then not be relevant to any issue presented in the case." *Id*. at 848.

Second, in the event that a plaintiff pleads a superficial claim against the defendant, the defendant may oppose the discovery request by establishing that he or she is entitled to summary judgment. This court believes there is merit to Mr. Vogel's analysis of this "defensive" summary judgment standard. "It 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

[17] Mr. Vogel was a visiting assistant professor from the University of Illinois College of Law.

[18] *Cahill*, 2005 Del. LEXIS at *12-13.

possession.[19] 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*. at 850.

Lastly, Mr. Vogel points to defendant's right to limit discovery under protective order grounds. *Id*. at 851. This is precisely the procedural posture of this case.

This court accepts the notion that the implementation of new standards for cases involving plaintiff's efforts to learn the identities of anonymous internet posters will likely do more harm than good. Further, this court believes that a balancing of John Does' First Amendment rights against the plaintiff's rights to the information sought is built into our Commonwealth's existing civil procedure. Accordingly, this court will not apply the *Dendrite* or the *Cahill* standards. Instead, it will analyze defendants' Motion for a Protective Order under existing Pennsylvania discovery rules.

## VI. Under the Pertinent Rules of Evidence, this Court's Order Denying Defendants'Motion for a Protective Order Should be Affirmed.

Pennsylvania Rule of Evidence 4011 directs courts to limit discovery under certain circumstances, thusly:

> No discovery or deposition shall be permitted which is
>
> (a) is sought in bad faith;
>
> (b) would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party;
>
> (c) is beyond the scope of discovery as set forth in Rules 4003.1 through 4003.6; . . .

The term "bad faith", as it relates to Pa.R.C.P. 4011, is defined as "fraud, dishonesty, or corruption." *Casel v. Scott*, 330 Pa. Super. 412, 416, 479 A.2d 619

[19] This is consistent with the *Cahill* court's holding that "a public figure defamation plaintiff *must only plead and prove facts with regard to element of the claim that are within his control*." *Cahill*, 2005 Del. LEXIS at *33 (emphasis added), p. 11 of this Opinion.

(1984) *citing In Re Estate of Roos*, 305 Pa. Super. 86, 94-95 n.2, 451 A.2d 255 259 n.2 (1982).

Rule 4003.1 (a) sets out the scope of discovery:

> . . . a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . .

There is **no** evidence that plaintiff has sought the identities of the anonymous posters (or poster) in bad faith. But, the question whether the discovery sought would cause defendants unreasonable burden necessarily compels an analysis of the anonymous posters' First Amendment rights.

This court acknowledges the democratizing power of the Internet. Further, this court does not quarrel with the statement that "[t]hrough the use of [the internet], any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox."[20] Courts have repeatedly held that the right to speak anonymously is subsumed within the Constitutional right to speak freely. *See Talley v. California*, 362 U.S. 60, 4 L. Ed. 2d 559, 80 S. Ct. 536 (1960). *See also McIntyre v. Ohio Elections Board*, 514 U.S. 344, 131 L.Ed. 2d 426, 115 S. Ct. 1511 (1995).

However, as noted, the United States Supreme Court has instructed that "free speech is not absolute at all times and under all circumstances" and that defamatory and libelous speech enjoys no Constitutional protection as "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from this is clearly outweighed by the social interest in order and morality." *Chaplinski*, 315 U.S. at 572.

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[20] *Reno*, 521 U.S. at 896-897

This court has previously held that many of the statements set forth in the "Guestbook" constitute defamation *per se*. And, while the posters are undeniably entitled to First Amendment rights, the defamatory *per se* statements are not entitled to First Amendment protection. This court finds that defendants' are not unreasonably burdened by this court's order denying defendants' request that the identities of the anonymous posters **not** be revealed.

Furthermore, this court finds that the plaintiff's Interrogatories and Request for Production of Documents related to the identities of the anonymous posters were calculated to lead to relevant information. Plaintiff named Mr. Pantelidis and JPA as defendants. Plaintiff has alleged that Mr. Pantelidis himself either posted the defamatory comments on the Guestbook, or directed that the comments be posted to the Guestbook.[21] Plaintiff should be entitled to discover materials that would either support or disprove their position.[22]

[21] *See* Footnote "1" *infra*.

[22] Plaintiff also asserts that discovery of the identity of the anonymous posters is directly relevant to the issues of malice and intent. Plaintiff's Response and Memorandum of Law in Opposition to the Motion for Protective Order of Defendants JPA Development, Inc. and Jerry Pantelidis, p. 5. The elements of malice and intent need only be proven in cases involving a public figure plaintiff. *Melvin*, 575 Pa. at 271, *citing New York Times*, 376 U.S. at 270-271. This court does not believe that plaintiff is a public figure. According to *Gertz v. Robert Welch*, "[t]hose who attain the status of [public figure] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and public comment." 418 U.S. 323, 345, 94 S. Ct. 2997, 41 L.Ed. 2d 789 (1974). This definition has been adopted by the Pennsylvania Superior Court in *Brown v. Philadelphia Tribune Co.*, 447 Pa. Super. 52, 59, 668 A.2d 159 (1995). Accordingly, this court finds that plaintiff is not a public figure and, thus, it is not required to prove malice or intent.

## Conclusion

For the reasons discussed above, this court respectfully submits that its Order of September 22, 2004 be affirmed.

**BY THE COURT,**

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**ALBERT W. SHEPPARD, JR., J.**