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Scot Wilson

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Corporate Criticism on the Internet: The Fine Line Between Anonymous Speech and Cybersmear

I. INTRODUCTION

In recent years, the securities market has experienced a remarkable period of growth and fluctuation that is largely attributable to the Internet.¹ Currently, more than nine million investors trade stocks over the Internet, and by 2003 there will be over 3.3 trillion dollars in online brokerage assets.² The rapid increase of online investors can be traced to the availability of information provided by the Internet.³ The Internet has allowed the average investor to access investment information that was previously exclusive to market professionals.⁴

Unfortunately, many of the same characteristics that make the Internet such an excellent avenue for Internet users to obtain securities information have simultaneously created opportunities for unparalleled tortious conduct and rampant defamation.⁵ “As the Internet continues to expand as a vehicle

1. See Mark Ishman, Comment, *Computer Crimes and the Respondeat Superior Doctrine: Employers Beware*, 6 B.U. J. SCI. & TECH. L. 6, 20 (2000); see also Nancy Toross, *Double-Click On This: Keeping Pace With Online Market Manipulation*, 32 LOY. L.A. L. REV. 1399, 1402 (1999) (observing that many “investors routinely use the Internet’s financial forums to seek prospective investments and discuss actual ones.”); ACLU v. Reno, 31 F. Supp. 2d 473, 481-82 (E.D. Pa. 1999) (observing that “[a]pproximately 70.2 million people of all ages use the Internet in the United States alone.”), *aff’d*, 217 F.3d 162 (2000), *cert. granted*, 121 S. Ct 1997.

2. See SEC Commissioner Laura S. Unger, *Technology Bytes the Securities Industry: The New Millennium Brings New Investors and New Markets* (March 14, 2000), at <http://www.sec.gov/news/speech/spch354.htm> (last visited Feb. 19, 2002).

3. See Michael Schroeder, *Growth in Internet Securities Fraud Will Be Difficult to Combat*, GAO Says, WALL ST. J., Mar. 22, 1999, at C15 (projecting that by 2001 over fourteen million Internet users will trade exclusively via online trading accounts).

4. Toross, *supra* note 1, at 1403 (articulating that “[t]he new medium essentially provides individual investors with the informational resources traditionally available only to market professionals.”). See also Michael Moss, *CEO Exposes, Sues Anonymous Online Critics*, WALL ST. J., July 7, 1999, at B1 (noting that “[u]ntil the Internet came along, the traffic in opinion about stocks and bonds was largely - and for the most part calmly - controlled by Wall Street analysts.”).

5. Toross, *supra* note 1, at 1403 (noting that these defamatory remarks both “injure[] the legitimate investor and undermine[] the integrity of the securities markets.”). See also *Be Wary of Chat Room Tips*, WINNIPEG FREE PRESS, Feb. 13, 2001, at B5, (quoting Patrick McKeough, an

for both information and commerce, corporations have increasingly confronted the problem of cybersmearing.”⁶ Posting false information on financial bulletin boards or stock related chat rooms has sparked a new breed of defamation lawsuits alleging a “corporate cybersmear.”⁷ A corporate cybersmear is a false and disparaging rumor about a company, its management, or its stock that is posted on the Internet.⁸ Although the message is false, it can cause real damage to a corporation and be potentially devastating to its stock value.⁹ The unprecedented power of the Internet to disseminate information, either true or false, allows this new form of defamation to spread like wildfire throughout cyberspace because “[o]nce the rumor is posted in cyberspace, it takes on a life of its own.”¹⁰ In many

author and investment manager, as stating: ““You can get vast amounts of information for free on public companies you may want to invest in. But it’s just as easy to get false or incorrect information, so you need to read critically and skeptically.””). Last December, the Ontario Securities Commission (“OSC”) obtained injunctions that shut down several Internet chat-rooms where defamatory statements had been posted. *See id.*

6. Bruce P. Smith, *Cybersmearing and the Problem of Anonymous Online Speech*, 18 COMM. LAW. 3, 3 (2000). “Numerous Fortune 500 leaders, including Microsoft, Ford, Wal-Mart, and Electronic Data Systems, as well as a host of smaller companies, have been targets of online criticism, ranging from blasts against environmental practices to rumors of financial mismanagement to complaints about unclean restrooms.” *Id.* Usually, Internet users post messages on message boards that are exclusively devoted to a particular company. *See Moss, supra* note 4, at B1 (noting that Yahoo!, for example, “has several thousand boards, each dedicated to a single company.”).

7. *See* Greg Miller, *Online Power Gives David a Little Leverage on Goliath Internet: Unhappy Workers, Consumers are Building Websites and Firing Off E-mail Like Electronic Grenades*, L.A. TIMES, Feb. 1, 1999, at A1 (noting that tactics range from “the anonymous posting of messages—ranging from personal attacks on executives to leaks of inside information . . .”).

8. *See* Blake A. Bell, *Dealing With Cybersmear*, N.Y.J.L., April 19, 1999, at T3; Ishman, *supra* note 1, at 34 (citing Garry G. Mathiason, *Cybersabotage-The Internet as a Weapon in the Workplace: Internet Zone One*, at http://www.profs.findlaw.com/networked_6.html).

9. *See* Laura DiBiase, *Are Your Clients Smear-Savvy?*, 18 AM. BANKR. INST. J. 22, 22 (Nov. 1999).

The rumors can be either good or bad, depending on the results that the author of the message desires. A stockholder, wanting to make a quick profit, might post a false message regarding a company’s expected merger with a larger corporation. This could temporarily drive the stock prices up, giving the author of the message time to sell his/her shares. Even worse, a disgruntled employee could post a message accusing the company or its executives of mismanagement could easily cause the stock to plummet.

Id. “A stock’s price can be influenced within minutes of posting information on a newsgroup, a portal’s message board, or most commonly, on a Web site’s message board or discussion forum.” Toross, *supra* note 1, at 1403 (citing Joseph J. Cella III & John Reed Stark, *SEC Enforcement and the Internet: Meeting the Challenge of the Next Millennium: A Program for the Eagle and the Internet*, 52 BUS. LAW. 815, 825 (1997)). *See also* John Reed Stark, *Tombstones: The Internet’s Impact upon SEC Rules of Engagement*, 12 INSIGHTS 10, 11 (1998) (describing the ability to manipulate a company’s stock price by creating a false “buzz” in Internet message boards and chat rooms).

10. Garry G. Mathiason, *Cybersabotage - The Internet as a Weapon in the Workplace: Internet ZoneOne*, at http://www.profs.findlaw.com/networked_6.html (discussing the adverse effects suffered by companies as a result of third party reliance on information obtained on online bulletin boards); *see also* THE MAG. FOR SENIOR FIN. EXECUTIVES 20, March 15, 2000, available at 2000 WL 15330408 (observing that “[w]hat distinguishes a cybersmear from real-world smutch is that the Internet acts as an electronic megaphone for mischief makers.”).

cases, “by the time such rumors are dispelled, irreparable damage to a company’s reputation has already been done.”¹¹ Defamatory cybersmear, because it is published on the Internet, is capable of reaching an infinitely large audience and is easy to accomplish while remaining entirely anonymous.¹² Individuals posting false statements on message boards or in chat rooms are capable of causing tremendous damage to investors who rely on such defamatory statements because “the Internet’s speed, low cost, and relative anonymity give con artists access to an unprecedented number of innocent investors.”¹³

“Ironically, the anonymity that has contributed to the Internet’s growing popularity is coming under attack.”¹⁴ Presently, Internet defamation is virtually impossible to control, and can circulate in cyberspace long after the initial message was posted.¹⁵ Both scholars and practitioners agree that “[t]he corporate cybersmear . . . is a problem that is out of control and is likely to get worse.”¹⁶ “[O]nce the ‘news’ is posted, Wall Street analysts want reassurance; shareholders want answers; and the company finds itself

11. Ishman, *supra* note 1, at 34.

12. See Blake A. Bell, *Reducing the Liability Risks of Employee Misuse of the Internet*, WALLSTREETLAWYER.COM, June 1999, at 16 (articulating that “[r]umors posted on the Internet are especially damaging because they are so easily spread.”). “The Internet has placed the power of publication in the hands of anybody who owns a computer. But a lot of people don’t understand you don’t have the right to go about and lie about someone with impunity.” Anick Jesdanun, *Anonymous Online Talk Faces Threat From Lawsuits*, THE COLUMBIAN, Apr. 2, 2001, at A1, available at 2001 WL 6282287 (quoting Boston attorney Victor Polk).

13. SEC Chairman Arthur Levitt, *Plain Talk About Online Investing, Speech at the National Press Club* (May 4, 1999), at <http://www.sec.gov/news/speech/speecharchive/1999/spch274.htm> (last visited Feb. 19, 2002).

14. David L. Sobel, *The Process That “John Doe” Is Due: Addressing The Legal Challenge To Internet Anonymity*, 5 VA. J.L. & TECH. 3, 2 (2000) (arguing that “anonymity allows the persecuted, the controversial, and the simply embarrassed to seek information, and disseminate it, while maintaining their privacy and reputations in both cyberspace and the material world.”); see also Smith, *supra* note 6, at 3 (reasoning that “[t]he relative absence of editorial filters on the Internet and the lack of significant barriers” presents special challenges). Traditionally, media sources are capable of screening publications for misstatements. *Id.* On the Internet, although speech is comparatively unbridled and spontaneous, it seems almost more effective than traditional speech. See Jonathan Zittrain, *The Rise and Fall of Sysopdom*, 10 HARV. J.L. & TECH. 495, 10 (1997) (observing that “in the real world individuals without institutional sponsorship or collaboration cannot speak to the world at large. Not so on the Net.”).

15. See Smith, *supra* note 6, at 3. “An e-mail or posting on a message board can also be ‘republished again and again,’ giving online communication the ‘extraordinary capacity . . . to replicate almost endlessly.’” *Id.* (quoting Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 864 (2000)).

16. Blake A. Bell, *Dealing with False Internet Rumors: A Corporate Primer* (Sep. 15, 2000), at <http://www.simpsonthatcher.com/memos/art.006.htm>; see also Bell, *supra* note 8 (noting that “[s]ince June 1998, American companies fighting . . . cyber-smears reportedly have been filing one or two lawsuits a week in Santa Clara County, Calif., the home of Yahoo! Inc.”).

wondering how to regain control of its business reputation.”¹⁷ In an attempt to combat the problem, “dozens of companies are trying to flush out the anonymous posters by filing lawsuits and subpoenaing records from Yahoo! and other companies that manage the online forums.”¹⁸

The gravamen of the cybersmear debate rests upon striking a balance between the rights of corporate plaintiff’s “using the discovery process to pierce the veil of online anonymity” to pursue a legitimate cause of action against the “significant privacy concerns for the average Internet user” that has been named as a Doe defendant because of his defamatory statements.¹⁹

This Comment seeks to examine the emergent issue of the corporate cybersmear and the attempt to strike a balance between corporations seeking to protect or repair their reputations and anonymous speech protected under the First Amendment. Part I of this Comment will address the underlying First Amendment concerns involving restrictions of anonymous Internet speech. Part II will discuss how corporations are able to sue John Doe. Part III will discuss how defamatory cheap shots can cause cheap stocks and

17. Jeffrey R. Elkin, *Cybersmeared: Dealing With Defamation on the Net*, 9 BUS. L. TODAY 22, 22 (Feb. 2000) (explaining that “[i]n many cases the bearers of such detrimental comments are ‘virtual’ unknowns and the damaged parties may face legal difficulties in finding out who they are.”); see also Greg Miller, *High-Tech Smear Tactics/ People with Consumer and Corporate Complaints Find the Information Superhighway to be Their Road to Refunds - or Revenge*, HOUS. CHRON., Feb. 1, 1999, at A1, available at 1999 WL 3974966 (quoting John Reed Stark, chief of the SEC Office of Internet Enforcement, as saying “A lot of customers, clients, and competitors read the message boards. Companies say that they are suddenly getting calls from major accounts asking questions about the posting, as well as calls from the media.”).

18. Miller, *supra* note 7, at A1. “Since the dot-com bubble burst, Internet law experts have seen a steep increase in the number of ‘John Doe’ suits filed by companies seeking to unmask and stop electronic critics.” Laura Lorek, *Sue the Bastards!*, INTERACTIVE WK. FROM ZDWIRE, Mar. 12, 2001, available at 2001 WL 7347768 (suggesting that “[m]alcontents intent on bashing companies on electronic bulletin boards may want to think twice before hitting the send key.”). According to Megan Gray, an expert in John Doe cybersmear defense, “[o]nline privacy by Yahoo! is a charade . . . Yahoo! will comply to any subpoena without considering the substantive or technical legitimacy.” Michael D. Goldhaber, *Cybersmear Pioneer*, NAT’L L.J., July, 17, 2000, at A20 (quoting an interview with Megan Gray). The rising tide of cybersmear suits has markedly increased discovery requests seeking to identify defamatory critics. For example, “America Online, the world’s largest online service provider, received 475 civil subpoenas last year, a 40 percent increase from 1999.” Jesdanun, *supra* note 12, at A1. This increase has caused companies such as AOL to modify their policies for responding to such requests. See *id.* (noting that “AOL, which has always had a notification policy, gives subscribers about two weeks to file a challenge” and “Yahoo! implemented a policy last year giving posters 15 days notice, while Earthlink Inc. recently started giving 10 days.”).

19. Sobel, *supra* note 14, at 2 (observing that “[a]rmed with broad warrant and subpoena powers, law enforcement agencies are finding cyberspace to be fertile ground for the conduct of investigations, often seeking the identities of anonymous users.”). “Despite widespread use of Doe pleading, the Federal Rules of Civil Procedure undermine it.” Carol M. Rice, *Meet John Doe: It Is Time for Federal Civil Procedure to Recognize John Doe Parties*, 57 U. PITT. L. REV. 883, 914 (1996) (arguing that “[u]nlike most state court systems, the Federal Rules do not expressly provide for any form of fictitious name parties.”). In order to avert this problem, federal courts frequently maintain that “an action may proceed against a party whose name is unknown if the complaint makes allegations specific enough to permit the identity of the party to be ascertained after reasonable discovery.” *Estate of Rosenberg v. Crandell*, 56 F.3d 35, 37 (8th Cir. 1995).

provide examples of particularly notorious cybersmears. Part IV will analyze the difficulty of proving defamation in cyberspace. Lastly, Part V will discuss what actions a corporation should take in attempting to stop or minimize the effects of online defamation.

II. THE FINE LINE BETWEEN SPEECH AND SMEAR

A. Anonymity and the First Amendment

The Internet allows speakers to transcend far beyond the traditional barriers of speech and permits communication directly “to an audience larger and more diverse than any of the Framers could have imagined.”²⁰ Although it may be an overstatement to contend that a cybersmearer’s web posting “compete[s] equally with the speech of mainstream speakers in the marketplace of ideas,”²¹ anonymous Internet speakers, nevertheless, possess an unparalleled opportunity to disseminate their message in a manner that is infinitely more inclusive than traditional notions of speech under the First Amendment.²²

Frequently, cybersmearers “employ pseudonymous identities, and even when a speaker chooses to reveal her real name, she may still be anonymous for all practical purposes.”²³ Thus, for better or for worse, the Internet audience is left to “evaluate the speaker’s ideas based on her words alone.”²⁴ Although such anonymity may, at first glance, appear to create an idyllic form of equality in the realm of free speech, it can also serve as a shield to hide behind, leaving a defamed plaintiff without a potential defendant.²⁵

20. *ACLU v. Reno*, 31 F. Supp. 2d 473, 476 (granting a preliminary injunction that enjoined the application of 47 U.S.C. section 231, a provision of the Child Online Protection Act (“COPA”)). See also Steven R. Salbu, *Who Should Govern the Internet?: Monitoring and Supporting a New Frontier*, 11 HARV. J.L. & TECH. 429, 437 (1998) (arguing that the Internet has expanded the traditional “‘marketplace of ideas’ from the institutional dominance of publishers, distributors, broadcast media, and other traditional gate-keepers of speech.”).

21. *Reno*, 31 F. Supp. 2d at 476.

22. See Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1086 (1995) (arguing that “[t]he perfect ‘marketplace of ideas’ is one where all ideas, not just the popular or well-funded ones, are accessible to all.”). “To the extent that this ideal isn’t achieved, the promise of the First Amendment is only imperfectly realized.” *Id.*

23. Lyrrisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 896 (2000).

24. *Id.* (citing Robert C. Post, *The Constitutional Concept of Public Disclosure: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 640 (1990)).

25. See Anne Wells Branscomb, *Anonymity, Autonomy and Accountability: Challenges to the First Amendment in Cyberspace*, 104 YALE L.J. 1639, 1642 (1995) (arguing that “the ability to

The Supreme Court has consistently interpreted the First Amendment²⁶ to protect the right to speak anonymously,²⁷ and maintained that anonymity “plays an important role in fostering free expression.”²⁸ Although the expressive nature of anonymous Internet speech has long been recognized by its users, the medium had not received constitutional recognition until 1997.²⁹ In *Reno v. ACLU*,³⁰ the Supreme Court was determined to define the scope of First Amendment protection of online speech.³¹

The Court in *Reno* recognized that the Internet provides a “dynamic, multifaceted category of communication.”³² Further defining the scope of online speech, the Court reasoned that “[t]hrough the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.”³³ The Court concluded that there is “no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.”³⁴ Rather, “the vast democratic forum of the Internet’ would be stifled if users were unable to preserve” online anonymity.³⁵ Clearly, the Internet’s veil of anonymity provides a forum that encourages speech that may not otherwise have been disseminated.³⁶ This unique feature of the Internet, however, appears to entail both positive and negative consequences.³⁷

remain unknown removes many layers of the layers civilized behavior as . . . [Internet users] can escape responsibility for negligent or abusive postings.”)

26. The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press” U.S. CONST. amend I.

27. See, e.g., *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). In *McIntyre*, the Court, recognizing the “respected tradition of anonymity,” observed that “even . . . the Federalist Papers were published under fictitious names.” 514 U.S. at 342-43 (citing *Talley v. California*, 362 U.S. 60, 64-65 (1960)).

28. *McIntyre*, 514 U.S. at 343 (recognizing that “[t]he protection of anonymity . . . takes on added significance on the Internet, a medium which provides individuals with unprecedented opportunities to both publish and receive information.”).

29. See Smith, *supra* note 6, at 3 n.7.

30. *Reno v. ACLU*, 521 U.S. 844 (1997), *aff’g*, 929 F. Supp. 824 (E.D. Pa. 1996).

31. See *ACLU v. Reno*, 929 F. Supp. 824, 830 (E.D. Pa. 1996) (stating that “[t]he Internet is not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks.”), *aff’d*, 521 U.S. 844 (1997).

32. *Reno*, 521 U.S. at 870.

33. *Id.* (noting also that “[t]hrough the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.”).

34. See Sobel, *supra* note 14, at 4 (quoting *Reno*, 521 U.S. at 870).

35. *Id.* at 5 (quoting *Reno*, 521 U.S. at 868). Several lower courts have further established the right to communicate anonymously on the Internet. See, e.g., *ACLU v. Johnson*, 4 F. Supp. 2d 1029, 1033 (D.N.M. 1998), *aff’d*, 194 F.3d 1149 (10th Cir. 1999); *ACLU v. Miller*, 977 F. Supp. 1228, 1230-33 (N.D. Ga. 1997); *Apollomedia Corp. v. Reno*, 526 U.S. 1061 (1999), *aff’g*, 19 F. Supp. 2d 1081 (C.D. Cal. 1998) (protecting the anonymous Internet identities of Internet users using www.annoy.com, a website “created and designed to annoy” legislators through critical online speech).

36. See Smith, *supra* note 6, at 4 (reasoning that “pseudonymity can provide speakers with the courage to speak in ways that they might eschew if their words were easily traceable to them.”).

37. “Just as anonymity might give you the strength to state an unpopular view, it can also shield

B. Chilling Chat In Cyberspace

Compelled revelation of a speaker's identity can have serious costs.³⁸ Courts have long recognized the potential ramifications of requiring disclosure of one's identity and the chilling effect that it may have on free speech.³⁹ In *McIntyre v. Ohio Elections Commission*,⁴⁰ the Supreme Court observed that "[a]nonymity is a shield from the tyranny of the majority It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation- and their ideas from suppression- at the hand of an intolerant society."⁴¹

Similarly, in *Columbia Ins. Co. v. Seescandy.com*,⁴² the United States District Court for the Northern District of California sought to reach an equilibrium between the plaintiff's right to pursue a legitimate cause of action against concerns for the potential chilling effect of revealing online anonymity. Confronted with this dilemma, the court observed:

People are permitted to interact pseudonymously and anonymously with each other so long as those act are not in violation of the law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate 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 identit[ies].⁴³

Rather than haphazardly reveal the identities of anonymous speakers as a means of silencing unlawful speech, courts have instead relied on the speaker's audience to discern the content of the message.⁴⁴ In doing so,

you if you post an irresponsible view. Or a slanderous view. Or a hurtful view." LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 80 (1999).

38. Lee Tien, *Who's Afraid of Anonymous Speech? McIntyre and the Internet*, 75 OR. L. REV. 117, 144 (1996).

39. See Sobel, *supra* note 14, at 5 (arguing "that compelled identification can chill expression.").

40. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

41. *Id.* at 357 (noting that "[t]he decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible.").

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

43. *Id.* at 578.

44. See *McIntyre*, 514 U.S. at 348 n.11 (stating "[d]on't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing They can evaluate its anonymity along with its message, as long as they are permitted . . . to read that message.") (citations omitted). But see *Jesdanun*, *supra* note 12, at A1 (quoting Miami-Dade Circuit Judge Eleanor

however, speakers are frequently able to hide behind a shield of anonymity and create an uncivilized level of discourse.⁴⁵

C. *Financial Bulletin Boards and Chat Rooms: The Ultimate “Marketplace of Ideas,” Just a lot of Junk, or Somewhere in Between?*

“The Internet is a democratic institution in the fullest sense.”⁴⁶ As the Supreme Court explained in *Reno*,⁴⁷ “[f]rom the publisher’s point of view, [the Internet] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers.”⁴⁸ “[T]he fascination of the Internet lies in its potential for realizing the concept of public discourse at the heart of the Supreme Court’s First Amendment jurisprudence.”⁴⁹ A prevalent metaphor and the central tenet for the First Amendment public discourse is the “marketplace of ideas.”⁵⁰ “The marketplace of ideas is a sphere of discourse in which citizens can come together free from government[al] interference or intervention to discuss a

Schockett, in ruling that a “businessman’s right to face his accuser in court was more important than the defendant’s right to remain anonymous,” as stating: “‘Give them anonymity and nothing holds them back.’”). A Florida appellate court affirmed Judge Schockett’s decision. *Id.*

45. See Branscomb, *supra* note 25, at 1675-76 (arguing that “abusive” Internet posters should not be permitted to hide behind a veil of anonymity); see also *McIntyre*, 514 U.S. at 382 (Scalia, J., dissenting) (arguing that restricting the anonymous distribution of campaign literature would foster “a civil and dignified level of campaign debate.”). But see *United States v. Assoc. Press*, 52 F. Supp. 362, 372 (1943), *aff’d*, 326 U.S. 1 (1945) (stating “the First Amendment . . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be folly; but we have staked upon it our all.”).

46. *Doe v. Hritz*, Mem. in Supp. of Mot. to Quash Subpoena to America Online, (E.D. Va.), at ¶ 2, available at <http://www.citizen.org/litigation/briefs/HritzvDoe.htm> (last visited Feb. 19, 2002) (analogizing the Internet to “the modern equivalent of Speaker’s Corner in England’s Hyde Park, where ordinary people voice their opinions, however, silly, profane, or brilliant they may be, to all who choose to read them.”). See also Patricia Sabga & Charles Molineaux, *Emulex Hoax*, CNNFN THE N.E.W. SHOW, (interview with Ann Kates Smith, Senior Editor, U.S. News and World Report) (August 25, 2000), Transcript # 00082508FN-107 (discussing how “the Internet has done a lot to democratize the stock market, but at the same time, it democratizes frauds and scams. There’s a very low barrier to entry to fraud and manipulation now.”).

47. *Reno v. ACLU*, 521 U.S. 844 (1997).

48. *Id.* at 853, 870 (holding that the First Amendment applies to Internet speech).

49. Lidsky, *supra* note 23, at 893 (citing Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 633 (1990)). See also Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 580-82 (1991) (arguing that freedom of speech is essential to promoting the wide dissemination of public discourse).

50. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (stating that “‘a central tenet of the First Amendment [is] that the government must remain neutral in the marketplace of ideas.’”) (quoting *FCC v. Pacifica Found.*, 438 U.S. 725, 745-46 (1978)). The “marketplace of ideas” metaphor originated in Justice Holmes’ dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The “marketplace of ideas” concept has remained prevalent theme of First Amendment jurisprudence ever since. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (articulating that “[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas . . .”).

diverse array of ideas and opinions.”⁵¹ “Scholars have touted the Internet as the living embodiment of the ‘marketplace of ideas’ metaphor that lies at the heart of First Amendment theory.”⁵²

However, “[t]his idealized vision of Internet discourse contrasts rather sharply with the reality of the financial message boards.”⁵³ Divergent from the type of rational discourse originally sought to be promoted in the marketplace of ideas, Internet chat rooms and “[m]essage boards have become the ‘Jerry Springer Show’ of the Internet,”⁵⁴ where communication is more likely to resemble “‘disinformation, rumors, and garbage’” than rational deliberation.⁵⁵ “Nevertheless, the boards are not useless as a source of information.”⁵⁶ Rather, message boards are useful to both investors and analysts alike.⁵⁷ Moreover, from a First Amendment perspective, financial

51. Lidsky, *supra* note 23, at 893-94 (citations omitted).

52. *Id.* at 893.

53. *Id.*

54. DiBiase, *supra* note 9, at 22 (arguing that message boards allow anonymous users who have no credentials to “say whatever they want about whomever they want and the public will believe it.”).

On March 22, 1999, Thomas M. Gardner, founder of website The Motley Fool Inc., testified before the Permanent Subcommittee on Investigations of the U.S. Senate Committee on Government Affairs. . . . For April Fool’s Day, he and his co-founder brother, Dave, decided to play a practical joke. They invented ‘a fictional company with a fictional product, listed on a fictional stock exchange and bearing a fictional ticker symbol.’ A fictional “hypster” promoted the stock by posting more than 50 messages on Prodigy over a one-week period. The response from investors was amazing. “Some of them frantically posted questions and stated they had contacted their brokers to buy shares, but those brokers had never heard of [the company or the stock exchange].” Mr. Gardner stated that the experience taught them several lessons. “First, it demonstrated that there was an audience for humorous material about personal finance. Second, it showed that some people will believe just about anything they read Third, it showed that many people have not learned how to make informed decisions about their money for themselves but will trade on tips, even ridiculous ones.”

Id. See also Sam Ali, *Lesson Is Investors Beware as Internet Hoax Sabotages Emulex Shares*, THE STAR-LEDGER, Sept. 3, 2000, at B1 (quoting Marc Beauchamp, a spokesman for the North American Securities Administration Association, “For investors, the main piece of advice, the main lesson they should take from this is to make their financial decisions based on homework and research and not headlines.”).

55. Lidsky, *supra* note 23, at 893 (quoting *Reliable Sources: Are 24-Hour TV and the Internet Helping People Understand Wall Street or Is There Too Much Bull in the Bull Market?* (CNN television broadcast, July 31, 1999), transcript available in LEXIS, Transcripts File). “As anyone who has spent time perusing the financial message boards knows board discussions are no model of rational deliberation and informed debate.” *Id.* at 898 (arguing that “[i]dle speculation, unintelligible musing, and ‘off-topic’ trivia predominate over serious financial discussion”). *Cf. Red Lion Broad. Co.*, 395 U.S. at 390 (noting that “[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . .”).

56. Lidsky, *supra* note 23, at 899.

57. Moss, *supra* note 4, at B1 (noting that “[s]erious investors find merit in the boards. . . . ‘[L]ooking at and monitoring the boards is something [that] a prudent analyst has to do.’”(quoting an

message boards contribute to the marketplace of ideas by encouraging and empowering Internet users to participate in an unprecedented medium of public discourse.⁵⁸

The real problem lies in clarifying the boundaries of protected speech and defamatory statements where there is such a fine line distinguishing lawful criticism from cybersmear.⁵⁹ Although speech should not be unnecessarily inhibited, because of the enormity of the potential Internet audience, coupled with the devastating consequences of defamatory statements, in some circumstances accountability is justified.⁶⁰ False statements posted on online message boards have caused the stock prices of several publicly traded companies to plummet.⁶¹ Similarly, in March 2000, telecommunications magnate Lucent Technologies Inc. fell victim to an Emulex-like cybersmear as an anonymous Internet user posted a fake earnings warning on the company's Yahoo! message board that was designed to actually look like a PR Newswire news release. Lucent's shares

analyst with Warburg Dillon Read)).

58. Lidsky, *supra* note 23, at 900 (arguing that "financial message boards exercise a powerful democratizing effect on public discourse about the publicly held corporations that shape citizens' daily lives."). "But fostering a more participatory public discourse may come at a high cost. Speech from a 'multitude of tongues' may lead to truth, but it may also lead to the Tower of Babel." *Id.* at 902-03 (citing Genesis 11:4 (King James)). Further, Lidsky eloquently articulates that "[a] discourse that has no necessary anchor in truth has no value to anyone but the speaker, and the participatory nature of Internet discourse threatens to engulf its value as discourse." *Id.* at 903.

59. See Toross, *supra* note 1, at 1422. "There's a fine line between someone that wants to get on and vent about a product or talk about what they think is going to happen, and someone who is going to perpetrate a fraud." Tom Walsh, *Taking on Cybersmears - Regulators Watch for Manipulation of Stock Online*, BOSTON HERALD, Aug. 28, 2000, (Finance), at 25 (quoting Matt Nester, head of the Massachusetts Securities Division).

60. Tort law has opted for the preservation of good reputations at the expense of certain aspects of free speech. The conflict between these two vital interests in society rages through every defamation case "in which our traditional notions of freedom of expression have collided violently with sympathy for the victim traduced and indignation at the maligning tongue." ALLEN M. LINDEN, CANADIAN TORT LAW 627 (4th ed., Butterworths 1988) (quoting PROSSER AND KEETON ON THE LAW OF TORTS 772 (5th ed. 1984)). Foreseeing the potential the technological advances in the arena of traditional defamation principles, Justice Linden observed that "[t]he problems in this area have been exacerbated by . . . the explosion in the technological sophistication of mass communication." *Id.* at 628. See also Smith, *supra* note 6, at 3. For example, a rumor that apparel designer Tommy Hilfiger had made a racist comment "on the *Oprah Winfrey Show* persisted online for many months, despite the fact that Hilfiger had never even appeared on the show, much less uttered a racist statement." *Id.* at 4 (citing Howard Kleinberg, *Destroying Reputations in Cyberspace*, CHATTANOOGA TIMES/FREE PRESS, Apr. 16, 2000, at F4, available in LEXIS, News Database, Curnws File).

61. A prime example of how an anonymous cheap shot can rapidly make a cheap stock is the cybersmear involving Emulex, an electronic company. Following a bogus press release to an online news service posted by a former Internet Wire employee, shares of Emulex initially lost approximately \$2.5 billion in value. See Alex Berenson, *Suspect is Arrested in Fake News Case*, N.Y. TIMES, Sept. 1, 2000, at C1. On August 25, 2000, Emulex investors "got the financial shock of their lives." Ali, *supra* note 54, at B1. A 23 year old Internet Wire employee issued an early morning bogus press release declaring that Emulex's CEO had been fired and that fourth-quarter earnings were made up. See *id.* By 10:33 a.m., Emulex shares spiraled from \$113.06 to less than \$43 per share, a sixty-two percent drop worth more than \$2.52 billion in market value. *Id.*

immediately fell by four percent before the company contacted the SEC and requested that Yahoo! remove the false message. It is apparent, however, that the financial message boards constitute an important avenue for public discourse and even fair criticism.⁶² At a minimum, financial message boards and chat rooms educate both investors and non-investors about the nature of the stock market and the behavior of a particular corporation.⁶³ Furthermore, it appears that financial message boards and the stock market share an almost mutually beneficial symbiotic relationship.⁶⁴ The problem, therefore, does not lie in the message boards, but rather with striking a balance between the preservation of free speech and the right of corporations to preserve their reputations.

III. SEARCHING FOR SMEAR: USING THE DISCOVERY PROCESS TO IDENTIFY JOHN DOE

Although the most profound affect of the Internet appears to be the ability to speak anonymously, "it also increases the capacity to listen."⁶⁵ As technology continues to improve, companies are becoming increasingly able to regulate defamatory communication.⁶⁶ Surprisingly, for companies

62. See Lidsky, *supra* note 23, at 900.

63. *Id.*

64. The explosion of increased number of investors which is largely attributed to the Internet, is itself largely attributable to the rapid growth in interest and participation created by financial message boards. See CHRISTOPHER A. FARRELL, DAY TRADE ONLINE 2 (1999) (arguing that "the Internet has changed the very landscape of investing Trading stocks has never been cheaper or more accessible.").

65. See Smith, *supra* note 6, at 4 (describing how corporations use the Internet to "visit the same sites where their employees, investors, and customers vent their candid thoughts."). While the Internet provides an unprecedented opportunity to speak anonymously, it also creates an unprecedented opportunity to monitor every speaker and discover the anonymous Internet user's identity. See Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 504-05 (1999) (describing how the technology of the Internet is capable of monitoring Internet speakers because their communications leave behind an electronic footprint which can be easily traced back to the original sender). Thus, it appears that Internet anonymity may be more of a perception than a reality, causing some to question whether additional technological protections should be implemented to ensure online anonymous speech. See, e.g., David G. Post, *Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. CHI. LEGAL F. 139.

66. See *id.*; see also Lorek, *supra* note 18 (quoting Christopher Reeder, a lawyer at Kaye Scholer's Los Angeles office, as stating: "'People need to realize when they do the online posting bashing of a company that they can be caught pretty easily.'). Concerned about the negative effects of cybersmears, many corporations have sought assistance from both law and public relations firms in an effort to monitor Internet message boards for disparaging information regarding their company. Alternatively, other companies have decided that rather than attempting to combat the cybersmear, to instead try to control it by registering domain names for containing the words "sucks," "ihate," or "isnotfair," and have essentially provide a controlled forum for criticism. See, e.g., Smith, *supra*

seeking to eradicate online defamation, the Internet provides features that permit accountability for such messages.⁶⁷

Typically, Internet service providers (“ISPs”), online message boards, and financial news chat rooms require that individuals who wish to participate in the discourse through their service to provide their name and e-mail address.⁶⁸ In addition, at the time of registration, Internet users must agree to the particular provider’s terms of service.⁶⁹ Because online communication usually requires initial registration “with an Internet service provider or an operator of an online message board, a corporation that wishes to identify an anonymous online speaker can bring a lawsuit and seek to subpoena” the speaker’s identity from the provider.⁷⁰

Victims of this new form of defamation who have subsequently sought to obtain the identity of anonymous Internet posters “have come to expect prompt compliance from most online service providers, that now regularly employ individuals engaged in responding to subpoenas.”⁷¹ In seeking to quash the subpoenas, however, courts have become increasingly receptive to the argument that the Doe defendant’s online anonymity may be constitutionally protected under the First Amendment.⁷² The gravamen of

note 6, at 4 (providing the example of “www.walmartsucks.com.”).

67. See *id.* Routinely, “speech in cyberspace leaves an electronic identifier that, in many instances, can be readily traced back to its source.” *Id.* at 5

68. *Id.* at 6.

69. For example, Yahoo!’s terms of service prohibit speech that is “unlawful, harmful, threatening, abusive, harassing, tortious, defamatory, vulgar, obscene, libelous” YAHOO! TERMS OF SERVICE, available at <http://docs.yahoo.com/info/terms> (last visited Jan. 24, 2001). Similarly, America Online’s rules of user conduct prohibit speech that is “unlawful, threatening, abusive, harassing, defamatory, libelous, deceptive, fraudulent . . . tortious” and that which is “invasive of another’s privacy, . . . [or] victimizes, harasses, degrades, or intimidates an individual or group of individuals.” AOL.COM RULES OF USER CONDUCT, available at <http://www.aol.com/copyright/rules.htm> (last visited Jan. 24, 2001). Although these institutional safeguards designed to prohibit defamatory speech are posted, the proliferation of cybersmear suits suggests that they are largely ineffective. See Smith, *supra* note 6, at 8 (recognizing that “the possibility of a self-regulated idyll, if ever such an idyll were possible, has long since passed.”).

70. See *id.* at 5. “Although most online providers agree to protect the privacy of their subscribers, the applicable service terms and privacy policies usually permit the provider to disclose subscriber information in response to a subpoena duces tecum.” *Id.* at 6.

71. *Id.*; see also Sobel, *supra* note 14, at 22 n.36 (noting that John Doe defendants do not have the option of appearing pro se for two reasons. First, a personal appearance would obviously negate a defendant’s efforts to conceal his or her identity. Second, suits against John Does are frequently filed in jurisdictions distant to the defendants. As a result, anonymous defendants who wish to protect their identities are compelled to incur the expense of retaining counsel to represent them (assuming they are able to locate counsel in a distant jurisdiction on short notice)).

72. Amicus briefs filed on behalf of Doe defendants by public interest organizations have vigorously argued that online anonymity is entitled to protected under the First Amendment. See, e.g., Mem. of Public as Amicus Curiae in Opp’n to the Requested Disc., Dendrite Int’l, Inc. v. John Does 1-4, (N.J. Super. Ct) (No. MRSC-129), available at <http://www.citizen.org/litigation/briefs/dendrite.htm> (last visited Jan. 20, 2001) (arguing that “[i]t is well established that the First Amendment protects the right to speak anonymously.”); Def.’s Mem. in Opp’n to Mot. for Prelim. Inj. and in Supp. of Mot. to Dismiss, ServiceMaster Co. v. Virga, (W.D. Tenn) (No. 99-2866-TUV), available at <http://www.citizen.org/litigation/briefs/virga.htm> (last visited Jan. 20, 2001) (arguing that an alleged cybersmearer’s “consumer commentary is protected

these arguments have relied heavily on the 1995 decision of *McIntyre v. Ohio Election Commission*, in which Justice Stevens stated 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.”⁷³

Distinguishable from the content of cybersmear cases, *McIntyre* involved political speech in the form of anonymous campaign literature distribution.⁷⁴ Several courts, however, applying *McIntyre* to issues more analogous to tort cases, have held that limitations of anonymous online speech constitute a content-based restriction that is subject to a strict scrutiny analysis.⁷⁵ Because “compelled identification of anonymous speakers trenches on their First Amendment right to remain anonymous,” attorneys representing alleged cybersmearers have argued that divulging the identities of Doe defendants should only occur where “disclosure ‘goes to the heart’” of the company’s case, when all other elements of the cause of action can be established, and when the company “has exhausted all other means” of proving the element for which disclosure is deemed necessary.⁷⁶

The argument that a cybersmearer’s identity should only be disclosed when absolutely necessary to the pending litigation appears to be in accord with the United States District Court for the Northern District of California

by the First Amendment.”).

73. *McIntyre v. Ohio Election Comm’n*, 514 U.S. 334, 342 (1995). “Although ‘[s]peech about commercial or economic matters’ takes a back seat to political speech in the First Amendment hierarchy, the Supreme Court has nonetheless acknowledged that economic speech is ‘an important part of our public discourse.’” Lidsky, *supra* note 23, at 946 n.301 (quoting *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 787 (1985) (Brennan, J., dissenting)).

74. *See McIntyre*, 514 U.S. at 342-43.

75. *See, e.g., Am. KKK v. City of Goshen*, 50 F. Supp. 2d 835, 842 (N.D. Ind. 1999) (reasoning that limiting anonymity “is a direct regulation of the content of speech or expression.”); *ACLU v. Miller*, 977 F. Supp. 1228, 1233 (N.D. Ga. 1997) (striking down a statute that attempt to prohibit Internet users from “falsely identifying” as an impermissible content based regulation).

76. Smith, *supra* note 6, at 6 (quoting Mem. of Public Citizen as Amicus Curiae in Opp’n to the Requested Disc., *Dendrite Int’l Inc. v. John Does Nos. 1 through 4*, (No. MRSC-129-00) (N.J. Super.Ct.), available at <http://www.citizen.org/litigation/briefs/1stAmendment/articles.cfm?ID=1859> (last visited Feb. 19, 2002). It is important to note that a court order, even when it is issued at the behest of a private party, constitutes a state action that is subject to First Amendment limitations and constitutional analysis. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964). In situations where a court order to compel production of a person’s identity may threaten the exercise of fundamental rights, those protected under the First Amendment, are “subject to the closest scrutiny.” *NAACP v. Alabama*, 357 U.S. 449, 461 (1958). *See also Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). The Court has recognized “that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action,” such as requiring disclosure of an Internet user’s anonymous identity. *NAACP*, 357 U.S. at 461. Moreover, due process requires a showing of a “subordinating interest” which “must be compelling” where compelled disclosure threatens to significantly impair fundamental rights. *Id.* at 463 (citation omitted). *See also Bates*, 361 U.S. at 525.

in *Columbia Ins. Co. v. Seescandy.com*⁷⁷ resolution of the issue. In *Seescandy.com*, the district court observed that “limiting principles should apply to the determination of whether discovery to uncover the identity of a defendant is warranted” or merely intended “to harass or intimidate.”⁷⁸ In order to make this determination, the court established a four-part test requiring a plaintiff to: (1) “identify the missing party with sufficient specificity;” (2) “identify all previous steps taken to locate the elusive defendant;” (3) “establish to the court’s satisfaction that plaintiff’s suit against defendant could withstand a motion to dismiss;”⁷⁹ and (4) submit “a statement of reasons justifying the specific discovery requested.”⁸⁰

Similarly, other courts have departed from more traditional principles and have attempted to reach solutions using the same technology that gave rise to the controversy. For example, a New Jersey state court required “a corporate plaintiff to post notice of its suit on a Yahoo! message board to provide the alleged cybersmearers with the opportunity to oppose identification.”⁸¹ Despite these innovative judicial measures designed to strike a balance between preserving anonymity in the realm of free speech against the right to pursue a legitimate cause of action, at least where the

77. 185 F.R.D. 573 (N.D. Cal. 1999).

78. *Id.* at 578.

79. *Id.* at 578-80. Several courts have required that before production of the cybersmearer’s identity is appropriate, the plaintiff must file a cause of action that is sufficient to withstand a motion to dismiss. *See, e.g., In re Subpoena Duces Tecum to America Online Inc.*, Misc. Law No. 40570 (Va. Cir. Ct., 2000) (noting that “before a court abridges the First Amendment right of a person to communicate anonymously on the Internet, a showing, sufficient to enable the court to determine that a true, rather than perceived, cause of action may exist, must be made.”); *Quad Graphics, Inc. v. S. Adirondack Library Sys.*, 664 N.Y.S.2d 225 (N.Y. Sup. Ct., 1997) (refusing to compel disclosure of anonymous library Internet users where no complaint had yet been filed).

80. *Seescandy.com.*, 185 F.R.D. at 580. The innovative district court decision in *Seescandy.com* appears to have evolved out of series of related federal cases involving unmasking individuals engaged in anonymous discourse. Consistently, even prior to *Seescandy.com*, courts have applied a three-pronged test in determining whether compelled disclosure revealing an anonymous source is appropriate, under which the party seeking the identity must show: (1) that the issue on the material is not only relevant, but goes to the heart of the case; (2) that disclosure is necessary; and (3) all other means of discovery have been exhausted. *See, e.g., Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972); *Richards of Rockford, Inc. v. Pac. Gas & Elec. Co.*, 71 F.R.D. 388 (N.D. Cal. 1976). Further, if the plaintiff fails to come forth with sufficient evidence to prevail on all elements of its case that are based upon information within its control, or where it is not necessary to identify the defendants, there is really no need to unmask a John Doe. *See, e.g., Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 587 (1st Cir. 1980); *Southwell v. S. Poverty Law Ctr.*, 949 F. Supp. 1303, 1311 (W.D. Mich. 1996). Some courts have actually gone further than *Seescandy.com* and required that the party seeking discovery information that is protected by the First Amendment will, in fact, help its case. *See, e.g., In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 6-9 (2d Cir. 1982); *Pac. Gas & Elec.*, 71 F.R.D. at 390-91; *Cervantes*, 464 F.2d at 994 (stating that “[m]ere speculation or conjecture about the fruits of such examination simply will not suffice.”).

81. Smith, *supra* note 6, at 7. (citing Mem. of Public Citizen as Amicus Curiae in Opp’n to the Requested Disc., (stating “Public Citizen commends the Court for its sua sponte decision requiring the plaintiff to publish a notice on the Yahoo message boards . . . thus giving the anonymous posters an opportunity to appear before this Court to defend their right to anonymity.”)).

corporate plaintiff's sole motive is to merely unmask an anonymous critic as a scare tactic to quell continued criticism, the potential for abuse of the discovery process nevertheless appears to exist.⁸²

IV. HOW CHEAP SHOTS CAN MAKE CHEAP STOCKS

In just the past few years, more than one hundred defamation lawsuits alleging a "corporate cybersmear" have been filed in federal and state courts.⁸³ In one of the many recent cases, the chairman of Talk Visual Corporation settled a suit against an anonymous Internet critic, who had posted false statements accusing the company's chairman of engaging in fraudulent stock transactions, while using the alias "Rico Staris."⁸⁴ Pursuant to the settlement agreement, the company's chairman "agreed not to enforce the judgment as long as . . . [the cybersmearer] did not 'attack him or his businesses further.'"⁸⁵

A. *HealthSouth v. Krum: Exposing "IAMDIRKDIGGLER"*

In *HealthSouth Corp. v. John Doe*,⁸⁶ which became *HealthSouth Corp. v. Krum* after the identity of the defendant was revealed,⁸⁷ a former employee of the publicly traded corporation engaged in a relentless cybersmear campaign against HealthSouth, its CEO, and even the CEO's wife, on a Yahoo! finance message board, using the pseudoname "I AM DIRK

82. See, e.g., David Boies, *The Chilling Effect of Libel Defamation Costs: The Problem and Possible Solution*, 39 ST. LOUIS U. L.J. 1207, 1210 (1995).

(Lawsuits do not exist to provide discovery for its own sake (or to provide grist for publicity mills), or to punish (fair or unfair) by imposing the expense and disruption of litigations, or even to provide an outlet for somebody's dissatisfaction with criticism. Lawsuits are to vindicate a legal right.).

83. See *Corporate Cybersmear Lawsuits*, CYBER SECURITIES LAW, at http://www.cybersecuritieslaw.com/lawsuits/cases_corporate_cybersmears.htm (last visited Jan. 19, 2001) (listing and providing links to over one hundred "corporate cybersmear" cases).

84. Smith, *supra* note 6, at 5 (citing *Talk Visual Chairman Michael J. Zwebner Obtains a Second Lawsuit Award of \$1 Million Against Internet Poster*, BUS. WIRE, July 25, 2000, available in LEXIS, News Library, Curnws File; *Settlement Ends Litigation over Anonymous Internet Messages*, 6.11 EPIC ALERT (Electronic Information Privacy Ctr. (July 15, 1999)), available at http://www.epic.org/alert/EPIC_Alert_6.11.html (last visited Feb. 19, 2002). See also *Zwebner v. Dumont, Dobry* (a/k/a "Pugs" and "Spider Valdez"), *Shepard* (a/k/a "Rico Staris"), et al., Civ. No. 98-CV-682-M (D. N.H., complaint filed Dec. 10, 1998).

85. Smith, *supra* note 6, at 5.

86. Lidsky, *supra* note 23, at 866 (citing *HealthSouth Files Libel Suit for Statements Made on Web*, SUNDAY PATRIOT-NEWS, Nov. 1, 1998, at B5).

87. *Id.* (citing *Compl., HealthSouth Corp. v. Krum*, No. 98-2812 (Pa. C.P. Centre County, filed Oct. 28, 1998)).

DIGGLER.”⁸⁸ The messages “ranged from relatively innocuous statements about HealthSouth’s ‘self-serving’ management to accusations that” the CEO “was bilking Medicare reimbursement.”⁸⁹

The most egregious and bizarre postings, however, were smears detailing a nonexistent affair that “I AM DIRK DIGGLER” proclaimed to be having with the wife of HealthSouth’s CEO. For example, one posted message read, “I am dirk diggler and I have what [HealthSouth’s CEO] wants. Too bad I keep giving it to his new wife . . . for those of you who disapprove of my crowing about sexual liaisons . . . lighten up. I am practicing safe sex.”⁹⁰ The cybersmears prompted HealthSouth to file a lawsuit for libel and commercial disparagement, and its CEO and his wife to sue for libel and intentional infliction of emotional distress.⁹¹

B. “No Doubt the stock will plunge . . . Time to consider a major class action suit.”

In addition, M.H. Meyerson, a brokerage firm located in New Jersey, recently sued alleged cybersmearers for posting defamatory messages regarding “the company’s CEO in an attempt to drive down the price of the stock.”⁹² Similarly, “Carnegie International, a Maryland-based telecommunications company, is seeking \$1.1 billion in damages, claiming that [cybersmearers] posted defamatory messages about its executives Comments, such as, ‘No doubt the stock will plunge . . . and ‘time to consider a major class action suit, . . . ‘“ to drive down the stock price and spark a lawsuit by shareholders.”⁹³

88. *Id.* at 866-67 (citations omitted).

89. *Id.* at 867 (quoting Compl., HealthSouth Corp. v. Krum, No. 98-2812 (Pa. C.P. Centre County, filed Oct. 28, 1998, at ¶ 13)).

90. *Id.* (quoting Compl., HealthSouth Corp. v. Krum, No. 98-2812 (Pa. C.P. Centre County, filed Oct. 28, 1998, at ¶ 13)).

91. *Id.* Lidsky concedes that these cybersmears “were at least facially defamatory,” however questions what the large corporation and its millionaire CEO stood to gain by filing suit against Krum who was currently a food service worker at Penn. State University earning less than \$35,000 per year. *See id.* at 867-68 (arguing that “it is not entirely clear what HealthSouth stood to gain by suing him.”). The logical answer to this question is simply that the corporation, its CEO, and his wife, wanted the smears to stop. *Id.* at 876 (recognizing that “[p]laintiffs often seek vindication, and bringing suit provides a means—perhaps the only means available—to announce to the world that the defendant’s statements were false” or they “may be seeking an even simpler goal: they may just want the defamation to stop, and a defamation suit is the only legal tool available to accomplish this goal.”).

92. Elkin, *supra* note 17, at 25. Meyerson claimed that posted messages, such as “money-laundering scums” and “I will cautiously short the stock,” caused the company’s stock to plummet “from \$21 per share to \$4.50 per share amidst the post-message traffic.” *Id.*

93. *Id.* at 26 (asserting that in many cases “perception is reality” and that companies should attempt to reduce the risks that such rumors, falsehoods and innuendoes will rear their ugly heads).

C. *Southern Pacific Trading Corp.*

Another recent company that has fallen victim to the corporate cybersmear is Southern Pacific Funding Corporation.⁹⁴ Southern Pacific was forced to file Chapter 11 on Oct. 1, 1998, after its stock fell from more than \$17 per share to less than \$1 per share after a series of false accusations were posted on the company's Yahoo! Finance message board.⁹⁵ The posted messages alleged that the corporation's executives were covering up a multimillion dollar embezzlement, borrowing money from shareholders at high interest rates, exaggerating earning forecasts, and even purported that the company was for sale.⁹⁶

D. *"The buyout deals do not work."*

In 1998, PhyCor, a publicly traded physician management corporation, filed a libel action against fifty Doe defendants for cybersmears posted on a Yahoo! Finance board.⁹⁷ Of the more than eleven thousand posted statements regarding the company, the alleged cybersmears contained both elements of absurdity ("PhyCor is going to murder me!") and apparent insight regarding confidential information ("Problem in a nutshell: The buyout deals do not work . . .").⁹⁸ Additionally, many of the posters claimed to be current or former PhyCor physicians.⁹⁹ PhyCor alleged that the defamatory statements caused its stock to drop dramatically.¹⁰⁰ In fact, PhyCor's stock fell from a high of \$41.75 per share in 1996, around the time when the smears first began, to \$1.09 per share in December 1999.¹⁰¹

94. DiBiase, *supra* note 9, at 22.

95. *Id.*

96. *Id.*

97. Lisa M. Nijm, *The Online Message Board Controversy Physicians Hit With Claims of Libel and Insider Trading By Their Employers*, 21 J. LEGAL MED. 223, 224 (2000) (citing Cathy Tokarski, *PhyCor Moves to Uncover Physicians' Online Identities*, AM. MED. NEWS, May 24/31, 1999, at 1).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* In a similar case involving a biotech company, Hollis-Eden Pharmaceuticals, located in San Diego, recently filed suit in San Diego Superior Court alleging that defamatory "slurs hurt its business and reputation." Penni Crabtree, *S.D. Biotech Sues Over Messages on Internet*, SAN DIEGO UNION-TRIB., Feb. 3, 2001, at C3, available at 2001 WL 6440781 (noting that the company's "stock has fallen steadily from a 52-week high of \$19.25 in March to [a recent] closing price of \$5.09."). Likewise, on August 3, 2000, a New Jersey Superior Court granted partial summary judgment in favor of Biomatrix, Inc., a pharmaceutical company that manufactures medical applications, for defamatory postings on the company's Internet message board. *Court Finds Anonymous Online Postings "Libelous"*, 17 COMPUTER & INTERNET L. 31, 31 (2000) (noting that "[t]he defendant's allegedly posted defamatory messages for over of year . . . the messages stated that one of Biomatrix's key officers was a 'Nazi' and that the company's products had killed product users.").

E. AgriBiotech, Inc.

In a similar case, Nevada-based AgriBioTech, Inc., fell victim to an online defamation campaign claiming that the company was on the verge of bankruptcy and one its co-founders was about to be indicted for accounting fraud.¹⁰² Despite strong enthusiasm from market analysts, the cyber-gossip posted on the company's Yahoo! Finance message board sparked an immediate drop in AgriBioTech's stock from \$29.50 per share to less than \$9.75 per share.¹⁰³

F. Contact Judy Gilbert of the Stock Exchange Commission

Perhaps the most ridiculous and humorous, absent its consequences, of all corporate cybersmears involved the Diana Corporation. On May 30, 1996, an anonymous defamer posted a message on America Online's The Motley Fool chat room seeking "anyone willing to 'cooperate with an inquiry into possible violations of federal laws by [Diana Corporation insiders or affiliates] using the Internet for stock manipulation purposes.'"¹⁰⁴ Although such a commission did not exist, the message board post said to contact Judy Gilbert of the Stock Exchange Commission's investigative commission.¹⁰⁵ Despite the ridiculous message board posting, Diana Corp.'s stock plummeted, and, by March 6, 1997, had fallen from \$115 per share to \$6 and 1/8 per share.¹⁰⁶

All indications suggest that these types of lawsuits will continue to increase.¹⁰⁷ Since June of 1997, victims of corporate cybersmear have "filed one to two lawsuits per week in Santa Clara County, California, where Yahoo! Inc. is based."¹⁰⁸ In addition, investor bulletin boards are being

102. Nijm, *supra* note 97, at 226.

103. See Blake A. Bell, *Dealing with False Internet Rumors: A Corporate Primer*, 2 (No. 7) WALLSTREETLAWYER.COM: SEC. ELEC. AGE, Dec. 1998, at 1; see also Bell, *supra* note 8 (observing that "the AgriBioTech demonstrates Internet rumors can raise serious issue for companies and their investor relations personnel."). Despite the damage that cybersmear has the ability to cause, occasionally there is a humorous element. See *id.* "For example, a rumor that recently circulated throughout the Internet suggested that Nike would replace old sneakers collected and forwarded to the company by schools." *Id.* "Although it was false, the rumor prompted the return of nearly 7,000 pairs of smelly shoes to Nike's headquarters!" *Id.*

104. Richard Gibson & Drew Ward, *Cyberspace War Rages Over Diana Corp.'s Technology*, WALL ST. J., July 1, 1996, at B4.

105. *Id.*

106. See Larry Bauman, *Small Stock Focus*, WALL ST. J., Mar. 7, 1997, at C7.

107. Nijm, *supra* note 97, at 228. In a similar cybersmear case involving biotech companies, Genzyme Corp. and Biomatrix, Inc. became the targets of a massive cybersmear campaign following an announced acquisition. See Walsh, *supra* note 59. Online critics posted over sixteen thousand derogatory messages smearing Biomatrix, some even claiming that Biomatrix's leading product actually killed patients. *Id.* Illustrative of a prevalent problem in cybersmearing, after the messages were posted Biomatrix contacted Yahoo! to have the false statements removed. However, each time the anonymous posters would simply re-enter the message board under a different pseudonym. *Id.*

108. Nijm, *supra* note 97, at 228. See also Epic Alert 6.06 (Electronic Privacy Information

served with “subpoenas arising out of John Doe suits at the rate of about one a day.”¹⁰⁹ “Some estimate that there are actually ‘hundreds of these lawsuits and only a few get publicized.’”¹¹⁰

V. USING TORT LAW TO DETER DEFAMATION ON THE INTERNET

Companies that have sought to reveal the anonymous Internet users and sue them for their false online messages have attempted to apply a variety of legal theories to find liability, however, because many of these suits are simply intended to stop the spread of the smear, few cases have been litigated to a final judgment.¹¹¹ Thus, it remains unclear which theories of liability will ultimately prove most successful. However, “[c]orporations have increasingly used defamation suits as an offensive weapon” in their efforts to combat the online comments of a defamatory critic.¹¹²

Center), Apr. 22, 1999, at http://www.epic.org/alert/EPIC_Alert_6.06/html (last visited Feb. 19, 2002) (discussing the statement of a Lycos spokesperson who stated that the provider receives subpoenas on “pretty close to a regular basis.”).

109. Nijm, *supra* note 97, at 228.

110. *Id.* In one relatively unpublicized case, Quest Net Corp., a large regional wireless Internet provider, filed a cybersmear suit against a number of anonymous Internet users who had posted a series of defamatory remarks on the Raging Bull Bulletin Board. *Quest Net Granted Another Injunction in Cybersmear Lawsuit*, BUS. WIRE, May 8, 2000, available at LEXIS, News Library, BWIRE File.. Quest Net alleged that the posters, using the aliases “jollyr,” “ADVISORY,” “Cats3,” and “gman007,” had made numerous defamatory and disparaging remarks about the company and its chairman. *Id.* The cybersmeas ranged from personal attacks, bashing of the company’s products, uncertain earnings forecasts, and allegations that the company’s filing with the SEC was suspect. *See id.* According to Quest Net’s president, the court granted a permanent injunction that enjoined one of the defendants from using the “jollyr” alias to publish any future defamatory statements concerning the company or its current and former officers, directors, and employees. *Id.* Interestingly, however, the injunction did not appear to restrain “jollyr” from publishing any comments under a different user name. *See id.*

111. Smith, *supra* note 6, at 5 (recognizing that “many cybersmearing cases are dismissed or settled once the company identifies the anonymous speaker.”). According to Bill Weisberg, an attorney at Reed Smith, “[a]bout 98 percent of the cases settle out of court.” Lorek, *supra* note 18. Frequently, the primary motivation for companies in filing suit against an anonymous cybersmearer is simply to obtain the identity of the speaker through the use of a subpoena, rather than pursuing the cause of action to a final judgment. *See* Smith, *supra* note 6, at 5.

112. D. Mark Jackson, *The Corporate Defamation Plaintiff in the Era of SLAPPS: Revisiting New York Times v. Sullivan*, 9 WM. & MARY BILL RTS. J. 491, 491-92 (2001) (articulating that “[d]efamation involves a conflict. While the freedom to speak is an essential principle of personal liberty, defamation law seeks to remedy the reputational injuries resulting from speech The defamation suit has become a tool to ward off public criticism.”).

A. *The Emergent Tort of Cyber-Libel*

"In cyberspace, the power to defame is unprecedented."¹¹³ Thus, it is not surprising that libel is the most common cause of action alleged in corporate cybersmear cases.¹¹⁴ Within the past year, several companies have filed cybersmear suits predicated upon online libel. In July of 2000, Credit Suisse First Boston filed a lawsuit seeking one million dollars in damages as a result of libelous statements regarding an analyst that were posted on the web by eleven anonymous cybersmearers.¹¹⁵ Similarly, in February 2000, following a series of anonymous defamatory postings on the Raging Bull financial bulletin board, Quest Net Corporation sued four cybersmearers that were responsible for a barrage of false messages.¹¹⁶

B. *Who Can Be Liable For Online Libel?*

Initially, it may seem strange that the victims of corporate cybersmear choose to sue John Doe, who would likely be unable to pay damages if a judgment was reached, rather than the wealthier ISP or online news boards.¹¹⁷ This phenomenon, however, occurs partly due to preference and partly due to necessity. As a matter of preference, for many companies, the primary goal in filing a cybersmear suit is simply to send a message aimed at curtailing continued false postings.¹¹⁸ In addition, Congress and subsequent court decisions have severely limited the ability to seek the comparatively deeper-pocketed defendants.¹¹⁹

113. Bruce W. Sanford & Michael J. Lorenger, *Teaching an Old Dog New Tricks: The First Amendment in an Online World*, 28 CONN. L. REV. 1137, 1154 (1996); see also Craig Martin, Tolofson and Flames in Cyberspace: *The Changing Landscape of Multistate Defamation*, 31 U. B.C. L. REV. 127, 127-28 (1997) (arguing that "to say that libel and slander are rampant on the Internet would be an understatement.").

114. See Sanford & Lorenger, *supra* note 113, at 1154; see also Nijm, *supra* note 97, at 230 (noting that "'cyberlibel' . . . ranks as one of the most frequent claims made by publicly traded corporations against anonymous posters.").

115. Smith, *supra* note 6, at 5.

116. See *supra* note 110 and accompanying text.

117. See Smith, *supra* note 6, at 6. Instead, many smeared companies have "tended to view Internet service providers and operators of online message boards as allies rather than adversaries." *Id.* See also Norman Redlich, *The Publicly Held Corporation as Defamation Plaintiff*, 39 ST. LOUIS U. L.J. 1167, 1167-68 (noting that unlike traditional defamation plaintiffs who sue for psychological or emotional satisfaction, corporations tend to bring defamation suits for business reasons).

118. See Lidsky, *supra* note 23, at 858-60 (observing that "[o]ne of the most striking features of these new cases, is that, unlike most libel suits, they are not even arguably about recovering money damages, for the typical John Doe has neither deep pockets nor libel insurance from which to satisfy a defamation judgment."). Lidsky argues that "[t]he sudden surge of John Doe suits stems from the fact that many defamation actions are not really about money" [because] "[i]f they were, the tremendous obstacles to recovery would almost certainly make plaintiffs (and their lawyers) conclude that the game was not worth the candle." *Id.* at 872. Instead, Lidsky suggests that "libel plaintiffs often sue because they believe that the social and psychological benefits of suing make it worthwhile, even if they never recover a money judgment from the defamer." *Id.* at 876.

119. See *infra* text accompanying notes 145-61.

1. Why Corporations Prefer to Sue John Doe: Hitsgalore.com and Silencing “Mr. Pink.”

Frequently in cases based on corporate cybersmear, there is a symbolic aspect in bringing a defamation claim.¹²⁰ As one commentator has suggested there may be a variety of reasons why companies prefer to sue John Doe, however, the primary goal appears to be simply to repair the damage that has been done.¹²¹ Moreover, as Professor Lidsky insightfully observed:

Although corporations that sue John Doe may never recover money damages, they still deem it economically rational to sue the pseudonymous posters who make negative comments about them on financial message boards. Corporate plaintiffs are at least partly motivated by the fear that negative comments on financial bulletin boards will drive down their stock price. The stock market trades on information, and negative information shifts stock prices very quickly. Hence, corporations must act quickly to offset the potentially negative effects of defamatory messages by offering an alternative version of events. Indeed, failure to respond may itself be deemed an admission that the negative statements are true.¹²²

The corporate cybersmear case involving Hitsgalore.com is particularly illustrative of this phenomenon.¹²³ On May 10, 1999, Hitsgalore’s stock was selling at \$20.69 per share.¹²⁴ However, on May 11, 1999, Bloomberg News service “reported, apparently truthfully, that a principal shareholder and ‘founder’” of the company may be facing charges from the Federal Trade Commission (“FTC”) for false and deceptive promises that he had made to a

120. See Lidsky, *supra* note 23, at 877 (adding that in some cases there might also be a profit motive); see also Boies, *supra* note 82, at 1208 (noting that “[o]ne of the things that distinguishes defamation litigation from most commercial litigation is the extent to which noneconomic motives (i.e., motives other than to receive compensation for economic loss caused by the alleged breach of duty) are operative.”).

121. See Arlen W. Langvardt, *Section 43(a), Commercial Falsehood, and the First Amendment: A Proposed Framework*, 78 MINN. L. REV. 309, 310 (1993) (observing that “[b]usiness entities have become increasingly inclined in recent years to institute litigation as a means of vindicating corporate reputation or economic interests when false statements have been made about their products, services, or commercial activities.”).

122. Lidsky, *supra* note 23, at 877 (internal citations omitted).

123. See *id.* at 878 (citing Compl., Hitsgalore.com, Inc. v. Shell, No. 99-1387-CIV-T-26C (M.D. Fla. filed June 1999) [hereinafter “Complaint”]).

124. See *id.* at 879 (citing Don Benson, *Hitsgalore.com Searches for New Life After Setbacks*, BUS. PRESS, June 7, 1999, at 7). Hitsgalore.com had recently experienced a market value increase “from \$53 million to \$1 billion in less than three months.” *Id.*

previous Internet company he was affiliated with.¹²⁵ The report perhaps incorrectly implied, however, “that Hitsgalore.com had improperly failed to disclose the FTC case to the Securities and Exchange Commission (“SEC”).”¹²⁶

The report sent shockwaves throughout the online financial bulletin board community.¹²⁷ Angry online investors posted messages calling the company’s officers “crooks,” “criminals,” and “con men.”¹²⁸ “One poster, ‘Mr. Pink,’ stated that ‘these crooks belong in Jail!’ and even dared Hitsgalore.com to sue him [by stating]: [n]o disclaimer, this is not opinion but a fact and if company doesn’t like it, please sue Him; discovery will be a treat!”¹²⁹

Hitsgalore.com promptly accepted “Mr. Pink’s” offer by filing suit against him and one hundred other Doe defendants seeking \$20 million in damages for “libel, tortious interference, and a civil conspiracy to defame” the company and send its stock “into a downward spiral.”¹³⁰ Adding insult to injury, in addition to the \$20 million in compensatory damages for the seventy-five percent plunge in its stock price, Hitsgalore.com requested removal of the defamatory messages from the bulletin boards and sought injunctive relief prohibiting future postings of a similar nature.¹³¹

Although there may be some financial incentive for corporations in filing these suits against an anonymous critic, “[s]uing John Doe may also be a victory if it silences John Doe.”¹³² Furthermore, the mere threat of revealing the culprit’s anonymous identity may be sufficient to ensure that no further defamatory messages are posted.¹³³

125. *Id.* (citing Complaint, *supra* note 123, at ¶¶ 30-31).

126. *Id.* (citing Complaint, *supra* note 123, at ¶¶ 31-32).

127. *See id.* at 880. “Discussions of the company on the Raging Bull and Silicon Investor bulletin boards . . . took a negative turn.” *Id.*

128. *Id.* (citing Complaint, *supra* note 123, at ¶¶ 39-43).

129. *Id.* (citing Complaint, *supra* note 123, at ¶ 1).

130. *Id.* (citing Complaint, *supra* note 123, at ¶ 64).

131. *Id.* (citing Complaint, *supra* note 123, at ¶ 57). However, “[g]ranted this request would almost certainly violate the First Amendment” as a prior restraint on free speech. *Id.* at 946 n.131 (citing *New York Times v. United States*, 403 U.S. 713, 714 (1971); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 698 (1931)).

132. *Id.* at 880-81. Lidsky articulates a variety of reasons why it is financially wise for smeared companies to file suit:

By announcing its decision to file suit, the company appears to respond aggressively to the Internet rumor-mongers who revel in reports of its demise. Bringing suit sends a message to shareholders and potential investors that they should not believe all the negative information they hear about the company; it quells rumors and takes the focus away from the negative press the company has been receiving - whether true or untrue. Even if the company ultimately decides not to pursue its action past filing a complaint, it may have won a symbolic victory simply by suing John Doe.

Id.

133. “[I]t is perfectly legitimate for plaintiffs to seek to stop an onslaught of offensive and damaging untruths.” *Id.* at 881. In *HealthSouth Corp.*, after obtaining the true identity of “I AM DIRK DIGGLER,” by subpoenaing Yahoo!, the cybersmeared’s cybersmeared ceased. *See* Bob

2. Why Suing John Doe is Necessary: Section 230 of the Communications Decency Act

Most victims of corporate cybersmear “would prefer to sue defendants with deeper pockets than John Does typically have.”¹³⁴ Initially, many companies sought to hold ISPs liable as “publishers”¹³⁵ for the third party Internet user statements posted on their service.¹³⁶ In 1996, however, Congress enacted the Communications Decency Act (“CDA”)¹³⁷ which has “largely foreclosed access to these deep-pocket defendants.”¹³⁸ Under

Cook, *Down and Dirty: PhyCor and Other Companies Sue Anonymous Message Posters for Internet Mudslinging*, MOD. PHYSICIAN, June 1, 1999, at 30.

134. Lidsky, *supra* note 23, at 868 (reasoning that “ISPs are logical targets for defamation suits.”). “Suing the ISP frees plaintiffs from having to discover the identity of the person who posted the message, and ISPs have plenty of money to satisfy defamation judgments.” *Id.* at 868-870 (citing David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147, 174-75 (1997)).

135. At common law, one who “repeats” the defamatory statements of another is equally as liable as the original speaker. *See, e.g.*, *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 60-61 (2d Cir. 1980); RESTATEMENT (SECOND) OF TORTS § 578 (1977). The republication theory of liability, however, is subject to the general principle that the republisher must have taken a “responsible part in the publication.” *Lewis v. Time, Inc.*, 83 F.R.D. 455, 463 (E.D. Cal. 1979), *aff’d*, 710 F.2d 549 (9th Cir. 1983).

136. *See Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), *superseded by* 47 U.S.C. § 230 (1998). In *Stratton Oakmont*, a securities investment firm and its president sued the ISP for libelous statements published on the provider’s financial news bulletin accusing the company of fraudulent acts concerning a recent initial public stock offering. *See id.* at *1 (alleging that the IPO was a “major criminal fraud” and “100% criminal,” that Stratton’s president was “soon to be proven criminal,” and the firm was a “cult of brokers who either lie for a living or get fired.”). The primary issues in *Stratton Oakmont* were whether an ISP constitutes a publisher, for defamation purposes, and whether a bulletin board content moderator acts an agent to the ISP making it vicariously liable. *See id.* Examining the degree of control exercised by the content moderator, the court concluded that the ISP should be treated as a publisher. *See id.* at *5. In reaching this conclusion, the court stressed that the ISP took virtually no affirmative steps to delete the cybersmeas although it had “created an editorial staff of Board Leaders who ha[d] the ability to continually monitor incoming transmissions and in fact d[id] spend time censoring notes.” *Id.* Thus, the court held that although ISPs are generally distributors, the ISP’s “own policies, technology and staffing decisions . . . ha[d] altered the scenario and mandated the finding that it [was] a publisher. *Id.* But *see* *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 140-41 (S.D.N.Y. 1991) (holding that an ISP that exercises relatively little control over an online newsletter in which a defamatory statement is published is not liable as the “publisher” of the third party defamatory statement).

137. 47 U.S.C. § 230.

138. Lidsky, *supra* note 23, at 870 (citing 47 U.S.C. § 230 (Supp. III 1999)). Section 230 is part of Title V (§§501-509) of the Telecommunications Act of 1996. *See* Act of Feb. 8, 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified as amended in 18 U.S.C. and 47 U.S.C.). Congress’ enacting Section 230 was largely a response to *Stratton Oakmont*, which many members of Congress perceived as protecting ISPs that do nothing to regulate the content of communication occurring on their service while immunizing those who make good faith, albeit failed, attempts to moderate the discourse. *See* H.R. CONF. REP. No. 104-458, at 194 (1996), *available in* 1996 U.S.S.C.A.N. 124, 207-08.

Section 230(c)(1) “no provider or user of an interactive computer service¹³⁹ shall be treated as the publisher or speaker of any information provided by another information content provider.”¹⁴⁰

3. *Zeran v. America Online, Inc.*

Subsequent judicial interpretation of Section 230 has further broadened its already expansive scope. For example, in *Blumenthal v. Drudge*,¹⁴¹ the court interpreted Section 230 to mean that Congress had intended to grant immunity to ISPs, even where they “aggressive[ly]. . .mak[e] available content prepared by others.”¹⁴² Analogous to *Drudge*, in *Zeran v. America Online, Inc.*,¹⁴³ the district court interpreting Section 230 held that ISPs are immune from both re-publisher and distributor liability for the third party defamatory statements of Internet users using their service, even if the provider is given notice of the defamatory content.¹⁴⁴

However, at least one prominent scholar has argued that Section 230 does not completely insulate online service providers from damage caused by third party defamation.¹⁴⁵ Rather, it appears that an ISP could possibly be liable under the language of Section 230 for third party cybersmears “where it actually knew that the material posted online was defamatory and failed to take any action, or in very limited circumstances where it failed to act despite reason to know that the material was defamatory.”¹⁴⁶

139. 47 U.S.C. § 230(f)(2)(2000)(defining an “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”).

140. *Id.* at § 230(c)(1). Additionally Section 230(c)(2), in relevant part, provides:

No provider or user of an interactive computer service shall be held liable on account of (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.

141. 992 F. Supp. 44 (D.D.C. 1998).

142. *Id.* at 52.

143. 958 F. Supp. 1124 (E.D. Va. 1997), *aff'd*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 2341 (1998).

144. *Id.* at 1137; *see also* *Doe v. America Online, Inc.*, available at 1997 WL 374223, at *3 (Fla. Cir. Ct. June 26, 1997) (following *Zeran* and concluding that “to hold AOL liable for negligently ‘distributing’ . . . chat room statements, as Doe seeks, would treat AOL as the ‘publisher or speaker’ of those statements in violation of Section 230.”); *cf.* *Godfrey v. Demon Internet Ltd.*, available at 1999 WL 477647 (High Court, United Kingdom March 26, 1999) (applying England’s Defamation Act of 1996 and holding that although an ISP is not the publisher of defamatory statements posted by third party Internet users, the host can still be liable if it knew about the posting and choose not to remove it from its server).

145. *See* Ian C. Ballon, “*Zeran v. AOL: Why the Fourth Circuit Is Wrong*,” J. OF INTERNET L., Mar. 1998, at 6.

146. *Id.* *But see* *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (holding that Section 230 eliminates both republication and distribution liability for OSPs and ISPs).

4. *Lunney v. Prodigy Services Co.*

Even in circumstances where Section 230 might not protect an ISP or online bulletin board operator from liability for third party defamatory statements posted on their service, a recent case suggests that common law may provide protection.¹⁴⁷ In *Lunney v. Prodigy Services Co.*,¹⁴⁸ the father of a boy whose name had been used by an online imposter to post vulgar messages, filed a claim against Prodigy based on the conduct occurring via its service.¹⁴⁹ The New York State Court of Appeals dismissed the case, concluding that Prodigy was entitled to a qualified privilege under the common law, which protected it from liability for the transmitting of the e-mail messages.¹⁵⁰ The court further reasoned that Prodigy was neither “a publisher of the electronic message board messages,” nor was it negligent in failing to screen the messages earlier.¹⁵¹

Therefore, it appears that “the practical effect of these interpretations of section 230 of the CDA is to leave Internet defamation victims with no deep pocket to sue” as any effort to pursue re-publisher or distributor liability against the service provider would likely prove unsuccessful.¹⁵² “Instead, the plaintiff must go to the source and sue the person who originated the defamatory communication, even if that person is an unknown John Doe.”¹⁵³

C. *The Long Road To Proving Defamation In Cyberspace*

“Defamation consists of the ‘twin torts’ of libel and slander.”¹⁵⁴ Traditionally, defamation has been defined as the publication of a false statement of fact that tends to cause injury to one’s reputation in a respectable segment of the community.¹⁵⁵ In order to prevail on a claim predicated upon defamation, a corporate plaintiff must prove: (1) the defendant published a false statement of fact; (2) the statement would tend to cause injury to one’s reputation; (3) the statement reasonably referred to the

147. See Smith, *supra* note 6, at 6.

148. 723 N.E.2d 539 (N.Y. 1999), *cert. denied*, 120 S. Ct. 1832 (2000).

149. *Id.* at 540.

150. See *id.* at 541.

151. *Id.* at 542.

152. Lidsky, *supra* note 23, at 871-72.

153. *Id.* at 872.

154. Jackson, *supra* note 112, at 495.

155. See Nijm, *supra* note 97, at 230 (noting that defamation “includes the torts of libel and slander.”). Libel and slander are generally proscribed by state common law and may also be defined by statute. See, e.g., CAL. CIV. CODE §§ 44, 45, 46 (1999) (stating that “[d]efamation is false and unprivileged statement of fact which is defamatory, about the plaintiff, and published with fault.”).

plaintiff;¹⁵⁶ (4) the statement was published¹⁵⁷ with the requisite degree of fault;¹⁵⁸ and (5) the statement caused injury.¹⁵⁹ The typical cybersmear case, although distinguishable from the average defamation claim because it involves a publicly held corporation suing a John Doe for messages posted on the company's financial message board where the message pertains to anything that might affect the company's stock price, nonetheless must be analyzed pursuant to traditional principles.¹⁶⁰

1. Resolving the Constitutional Questions

At common law, courts considered defamatory statements to be lacking constitutional protection.¹⁶¹ Nevertheless, the common law recognized several areas of speech that were extended constitutional privilege.¹⁶² Building on the common law privilege, the Court in *New York Times v. Sullivan*¹⁶³ sought to strike a balance between the interests of free speech and

156. Although courts have held that the statement must refer to the plaintiff "to a certainty," *Murray v. Bailey*, 613 F. Supp. 1276, 1283 (N.D. Cal. 1985), most courts require only that the plaintiff be "reasonably identifiable." See, e.g., *Church of Scientology of California v. Flynn*, 744 F.2d 694 (9th Cir. 1984).

157. As applied to the Internet, a statement is published where it is posted on a message board or chat room. See Giorgio Bovenzi, *Liability of Systems Operators on the Internet*, 11 BERKELEY TECH. L.J. 93, 119 (1996).

158. A private figure plaintiff must only prove that the defendant published the statement negligently. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-46 (1974). By contrast, a public figure must prove that the defendant published the statement with "actual malice," meaning that the defendant acted with reckless disregard or "entertained serious doubts" as to the truth or falsity of the claim. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964). In such circumstances, actual malice must be proven with "convincing clarity." See *Anderson v. Liberty Lobby*, 477 U.S. 242, 257 (1986).

159. RESTATEMENT (SECOND) OF TORTS §§ 580, 621 (1976). A statement that is substantially true is not actionable. See *Masson v. New Yorker Magazine*, 501 U.S. 496, 516 (1991). In order to be actionable, the statement must expressly or implicitly assert an assertion that is provably false. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990). In determining whether a statement is a statement of opinion, the test is whether the average reader/listener would reasonably understand the statement as a provably false assertion of fact. See *id.* at 20; see also *Partington v. Bugliosi*, 56 F.3d 1147 (9th Cir. 1995); *Baker v. Los Angeles Herald Exam'r*, 42 Cal. 3d 254 (1986), *cert. denied*, 479 U.S. 1032 (1987).

160. Lidsky, *supra* note 23, at 905. For many plaintiff corporations, causation may be the most difficult element to prove. See Nijm, *supra* note 97, at 231-32. Specifically, "[t]he plaintiff corporation must show a causal relationship between the allegedly libelous statements and the professed harm, which, in most cases, is a drop in stock price." *Id.* at 232 (citing Cathy Tokarski, *PhyCor Moves to Uncover Physicians' Online Identities*, AM. MED. NEWS, May 24/31, 1999, at 30). "Given the thousands of anonymous postings (both supportive and critical) found on a financial message board," coupled with the volatility of the stock market, a causal connection may be virtually impossible to establish. *Id.*

161. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (considering defamatory statements to be lacking any constitutional value that fall within a "well-defined and narrowly limited class of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.").

162. Jackson, *supra* note 112, at 496.

163. 376 U.S. 254 (1964).

the strong interest of protecting one's reputation.¹⁶⁴ "In a revolutionary opinion, the United States Supreme Court held that defamatory publications may be entitled to constitutional protection,"¹⁶⁵ reasoning that "libel can claim no talismanic immunity from constitutional limitations."¹⁶⁶ According to the Court, the protection of even defamatory speech was based upon a "profound national commitment" to fostering "uninhibited, robust, and wide-open" public discourse.¹⁶⁷

In defining the scope of constitutional protection to be afforded to Doe defendants in corporate cybersmear cases, a line of Supreme Court decisions have established three pivotal determinations: "(1) Is John Doe entitled to the same level of constitutional protection as a media defendant? (2) Is the corporate plaintiff a public or private figure? and (3) Is the speech at issue a matter of public concern?"¹⁶⁸ The answer to each of these questions boils down to how contemporary online communication conforms to traditional defamation principles, or in the alternative, mandates their modification.¹⁶⁹

a. Cybersmear: Diluting The Already Indeterminate Media/Nonmedia Defendant Distinction

Individual Internet users defy the traditional distinction between media and nonmedia defendants.¹⁷⁰ On one hand, it appears that media defendant status should be afforded to a cybersmearer, because Internet users are

164. *See id.* at 272.

165. Jackson, *supra* note 112, at 497 (citing *Sullivan*, 376 U.S. at 268).

166. *Sullivan*, 376 U.S. at 269.

167. *Id.* at 270-72. The Court further reasoned that the occasional "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Id.* at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

168. Lidsky, *supra* note 23, at 905.

169. *See It's In The Cards v. Fushetto*, 535 N.W.2d 11, 14 (Ct. App. Wisc. 1995). In *Fushetto*, a defamation case involving false messages posted on an Internet bulletin board, the court, noting the difficulty in applying state law that was enacted years prior to this new technology, observed:

The magnitude of computer networks and the consequent communications possibilities were non-existent at the time this statute was enacted. Applying the present libel laws to cyberspace or computer networks entails rewriting statutes that were written to manage physical, printed objects, not computer networks or services. Consequently, it is for the legislature to address the increasingly common phenomenon of libel and defamation on the information superhighway.

Id. (holding that a message posted on an Internet bulletin board is not a publication at regular intervals, unlike a newspaper, and thus the plaintiff was not required to provide the defendant with the opportunity to retract the statement, which is required under Wisconsin state law).

170. *See Michael Hadley, Note, The Gertz Doctrine and Internet Defamation*, 84 VA. L. REV. 477, 487 (1996) (concluding that "most speakers on the Internet could not properly be described as the 'press.'").

similar to mainstream media defendants, and because the Internet, like traditional forms of media, has the ability to reach such a massive audience.¹⁷¹

The Supreme Court, however, has traditionally applied media defendant protection under the First Amendment exclusively to institutional forms of media such as newspaper publishers and broadcasters.¹⁷² Thus, although it is unlikely that Internet users like John Doe would be considered traditional media defendants, the issue of whether Internet users should be afforded the same level of constitutional protection under the First Amendment, as their more mainstream media counterparts, remains unresolved.¹⁷³ The “best educated guess,”¹⁷⁴ however, of both scholars¹⁷⁵ and lower court opinions, indicates that nonmedia and media defendants are entitled to an equal level of constitutional protection for defamatory statements.¹⁷⁶

Given the practical implications of online speech, however, the distinction becomes rather irrelevant because, as the Court noted in *Branzburg v. Hayes*,¹⁷⁷ the “lonely pamphleteer’s” impact to public discourse can rival even the most powerful of all media speakers.¹⁷⁸ Moreover, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,¹⁷⁹ the majority of the Court seemingly rejected the media/nonmedia distinction altogether.¹⁸⁰ Thus,

171. Lidsky, *supra* note 23, at 905.

172. *See, e.g.*, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) (applying the media defendant to a newspaper publisher); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (analyzing a newspaper publisher under the media defendant standard of constitutional protection); *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974) (limiting the media defendant standard exclusively to publishers and broadcasters).

173. *See* Lidsky, *supra* note 23, at 906 (arguing “[t]he Supreme Court has studiously avoided providing a definitive resolution to this question . . .”).

174. *See* Rodney A. Smolla, *Dun & Bradstreet, Hepps, and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, 1564 (1987) (arguing that “[t]he best educated guess . . . is that the Court will ultimately reject the media/nonmedia distinction.”).

175. *See, e.g.*, *Developments in the Law - The Long Arm of Cyber-Reach*, 112 HARV. L. REV. 1610, 1616 n.50 (1998) (recognizing that “[a]lthough guilty of giving mixed signals,” the Court has “confirmed the irrelevance of the media/nonmedia distinction. . .”); Anne Benaroya, Note, *Philadelphia Newspapers v. Hepps Revisited: A Critical Approach to Different Standards of Protection for Media and Nonmedia Defendants in Private Plaintiff Defamation Cases*, 58 GEO. WASH. L. REV. 1268, 1270 (1990) (contending “that the defamation defendant’s status as part of the institutional media should have no bearing on whether, and to what degree, the defendant should receive constitutional protection.”).

176. *See* JOHN B. MCCRORY & ROBERT C. BERNIUS, CONSTITUTIONAL PRIVILEGE IN LIBEL LAW, 1 COMMUNICATIONS LAW 7, 464-73 (Practising Law Institute Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G-398, 1994). Generally, most lower courts have abandoned the media/nonmedia distinction, in favor of requiring that public figures or public officials prove actual malice regardless of the level of constitutional protection to be afforded to the defendant’s status. *See id.* at 465-71.

177. 408 U.S. 665 (1972).

178. *See id.* at 704.

179. 472 U.S. 749 (1985).

180. *See id.* at 783-84 (Brennan, J., dissenting) (noting that “at least six Members of this Court . . . agree today that, in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same

although it is unlikely that an Internet speaker would be considered a media defendant, it is correlatively unlikely that they would receive any varying level of constitutional protection for their allegedly defamatory statements.¹⁸¹

b. Are Corporations Public or Private Figures?

“[T]he Supreme Court has yet to establish the status of corporate defamation plaintiffs.”¹⁸² Since corporations “are not so much real entities as they are simply means of structuring financial transactions,” many corporations fail to neatly conform to either the private or public figure classification.¹⁸³ In the typical corporate cybersmear case, the “plaintiff is a publicly held corporation listed on a national stock exchange;” however, although the corporation is “publicly held,” it is not necessarily a public figure.¹⁸⁴

The distinction between public and private figures is crucial, because a public figure plaintiff must prove that the defendant published the defamatory statement with actual malice, in reckless disregard of the truth or falsity of the claim, in order to recover.¹⁸⁵ Although distinguishing public and private figure status is necessary to establish the requisite level of intent to find liability and is often hazy, the distinction becomes especially difficult where a corporate plaintiff is involved.¹⁸⁶ In *Gertz v. Welch, Inc.*,¹⁸⁷ the

activities.”). In a plurality opinion authored by Justice Powell, the Court held that, in cases involving private figure plaintiffs and statements of public concern, states may award presumed and punitive damages for defamatory statements absent a showing of actual malice. *See id.* at 764.

181. *See* Lidsky, *supra* note 23, at 907 (predicting that it seems “unlikely that the Supreme Court will extend less First Amendment protection to Internet users than it has extended to traditional media defendants.”); *see also* Frederick Schauer, Comment, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998) (arguing that “[w]ith few exceptions, constitutionalized defamation law applies the same principles to a libel in the New York Times as it does to slander over the back fence.”).

182. Jackson, *supra* note 112, at 502.

183. Matthew D. Bunker, *The Corporate Plaintiff as Public Figure*, 72 JOURNALISM & MASS COMM. Q. 597, 598 (1995).

184. Lidsky, *supra* note 23, at 908 (arguing that “[a] strong argument can be made that the typical corporate plaintiff in a John Doe libel case will be a public figure.”). Professor Lidsky argues that corporations should be treated as public figures where the alleged defamatory statements are posted “in a forum dedicated to discussion of the corporation’s management and operation” and are “reasonably related to that subject.” *Id.*

185. *See* Curtis Publ’g Co. v. Butts, 388 U.S. 130, 162 (1967) (holding that public figures must prove actual malice in order to prevail). The heightened standard of actual malice requires that plaintiffs prove, with clear and convincing evidence, that the defendant published the defamatory statement with either knowledge of its falsity or in reckless disregard of the truth or falsity of the claim. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 773, *cert. denied*, 475 U.S. 1134 (1986).

186. *See, e.g.,* Rosanova v. Playboy Enter., Inc., 411 F. Supp. 440, 443 (S.D. Ga. 1976) (noting that distinguishing private and public figures “is much like trying to nail a jellyfish to the wall.”),

Supreme Court set forth two critical factors for determining public figure¹⁸⁸ status: (1) whether the plaintiff had access to channels of communication to rebut the defamatory statement;¹⁸⁹ and (2) whether the plaintiff had voluntarily assumed a prominent role in a public controversy, and the accompanying risk of heightened public scrutiny.¹⁹⁰

As applied to the typical cybersmear case, corporations clearly have the ability to rebut defamatory statements by using numerous channels of communication, including the use of the very technology on which the statement was published; however, securities laws pertaining to selective disclosure largely preclude corporations from actually being able to use such channels of communication to rebut false accusations.¹⁹¹ Moreover, the “public controversy” requirement appears to be lacking in most cases of corporate cybersmear.¹⁹² Nevertheless, courts have held that a listing on a national stock exchange is sufficient to confer public figure status.¹⁹³

aff'd, 580 F.2d 859 (5th Cir. 1978); Patricia Nassif Fetzer, *The Corporate Defamation Plaintiff as First Amendment “Public Figure”: Nailing the Jellyfish*,” 68 IOWA L. REV. 35 (1982) (discussing the difficulty of distinguishing the difference between private and public figures where a defamed corporate plaintiff is involved). Other courts have similarly suggested that the elusive “distinction between corporations and individuals is one without a difference.” *Trans World Accounts, Inc. v. Assoc. Press*, 425 F. Supp. 814, 819 (N.D. Cal. 1977). In addition, some courts have concluded that a corporation should not be considered a public figure where commercial speech is involved. *See Bunker*, *supra* note 183, at 602. These courts have reasoned that if the defamatory statement stems from commercial speech, then the corporation is not subject to the actual malice standard. *See Healthcare v. Blue Cross*, 898 F.2d 914, 933 (3d Cir. 1990).

187. 418 U.S. 323 (1974).

188. There are three types of public figures: (1) involuntary public figures; (2) general-purpose public figures; and (3) limited-purpose public figures. *See id.* at 351-52; *see also Barry v. Time, Inc.*, 584 F. Supp. 1110 (N.D. Cal. 1984); *Dameron v. Wash. Magazine, Inc.*, 779 F.2d 736 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1141 (1986).

189. *See Gertz*, 418 U.S. at 346 (stating that “[p]ublic figures and public officials usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.”). With this in mind, a strong argument could be made that publicly held corporations should be treated a private figures. Although corporate plaintiffs that have been cybersmeared will almost invariably have access to such “effective channels of communication” and the ability to rebut the defamatory statements, it is not clear that corporations are allowed to do so. Distinguishable from the situation where “some bozo writes one hundred lines of point by point innuendo about you and your sex life or personal habits, [and] you can write five hundred lines of point by point refutation,” MIKE GODWIN, *CYBER RIGHTS* 77, 82 (1998). In many cases, smeared corporations, unlike private individuals, are forced to remain silent for fear that response may give rise to allegations of selective disclosure. *See Robert A. Prentice, The Future of Corporate Disclosure: The Internet, Securities Fraud, and Rule 10(b)5*, 47 EMORY L.J. 1, 77 (1998) (discussing potential liability for selective disclosure by responding to false rumors).

190. *See Gertz*, 418 U.S. at 344-45.

191. *See Lidsky*, *supra* note 23, at 912 (noting that “many corporations . . . monitor board discussions, and they may sometimes take an active role in shaping the discussion to their benefit.”). *But see Prentice*, *supra* note 189, at 77 (arguing that response to rumors could give rise to liability for selective disclosure).

192. *See Lidsky*, *supra* note 23, at 910 (observing that:

[t]he “public controversy” at issue will ordinarily be a topic that affects the corporation’s stock price: it may be as diffuse a subject as the overall financial health of the corporation or as specific as a particular venture on which the company has embarked or a particular

“Despite the lack of a true ‘controversy,’” there are some justifications for applying the public figure standard to publicly held corporations.¹⁹⁴ For example, “[i]n making the decision to ‘go public,’ the corporation seeks and often obtains national recognition,” and “voluntarily submits itself both to extensive legal regulation (including public disclosure requirements) and to a degree of public scrutiny.”¹⁹⁵ Therefore, whether a corporation should be considered a private or public figure appears to entail a fact-intensive inquiry, rather than an absolute classification, depending on the nature of the company and the degree to which it has injected itself into the public realm.¹⁹⁶

c. Is Financial Concern the Same as Public Concern?

The Supreme Court has “long recognized that not all speech is of equal First Amendment importance.”¹⁹⁷ Rather, heightened protection under the First Amendment is solely applicable to “speech on ‘matters of public concern.’”¹⁹⁸ “Whether speech deals with a matter of public concern is not judged by its subject matter alone, but by its ‘content, form, and context.’”¹⁹⁹ It seems logical that most cybersmears do not involve matters of public concern because “most of those who follow the message board for a

corporate decision. The problem with applying this analysis to the John Doe cases is that they do not tend to involve a “controversy” but rather a subject of discussion).

193. See, e.g., *Reliance Ins. Co. v. Barron’s*, 442 F. Supp. 1341, 1348 (S.D.N.Y. 1977) (holding that a publicly held corporation’s “role in society is such that it is a figure generally in the public eye.”).

194. Lidsky, *supra* note 23, at 911 (distinguishing privately and publicly held corporations and reasoning that the public figure status is proper for “publicly held corporations [because they] are more likely to ‘invite attention and comment’ on their business dealings and affairs by their affirmative acts.”).

195. *Id.* (citing ROBERT D. SACK & SANDRA L. BARRON, *LIBEL, SLANDER, AND RELATED PROBLEMS*, § 5.3.8 274 (2d ed. 1994)).

196. See MARC A. FRANKLIN & DAVID A. ANDERSON, *CASES AND MATERIALS ON MASS MEDIA LAW* 196, 311 (5th ed. 1995) (noting that “[t]he overwhelming majority of courts have concluded that the fact of incorporation alone does not make the plaintiff a public figure.”); cf. Lidsky, *supra* note 23, at 912 (arguing that “courts should ordinarily treat corporations as having assumed the risk of hard-hitting debate and criticism of their activities.”).

197. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1990) (plurality opinion); see also *Gertz v. Welch, Inc.*, 418 U.S. 323, 350-51 (1974) (holding that a private figure may not recover punitive damages absent a showing of actual malice for a statement involving a matter of public concern, a showing of negligence, is however, sufficient to recover for actual injury).

198. *Dun & Bradstreet*, 472 U.S. at 758 (noting that little First Amendment protection is afforded to speech involving matters of private concern (quoting *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 776 (1978) (citing *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940)))).

199. Lidsky, *supra* note 23, at 913 (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)).

particular corporation will be investors or potential investors who have self-interested motives for following the discussion.”²⁰⁰

On February 23, 2001, in *Global Telemedia International v. Does 1 through 35*,²⁰¹ however, the district court found allegedly defamatory statements referring to a publicly held company to constitute a matter of public interest because the company had “inserted itself into the public arena and made itself a matter of public interest by means of numerous press releases issued”²⁰² In addition, Judge Carter further articulated that “a publicly traded company with many thousands of individual investors is of public interest because its successes or failures will affect not only investors, but in the case of large companies, potentially market sectors or the markets as a whole.”²⁰³ Thus, it appears that whether allegedly defamatory cybersmears qualify as matters of purely public or private concern is not conducive to a blanket categorization. Instead, courts should analyze the statements on a case-by-case basis.

d. Proving a Malicious Smear was Posted With Actual Malice

In *St. Amant v. Thompson*,²⁰⁴ the Supreme Court held that in order to establish actual malice, “[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.”²⁰⁵ Unlike the typical anonymous Internet message poster, “[t]he Supreme Court’s examples of what constitutes actual malice are geared to the investigative practices of the institutional press.”²⁰⁶ In stark

200. *Id.* at 914 (arguing that “this argument overstates the extent to which the message boards involve speech that is ‘solely in the individual interest of the speaker and [his] specific business audience.’”). This counter-argument, however, seems to confuse protected speech with a defamatory cybersmear and presuppose that a false and disparaging statement actually constitutes a “useful source information.” *Id.* Clearly, Professor Lidsky is correct in stating that “[t]he financial message boards can be a useful source of information,” *id.* at 914, and “can provide an informal education to investors and noninvestors alike” *Id.* at 914-15. However, the operative word in both those arguments is “can.” Where message boards and chat rooms are used to perpetrate cybersmear they simply do not achieve these attributes. Rather, it is difficult to envision how false and disparaging “disinformation, rumors, and garbage,” do, in fact, provide either an educational or useful source information.

201. 132 F. Supp. 2d 1261 (C.D. Cal. 2001).

202. *Id.* at 1265 (citing Gray Decl., Ex. P at 97; Ex. Q. at 112; Ex. R at 122; Ex. T. at 127-49; Ex. U at 150-53; Stevens Decl. (Opp’n to Reader Mem.), Ex. D at 5).

203. *Id.* (adding that “[t]he fact that a chat-room dedicated to GTMI has generated over 30,000 postings further indicates that the company is of public interest.”).

204. 390 U.S. 727 (1968).

205. *Id.* at 731.

206. Lidsky, *supra* note 23, at 918 (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-12, at 871 (2d ed. 1998) which claims that, “[i]n the world of New York Times Co. v. Sullivan, ignorance is bliss”). “Actual malice may be found, for example, where the defendant invents a story . . . publishes information ‘so inherently improbable that only a reckless man would have put [it] in circulation,’ or where the defendant publishes despite ‘obvious reasons to doubt the veracity of [an] informant or the accuracy of his reports.’” *Id.* (quoting *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968)).

contrast to the routine investigative practices of the press, “[n]o professional ethic impels [a cybersmearer] to be accurate.”²⁰⁷ Rather, “the culture of the boards encourages just the opposite.”²⁰⁸ Thus, because a cybersmearer “is more likely than the average media defendant to be reckless . . . with regard to the accuracy of the facts he publishes on Internet financial bulletin boards,” it may be relatively easy for plaintiff corporations to carry their heavy burden of establishing actual malice.²⁰⁹

e. Opinion and Cybersmear: Have Modems and Message Boards Modified Milkovich?

In *Gertz v. Welch, Inc.*,²¹⁰ the Supreme Court stated that “[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”²¹¹ The First Amendment affords a privilege to mere statements of opinion that do not imply a provably false assertion “because such statements ‘cannot [reasonably] be interpreted as stating actual facts.’”²¹² Frequently, defendants forced to litigate a corporate cybersmear suit argue that “the spontaneous bursts of speech dispatched” onto the Internet more “closely resemble gossip, rumor ‘buzz,’ and opinion rather than verifiable factual statements.”²¹³ Moreover, courts have acknowledged that “‘words have different meanings depending on the context in which they are used.’”²¹⁴

207. *Id.* (citing JAY BLACK ET AL., *DOING ETHICS IN JOURNALISM: A HANDBOOK WITH CASE STUDIES* (1997)).

208. *Id.* (arguing that “[t]he boards prize speed over accuracy on the assumption that the reader will be able to sort reason from rhetoric and fact from fiction.”). As the many cybersmear cases illustrate, however, the assumption that the Internet audience will automatically be able to differentiate truth from fiction implies a type of knowledge that many online investors simply do not have. See DiBiase, *supra* note 9, at 22 (arguing that message boards allow anonymous users who have no credentials to “say whatever about whomever they want and the public will believe it.”).

209. Lidsky, *supra* note 23, at 919.

210. 418 U.S. 323 (1974).

211. *Id.* at 339-40.

212. Lidsky, *supra* note 23, at 919 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990)). Pursuant to the Restatement (Second) of Torts, a statement of opinion is actionable “only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.” RESTATEMENT (SECOND) OF TORTS § 566 illus. 4 & 5 (1977). Under *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (*en banc*), a statement of fact is one that is “capable of being objectively characterized as true or false.” *Id.* at 979. As both courts and litigants have realized, however, differentiating statements of fact and statements of opinion is “by no means as easy a question as might appear at first blush.” *Id.* at 975.

213. Smith, *supra* note 6, at 8 (citing Mem. of P. & A. in Supp. of Special Mot. to Strike, *Thomas & Betts Corp. v. Does 1 through 50*, No. GIC 748128 (Cal. Super. Ct. 2000), available at <http://www.citizen.org/litigation/briefs/sandiego.htm> (last visited July 12, 2000)). In *Thomas &*

Under *Milkovich v. Lorain Journal Co.*,²¹⁵ a statement that is published in a forum where the audience would reasonably expect to find verifiable assertions of fact is more likely to be considered a statement of fact.²¹⁶ Alternatively, a statement that is uttered in a forum where the audience expects “to find gossip, rumors, or ‘buzz’ is more likely to be construed as opinion, and thus nonactionable.”²¹⁷ Therefore, whether the opinion privilege applies to corporate cybersmear depends not only on whether the statement is couched in language suggesting that it is provably false or containing undisclosed defamatory facts, but also whether financial message boards and chat rooms constitute a forum in which the audience expects to find truthful and verifiable discourse.²¹⁸

2. Language of Hyperbole and Opinion

Although the majority of corporate cybersmear cases “have been settled, dismissed, or remain in the early stages of litigation,” a prevalent defense appears to have emerged: “that speech on the Internet is, by its nature, language of hyperbole and opinion and thus not actionable under traditional principles of libel law.”²¹⁹ Moreover, online communication tends to be “colloquial in tone, opinionated, speculative, and frequently caustic and derogatory,” and “anyone who frequents the message boards interprets what

Betts Corp., defendants argued that “casual statements about a company on a Yahoo! message board express opinions, rather than facts” analogous to “stock tips in financial publications, or commentary in financial newsletters.” Mem. of P. & A. in Supp. of Special Mot. to Strike, *Thomas & Betts Corp. v. Does 1* through 50, No. GIC 748128 (Cal. Super. Ct. 2000), available at <http://www.citizen.org/litigation/briefs/sandiego.htm> (last visited July 12, 2000).

214. *Agora, Inc. v. Axxess, Inc.*, 90 F. Supp. 2d 697, 702 (D. Md. 2000) (quoting *Peroutka v. Streng*, 695 A.2d 1287, 1293 (Md. Ct. App. 1997)). In *Agora*, the court held that an online statement accusing a company of relying on “pseudo research” was not defamatory “because it constitute[d] an expression of opinion based on disclosed or readily available facts.” *Id.* at 703.

215. 497 U.S. 1 (1990).

216. Smith, *supra* note 6, at 8.

217. *Id.* Illustrating this argument, some courts have held that discussions that may constitute libel in one context might not be considered libelous when posted on an Internet bulletin board. *See, e.g., Nicosia v. De Rooy*, 72 F. Supp. 2d 1093 (N.D. Cal. 1999). In *Nicosia*, the defendant posted statements on a bulletin board alleging that the plaintiff was a murderer and guilty of perjury, fraud, and a laundry list of other offenses. *Id.* at 1102-07. The court held that these statements were nothing more than mere opinion which frequently occurs “in the context of controversial debate on the Internet” and therefore, “readers are more likely to understand . . . as figurative, hyperbolic expressions.” *Id.*

218. *See id.* Clearly, a rational argument can be made that the opinion privilege should be extended to Internet users “who post on Internet message boards, despite the fact that those posters may be more apt to publish inaccurate information” Lidsky, *supra* note 23, at 946 n.332. This article, however, advocates that because victims of corporate cybersmear must cope with the consequences of the defamatory speech, the perpetrators of such reckless falsehoods should be held equally accountable.

219. Smith, *supra* note 6, at 7. “[C]ommon law tradition has combined with constitutional principles to clothe the use of epithets, insults, name-calling, and hyperbole with virtually impenetrable legal armor.” *Id.* (quoting JAMES J. SACK, *LIBEL, SLANDER AND OTHER RELATED PROBLEMS* § 2.4.7 (3d ed. 2000)).

is posted accordingly.²²⁰ In addition, given the prevalence of “flaming”²²¹ and other forms of “netiquette,”²²² several scholars have argued that the Internet audience has essentially become immune to the various forms of exaggerated and, at times, ridiculous discourse occurring in cyberspace.²²³

Despite the impact that these defamatory statements frequently have,²²⁴ Yahoo! financial message boards, for example, routinely caution that: “These messages are only the opinion of the poster, are no substitute for your own research, and should not be relied upon for trading or any other purpose.”²²⁵ Courts have held that similar disclaimers deny a defamation cause of action based on a detrimental financial rating.²²⁶ Thus, at least where the framing of the statement permits the presumption, casual statements posted on the Internet regarding a company should generally be construed as opinions, rather than facts, for the same reason that courts have been reluctant to treat negative “stock tips” in financial newsletters as actionable defamatory statements.²²⁷

220. *Id.* at 8. (citing Compl., Doe v. Yahoo! (N.D. Cal. 2000), available at http://www.epic.org/anonymity/aquacool._complaint.pdf. (last visited Feb. 19, 2002)). Supporting the possible merits of this defense, commentators have argued that in many cases, the level of discourse occurring in chat rooms and online message “boards bears more resemblance to informal gossip than to rational deliberation, and the culture of the boards fosters . . . ‘disinformation, rumors, and garbage.’” Lidsky, *supra* note 23, at 893 (quoting *Reliable Sources: Are 24-Hour TV and the Internet Helping People Understand Wall Street, or is There Too Much Bull in the Bull Market?* (CNN television broadcast, July 31, 1999), transcript available in LEXIS, Transcripts File)).

221. See Ian C. Ballon, *E-Commerce and Internet Law: A Primer*, in *Fourth Annual Internet Law Institute*, Vol. One 9, 20 (2000) (defining “flaming” as the practice of sending strident or offensive email messages).

222. Internet etiquette, or “netiquette,” generally refers to “the informal rules and customs that have developed on the Internet . . .” *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995).

223. Lidsky, *supra* note 23, at 919 (arguing that, in large part, the online audience views Internet discourse as mere “rhetorical hyperbole or subjective speculation rather than a sober recitation of actual facts.”).

224. “‘With the rise of day trading and momentum trading, people don’t take the time to do due diligence. Some people probably actually believe what they read. Others are just hoping to catch a wave.’” Walsh, *supra* note 59 (quoting Christine Chung, who oversees the SEC’s Internet Investigations division in Boston).

225. See *Hritz v. Doe*, *supra* note 46.

226. See *Jefferson County Sch. Dist. v. Moody’s Investor’s Servs.*, 988 F. Supp. 1341, 1345 (D. Colo. 1997).

227. See *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 184-85 (4th Cir. 1998) (holding that an observation that a company’s stock price was based on “hype and hope” was merely a statement of opinion); see also *Morginstar, Inc. v. Super. Ct.*, 29 Cal. Rptr. 2d 547 (Ct. App. 1994).

a. *Global Telemedia International, Inc. v. Does 1 through 35*

In *Global Telemedia International, Inc. v. Does 1 through 35*,²²⁸ Judge David O. Carter of the United States District Court for the Central District of California observed that in order

[t]o determine whether a statement is an opinion or fact, the Court must look at the totality of the circumstances. This entails examining the statement in its “broad context, which includes the general tenor of the entire work, the subject of the statement, the setting, and the format of the work.”²²⁹

In a ruling that free-speech advocates have heralded as a “significant victory,” the district court in *Global Telemedia* reasoned that the “message board was a forum for the exchange of opinions.”²³⁰

Similar to most victims of online corporate defamation, the plaintiff, Global Telemedia International (“GTMI”) was a publicly company and alleged that a long campaign of cybersmear had caused its stock to plummet.²³¹ In addition to other allegedly defamatory statements, defendants posted the following messages on the company’s message board:

228. *Global Telemedia Int'l, Inc. v. Does 1 through 35*, No. SA CV OD-1155(C.D. Cal. Feb. 23, 2001) (order granting defendant’s special motion to strike).

229. *Id.* at ¶ 20 (citing *Nicosia v. De Rooy*, 72 F. Supp.2d 1093, 1101 (N.D. Cal. 1999) (applying the fact/opinion distinction where libelous statements were posted on the Internet)). Describing the general tenor of the discourse at issue in *Global Telemedia*, which is similar to the typical cybersmear case, Judge Carter observed:

Unlike many traditional media, there are no controls on the postings. Literally anyone who has access to the Internet has access to the chat-rooms. . . . No special expertise, knowledge or status is required to post a message, or to respond. . . . The vast majority of the users are, because of the “handles,” effectively anonymous. The messages range from relatively straightforward commentary to personal invective directed at other posters and at the subject company to the simply bizarre. For example, one exchange includes “joemeat, you are one of the stupidest suckers that ever posted here” to which “joemeat” responded “akita: that means so much coming from a degenerate who speaks regularly from his lower orifice.”

Id. at ¶ 5 (quoting Gray Decl., Ex. G.).

230. Cassell Bryan-Low, *E*Trade Sues Over Postings*, WALL ST. J., Feb. 28, 2001, at C1, available at 2001 WL-WSJ 2855560.

231. *Global Telemedia Int'l v. Does 1 through 35*, No. SA CV 00-1155 (C.D. Cal. Feb. 23, 2001) (order granting defendant’s special motion to strike), at ¶ 2 (noting that GTMI “is a publicly traded telecommunications company trading on the [NASD] OTC Bulletin Board.”). GTMI began trading publicly in June 1999. *See id.* at ¶ 3. “It has traded from around \$.80 a share in June of 1999 to a high of around \$4.70 a share in March of 2000 to a low of [\$.25 [per] share in October 2000.” *Id.* (citing Opp’n to King Mot. at 9). GTMI’s stock “has closed at below \$1.00 a share since April of 2000.” *Id.* (citing Stevens Decl. in Opp’n to King Mot., Ex. B-1)).

1. **“Sinking Ship”**

“[a]nother day with GTMI steering the sinking ship, but don’t worry they are headed for the calmer waters of the caribbean where your money will be safe from federal authorities,, now thats newz”²³²

2. **“Fly the Coop”**

“[t]rust your stomach, that feeling that says we are beeing manipulated by the company so that they can fly the coop again, who oh why must we keep saying I hear they are, they said they were, WERE IS THE PR TO THE LONGS SAYING SORRY FOOLS WE WENT BELLY UP SORRY FOR SPOING YOUR WEEKEND, SORRY FOR NOT MEETING OUR TARGET DATES AND OH YEA SORRY WE MISSED THE BOAT IN GETTING OUR PRODUCT OUT.”²³³

3. **“Screwed out of your money”**

“sell tomorrow take your dollars, write off the loss . . . you have been screwed out of your hard earned money here its time to talk about a lawsuit.”²³⁴

4. **“Blatant mis-management . . . they lie”**

“I have never witnessed such blatant mis-management, these people hold our money and they dictate after they lie how it will be used. . . . greatest joke on the boards.”²³⁵

232. *Id.* at ¶ 31 (quoting Stevens Decl. In Opp’n to King Mem. Ex. A at 39). The district court concluded that “in the context of the full message,” [these] “comments are hyperbolic and figurative.” *Id.* at ¶ 32. Moreover, “[t]he posting [was] also in response to another posting, making it less likely to be a statement of fact. Given the tone and context of the message, a reasonable reader would not take this to be anything more than a disappointed investor who is making sarcastic cracks about the company.” *Id.*

233. *Id.* at ¶ 33 (quoting Stevens Decl. in Opp’n to King Mem. Ex. A at 37). “Plaintiffs argue[d] that ‘fly the coop again’ is stating a fact that ‘GTMI not only intends to steal investor money, but that such theft is or will be merely a repeat of a previous GTMI theft. This is not opinion, but an outright accusation of criminal intention” *Id.* at ¶ 34 (quoting Opp’n to King Mot. at 8). “First, the [c]ourt note[d] that ‘fly the coop’ is a colloquial expression meaning ‘to depart suddenly or surreptitiously, escape, flee.’” *Id.* (quoting WEBSTER’S THIRD INT’L DICT. (1986)). “Second, ‘fly the coop’ is part of a rambling sentence full of figurative and expressive language (‘trust your stomach,’ ‘why oh why’) and sarcasm.” *Id.* (determining that “[g]iven the context and content, no reasonable reader would believe that [the poster] was stating a fact that the company was going to flee or escape.”). According to Judge Carter, “[t]he posting [was] written with a great deal of linguistic informality, thus alerting a reasonable reader that these observations are probably not written by someone with authority or firm factual foundations for his beliefs.” *Id.*

234. *Id.* at ¶ 36. “Plaintiffs argue[d] that [the poster] appear[ed] to be soliciting a shareholder lawsuit against GTMI.” *Id.* at ¶ 37 (disagreeing with this interpretation and noting that “even if that is the import of the message, then it is simply the opinion of a shareholder who believes a lawsuit may be his only recourse against a company.”).

235. Plaintiffs interpreted this statement as, “in essence, that GTMI misrepresents its business

5. **‘Busted . . . Let the truth be told’**

“SEC link[.] To view Jonathon Bentley Stevens [GTMI’s CEO’s] violations:<http://www.sec.gov/enforce/litigrel/lr15774.txt>[.] He was busted for misrepresentation and overstatement of the facts: Let the truth be told”²³⁶

According to the district court “the general tenor, the setting and the format of . . . [the defendant’s] statements strongly suggest[ed] that the postings [were] opinion.”²³⁷ Judge Carter, in holding that all of the allegedly defamatory statements were non-actionable statements of opinion, emphasized the fact that “[t]he statements were posted anonymously in the general cacophony of an Internet chat-room”²³⁸ Moreover, “[t]he postings at issue were anonymous as are all other postings in the chat-room” and “were part of an on-going, free-wheeling and highly animated exchange about GTMI and its turbulent history.”²³⁹ The district court in *Global Telemedia* insinuated that in order to constitute actionable statements of fact, the postings must possess “formality and polish typically found in documents in which a reader would expect to find facts.”²⁴⁰ Although the

intentions, apparently as part of its standard practice to say anything to raise investor funds.” *Id.* at ¶ 38 (quoting Opp’n to King Mot. at 8). The district court, however, disagreed, and observed that “while [the] sentiments [were] not positive, the statements contain[ed] exaggerated speech and broad generalities, all indicia of opinion.” *Id.* at ¶ 38 (concluding that “[g]iven the tone, a reasonable reader would not think the poster was stating facts about the company, but rather expressing displeasure with the way the company [was] run.”).

236. *Id.* at ¶ 29. Amazingly, the court held that even this statement was not defamatory. Instead, Judge Carter reasoned that the statement was “clearly based on a public document which he provides for the readers.” *Id.* “Thus, any reader [could] look at the same document and determine what they think from the information.” *Id.* According to Judge Carter, “[b]y supplying the underlying document which supports his views, [the poster] ha[d] set forth an opinion, not fact.” *Id.* (citing *Nicossia*, 72 F. Supp. 2d at 1102). Moreover, the court carefully distinguished being “busted” from being “arrested.” *Id.* at ¶ 30 (noting that “[w]hile the average investor may interpret ‘busted’ as ‘caught’ or ‘found out,’ that reader is highly unlikely to believe that the SEC has arrested anyone for ‘misrepresentation’ or ‘overstatement.’”). In many cases, however, the mere fact that the SEC is investigating a company will create sufficient panic amongst investors, thus a drop in a stock’s value. Perhaps the court had an alternative rationale for concluding that this particular allegation was not a statement of fact, because even if it was, it appears that the statement was true. *See id.* (citing Gray Decl., Exs. A, B, C) (noting that while the poster was “simply stating his opinion that the SEC is investigating Bentley Stevens, which in point of fact it is.”).

237. *Id.* at ¶ 21.

238. *Id.*

239. *Id.* Although the district court’s reasoning is questionable, it provides, nevertheless, a solid framework for Doe defendant’s to escape liability for their defamatory statements by relying on the argument that “the postings are full of hyperbole, invective, short-hand phrases and language not generally found in fact-based documents, such as corporate press releases or SEC filings.” *Id.* at ¶ 22.

240. *Id.* at ¶¶ 25, 26 (deciding that the web posting merely constituted statements of opinion because, “[i]n short, the general tone and context of these messages strongly suggest that they are the opinions of the posters. In addition, the content and style of the individual postings support a finding that they are the opinions of the posters.”).

ultimate impact of the *Global Telemedia* holding remains unclear, for the time being, the case marks a definitive victory for Doe defendants.²⁴¹

3. Qualified Privilege For Communication Amongst Interested Parties

Another potential defense to a defamation claim brought against a anonymous cybersmearer could be qualified privilege for communications among “interested parties.”²⁴² Although the California Supreme Court, in *Brown v. Kelly Broadcasting*,²⁴³ held that the qualified privilege for communication among interested parties does not apply to mass media communications, the privilege does apply to communications that are published amongst a narrow group that share a common interest.²⁴⁴ It appears that defendants, in corporate cybersmear cases, could make a strong argument that the privilege should apply because financial message boards and chat rooms are dedicated to discussion of particular corporations, and thus appeal to a narrow audience who share a common interest.²⁴⁵

241. See *id.* at ¶ 14 (pronouncing that this holding does not “necessarily foreclose defamation cases against individuals, as not all business will be found to be a ‘public issue.’ Further, even where a business is found to be of public concern, where there is a probability of success, the claim may proceed.”). The *Global Telemedia* analysis is ripe for criticism. While largely basing his conclusion that remarkably all the statements at issue were opinions and claiming to adopt a reasonableness standard, Judge Carter, like most courts, did “not conduct empirical research as to the hypothetical conduct of the average person in similar circumstances despite the fact that the practice of mankind generally . . . carries significant weight in determining reasonableness.” Daniel More, *Informers Defamation and Public Policy*, 19 GA. J. INT’L & COMP. L. 503, 534 n.33 (citing Allen M. Linden, *Custom in Negligence*, 11 CAN. B. J. 151, 169 (1968)). Had the court embarked upon such an analysis, it would have realized that even “reasonable” investors are often significantly swayed, in their investment decisions, by defamatory cybersmear. See Toross, *supra* note 1, at 1403 (recognizing that “[a] stock’s price can be influenced within minutes of posting information on” an Internet chat-room or bulletin board). The *Global Telemedia* decision clearly marks the first time that “a court has held that Internet message boards devoted to discussions about a publicly traded company ‘are indeed connected with a public issue and fully protected under anti-SLAPP provisions.’” Joyzelle Davis, *Judge Says Investor Web Chat Is Not Libel Litigation*, L.A. TIMES, Feb. 28, 2001, at C4, available at 2001 WL 245336 (quoting Megan Gray, an attorney with Baker & Hostetler and leading cybersmear litigator). The ruling, however, might not create clear precedent for other courts to follow. See *id.* (quoting UCLA law professor and First Amendment scholar Eugene Volokh).

242. See, e.g., CAL. CIV. CODE § 47(c) (2000). Qualified communication among interested parties is a common law privilege afforded to persons who publish a statement on a matter of common interest as long as the statement is made in good faith. See *id.*

243. 48 Cal. 3d 711 (1989).

244. See *Emde v. San Joaquin County Central Labor Council*, 23 Cal. 2d 146 (1943) (extending the privilege to immunize liability for a defamatory statement published in a labor union newsletter).

245. See *id.* However, if the defendant were to attempt to invoke the qualified privilege for communication among interested parties, it would logically follow that he would simultaneously have to negate any possible argument that the statement involved a matter of public concern.

4. SLAPPED With Yet Another Procedural Pitfall On the Road to Recovery

“Corporations have begun to use defamation suits as an offensive tactic.”²⁴⁶ Several states have enacted “anti-SLAPP” (Strategic Lawsuits Against Public Participation) statutes²⁴⁷ as a prophylactic deterrent designed to limit frivolous defamation claims.²⁴⁸ For example, in 1992 the California legislature enacted an anti-SLAPP statute²⁴⁹ “which provided broad authority to strike a complaint based on an act of free speech ‘in connection with a public issue’ unless the court determined the plaintiff had established, by credible evidence, ‘a probability [that it would] prevail on the claim.’”²⁵⁰ Once the defendant establishes a prima facie case illustrating that the basis of the claims against him arise out of acts in furtherance of speech that is in connection with a public issue, the burden shifts to the plaintiff to demonstrate a probability of success on the merits.²⁵¹ Although anti-SLAPP

246. Jackson, *supra* note 112, at 492.

247. Thirteen states have enacted anti-SLAPP statutes, including California, Colorado, Delaware, Georgia, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New York, Oklahoma, Rhode Island, and Tennessee. See Gail Diane Cox, *Pushing the SLAPP Envelope*, NAT’L L.J., Apr. 19, 1999, at A1 (noting that ten additional states are currently considering whether to enact anti-SLAPP legislation).

248. Smith, *supra* note 6, at 8 (arguing that “it is not clear that these laws will adequately protect individuals accused of attacking corporate targets.”). “Between 1972 and 1992, ‘thousands of SLAPPS were filed, tens of thousands of Americans were SLAPPED, and still more were muted or silenced by the threat.’” Dennis J. Seider, *SLAPP Shot*, 23-NOV L.A. LAW. 32, 33-34 (2000).

249. CAL. CIV. CODE § 425.16. “The suits are an attempt to ‘privatize’ public debate: a unilateral initiative by one side to transform a public, political dispute into a private, legislative adjudication, shifting both forum and issues to disadvantage the opposition.” GEORGE W. PRING & PENELOPE CANAN, STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION, 35 SOC. PROB. 506 (1988); see also Seider, *supra* note 248, at 32 (noting that anti-SLAPP statutes were largely enacted because, in many cases, “[t]he object of a plaintiff’s lawsuit was often not to prevail at trial but to quell criticism by instilling a fear in its targets of large recoveries and legal costs” and “[c]ommercial plaintiffs - well positioned to absorb significant legal costs - posed an especially serious threat to small groups or lone critics sued for speaking against certain practices of the commercial plaintiffs.”).

250. *Id.* at 34 (quoting CAL. CIV. CODE § 425.16 added by 1192 CAL. STAT. c. 726 (S.B. 1264), § 2; amended by 1993 CAL. STAT. c. 271). California’s anti-SLAPP statute provides in relevant part:

(e) As used in this section, “act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue” includes:

(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Id. (noting that “[s]ection 425.16(e) subdivisions 1 and 2 are sometimes referred to as the ‘petitioning’ or ‘official proceeding’ privilege,” while “[s]ubdivisions 3 and 4 refer to what is often called the ‘public interest’ or ‘public issue’ privilege.”).

251. *Globetrotter Software, Inc. v. Elan Computer Group*, 63 F. Supp. 2d 1127, 1129 (N.D. Cal. 1999). In *Zhao v. Wong*, 48 Cal. App. 4th 1114 (1996) the court held that “sensation” or “media

statutes are primarily designed to apply in situations concerning governmental action, courts have interpreted the provision to apply to even where the speech “involves purely private commercial endeavors.”²⁵²

Commonly, “[t]hese suits are aimed not at rectifying truly defamatory statements made by defendants, but rather, at intimidating them from voicing their public concerns.”²⁵³ “Moreover, corporations use SLAPPs to discourage involvement not only by the named defendants, but also by their neighbors and the remaining community.”²⁵⁴ Generally, the effectiveness of SLAPP suits can be attributed to the disparity of resources between a corporate plaintiff and an individual defendant.²⁵⁵

As applied to cybersmear cases, in order to get the corporate plaintiff’s complaint SLAPPED out of court the defendant has a heavy burden of proving that the posted messages “could be characterized as statements made in [a] place open to the public or a public forum in connection with an issue of public interest.”²⁵⁶ Moreover, “[i]f absolute privilege does not

attention” does not create an issue of public interest. *Zhao*, however, has been criticized by the California Supreme Court for its interpretation of the SLAPP provision. *See Briggs v. Eden Council for Hope and Opportunity*, 19 Cal. App. 4th 1106 (1999) (disapproving of *Zhao*’s reading of “public interest” as too narrow and observing that the Legislature’s 1997 amendment to the SLAPP statute indicates that the section “shall be construed broadly.”).

252. Seider, *supra* note 248, at 34. “The public interest privileges of Code of Civil Procedure Section 425.16(e) are broadly construed to include what would otherwise be considered private commercial conduct.” *Id.* at 35 (arguing that “[c]ommercial speech, like all advocacy, has at its heart the advancement of self-interest and the defeat of another’s, but if the speech involves a commercial product that is subject to regulation or touches upon important social issues,” the anti-SLAPP statute “should apply.”). Thus, it appears that anti-SLAPP statutes should apply in many cybersmear cases because frequently the statements, albeit false ones, pertain to matters that are subject to regulation by the SEC and relate to matters that are generally in the public interest. *See Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 632 (1996) (stating that “[a]lthough matters of public interest include legislative and governmental activities, they may also include activities that involve private persons and entities, especially when a large, powerful organization may impact the lives of many individuals.”).

253. Jackson, *supra* note 112, at 493 (citing Sharlene A. McEvoy, “*The Big Chill*”: *Business Use of the Tort of Defamation to Discourage the Exercise of First Amendment Rights*, 17 HASTINGS CONST. L.Q. 503, 504 (1990)).

254. *Id.* (citing Edmond Costantini & Mary Paul Nash, *SLAPP/SLAPPback: The Misuse of Libel Law for Political Purposes and a Countersuit Response*, 7 J. L. & POL. 417, 466-70 (1991)).

255. *Id.* “As one defense lawyer stated, ‘[f]ew average citizens have the wherewithal [sic] to defend themselves against the armory of monies expended by . . . corporations who-not only may have the means to mount suits, but can claim further tax advantages for the legal expenses involved.’” *Id.* at 493-94 (quoting RALPH NADER & WESLEY J. SMITH, *NO CONTEST* 163 (1996)).

256. Seider, *supra* note 248, at 52 (quoting *Globetrotter Software v. Elan Computer Group*, 63 F. Supp. 2d 1127 (N.D. Cal. 1999)). In order to avoid the potential that their complaints could be SLAPPED out of court, there may be an incentive for corporate plaintiffs to file cybersmear suits in federal court and avoid the application of the anti-SLAPP statute altogether. *See United States v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1998), *cert. denied*, 530 U.S. 1203

protect the defendant, an argument for needed discovery into the existence of malice may be the best way to delay or defeat a SLAPP defendant's motion to strike."²⁵⁷ For example, in *ComputerXpress.com, Inc.*, a California court recently denied a cybersmear defendant's motion to strike a corporate plaintiff's complaint pursuant to California's anti-SLAPP statute on the grounds that the lawsuit fell outside the scope of the statute.²⁵⁸ Thus, although the anti-SLAPP statute poses an immediate procedural obstacle for corporate plaintiffs seeking to pursue a defamation claim for alleged cybersmear, in most cases it is unlikely to render summary dismissal.²⁵⁹

VI. HOW CORPORATIONS CAN MINIMIZE THE DAMAGE INFLICTED BY INTERNET DEFAMATION

Even in its infancy, the majority of scholarly attention concerning corporate cybersmear has focused on protecting the rights of John Doe, while the rights of smeared corporations to restore their reputations appear to have been forgotten somewhere along the way.²⁶⁰ As a practical matter, corporations face a number of both legal and financial decisions in determining how to combat a ruthless cybersmear campaign. Blake A. Bell, an attorney at New York's Simpson, Thatcher & Bartlett, and an expert in corporate cybersmear cases, suggests that "[s]eeking a judicial remedy may satisfy primal urges to seek vengeance, but is likely to be a costly and, perhaps, futile option."²⁶¹ Rather, Bell recommends implementing a series of

(2000) (noting that the anti-SLAPP statute under Erie "was plainly procedural, its objective was manifestly substantive."); see also *Rogers v. Home Shopping Network, Inc.*, 57 F. Supp. 2d 973, 977 (C.D. Cal. 1999) (concluding "that [section] 425.16 does not substantively alter any cause of action [but is] [i]nstead . . . 'a mere rule of procedure . . .'" (quoting *Ludwig v. Sup. Ct.* 43 Cal. Rptr. 2d 350, 360 (1995))).

257. Seider, *supra* note 248, at 54.

258. See Smith, *supra* note 6, at 8 (citing Def.'s Mot. to Strike Cybersmear Compl.as Improper SLAPP Denied by Court, 2 CYBERSECURITIESLAW TRIB., available at <http://www.cybersecuritieslaw.com> (last visited August 21, 2000).

259. In addition to making a strong argument that the cybersmear falls outside the scope of the anti-SLAPP statute, corporate plaintiff's can defeat a defendant's motion to strike the complaint simply by arguing for necessary additional discovery. See Seider, *supra* note 248, at 54.

260. See Lidsky, *supra* note 23, at 914 (emphasizing the potential contributions of John Doe's anonymous speech while neglecting the detrimental consequences that cybersmear in fact creates); Sobel, *supra* note 14, at 3 (sympathizing with John Doe while failing to acknowledge the damage frequently inflicted upon corporations victimized by ruthless falsehoods); Tien, *supra* note 38, at 144 (focusing on the "serious costs" of compelled revelation of an anonymous speaker's identity without recognition of the "serious costs" incurred by shareholders and corporations as a direct result of their speech). But see Branscomb, *supra* note 25, at 1675-76 (arguing that anonymity should not serve as a shield to protect abusive online speakers).

261. Bell, *supra* note 8 (observing that "[a]nyone - including short sellers, fired employees, disgruntled employees and irate customers - can easily walk into a cyber-café, plunk down cash to gain Internet access for a few minutes and make false and disparaging postings through services like www.anonymizer.com. Such posting are difficult, if not impossible, to trace.").

institutional safeguards and preemptive measures in attempting to combat the smear.²⁶²

A. Prophylactic Measures to Stop the Spread of Smear

To have a legitimate chance of minimizing the effects of cybersmear, companies “must be cyber-savvy and well-informed to avoid being caught off guard.”²⁶³ In certain circumstances, it may be beneficial to monitor online discourse concerning the company.²⁶⁴ Further, companies must take necessary precautions to ensure that their employees are not involved, either intentionally or unwittingly, in sparking “Internet rumors that can mushroom into public relations nightmares.”²⁶⁵

The case of CIBER Inc. illustrates how problems “can arise in the absence of clear employee guidelines” defining appropriate corporate discourse on the Internet.²⁶⁶ After failing to follow message board “discussions” until its stock price declined for no apparent reason, CIBER Inc. “issued a press release stating that it was unaware of any company-specific reason for the price decline.”²⁶⁷ Subsequently, CIBER Inc.’s “director of investor relations began to monitor message boards related to the company” and discovered that individuals identifying themselves as CIBER Inc. “employees were discussing the company on the message boards.”²⁶⁸ Analogous to CIBER Inc., Raytheon, after filing suit against twenty-one “Doe” defendants who posted embarrassing messages about the

262. *Id.* It appears that if corporations implement prudent courses of action to protect themselves from cyber-gossip, they might not have to worry about the problem later on down the road. *See id.* (noting that “[t]he increasing frequency of corporate cyber-smears strongly suggests that companies should anticipate the worst and put into place corporate policies and damage control mechanisms designed to deal with a cyber-smear as soon as it is discovered.”).

263. *Id.* (recommending that companies “[a]ssign personnel to monitor pertinent Internet chat rooms, message boards, Usenet newsgroups, Web pages and other Internet sites where the company is likely to be mentioned.”). It is possible, however, “that once a company begins monitoring the Internet for rumors, it assumes a duty to correct false rumors of which it learns if it has no valid corporate purpose for leaving the rumor uncorrected.” *Id.* (citing ARNOLD S. JACOBS, 5C LITIGATION AND PRACTICE UNDER RULE 10b-5 § 88.04[b], at 4-23 through 4-24 (1996)).

264. *See id.* (noting that there are many widely-used monitoring services including: Ewatch., Inc., Burson-Marsteller, and The Delahaye Group).

265. *Id.* (providing that employees should be given “clear guidelines that proscribe discussions of internal corporate matters, company business, client information and confidential business data via the Internet.”).

266. *Id.*

267. *Id.*

268. *Id.* After discovering that employees were using the boards to discuss internal corporate matters, CIBER Inc. decided to revise its Internet policy in the next edition of the company’s employee handbook. *Id.* (citing *Companies Battle Libel on the Web: Chat Rooms Pose Legal Challenges*, DEN. BUS. J., Oct. 9, 1998).

company, including allegations of product testing failures, learned that one of the posters, "RSCDeepThroat," was actually one of the company's vice-presidents.²⁶⁹

B. *Silence Might Not be Golden*

Contrary to the popular corporate belief "that silence or a simple 'no comment' is an appropriate response to any kind of rumor, this approach can be risky when cyber-gossip is involved."²⁷⁰ Rather, as Blake A. Bell explains:

Ordinarily a company has no duty under the securities laws to correct or to verify rumors unless those rumors can in some way be attributed to the company. If, however, the company has placed a hyperlink on its own Web site linking to a message board, chat room or newsgroup devoted to the company and its securities, and the rumor appears on the linked site, an argument could be made that the company has entangled itself with the rumor and, thus, may have a duty to respond.²⁷¹

Moreover, companies have a duty to act prudently and to protect their shareholder's interest, thus "mere inaction is rarely a viable alternative."²⁷²

C. *Should Companies Slug It Out With Their Libelous Cyber-Critics?*

Frequently, public relations firms and marketing experts have urged their corporate clients to respond to cybersmear "before it spirals out of control."²⁷³ "Internet-savvy securities lawyers, however, generally advise

269. *Id.* (noting that "RSCDeepThroat" has since resigned).

270. *Id.* (recognizing, however, "that there can be circumstances in which a company risks potential liability under the securities laws if it simply ignores Internet rumors."); see also Jeffrey B. Rudman, et al., *D&O Liability in Cyberspace: Taking Advantage of Technology Without Tripping Over the Federal Securities Laws*, 15 No. 18 ANDREWS CORP. OFFICERS & DIRECTORS LIAB. LITIG. REPORTER 16, July 17, 2000, Part III (recommending that "[g]enerally, it is not advisable to respond to rumors about the company . . . While a management's instinct may be to respond, especially when the rumor is patently offensive in nature (as many message board posts are), turning the other cheek is usually the best course of action.").

271. Bell, *supra* note 8. In addition, self-regulatory rules similar to "those promulgated by the New York Stock Exchange, AMEX and NASDAQ may impose an independent duty on listed companies to respond to Internet rumors." *Id.* "For example, section 202.03 of the New York Stock Exchange Listed Company Manual requires listed companies, in certain circumstances, promptly to deny or clarify rumors without regard to the source of such rumors." *Id.*; see also Rudman et al., *supra* note 296 (noting that "[t]he New York Stock Exchange Manual § 202.03, for example, requires that a company should be prepared to make an announcement if unusual market activity occurs prior to its announcement.").

272. Bell, *supra* note 8 (questioning the possibility that either the rumors may, in fact, be true or whether an investigation may be warranted).

273. *Id.* (noting that public relations and marketing firm often recommend that companies "go so

against using the Internet” when responding to cybersmear.²⁷⁴ In many instances, the “potential for liability escalates if . . . the [company] has followed the advice of some public relations experts and responded directly to newsgroups where unfavorable rumors were flying.”²⁷⁵ Likewise, John R. Hewitt, an attorney in the New York office of Chicago’s Mayer, Brown & Platt suggests that the last thing that the company should do is attempt to “slug it out” with a cybersmearer.²⁷⁶ Hewitt cautions, however, that a company which is publicly traded may have a duty to respond by issuing a press release and a statement through a corporate website if the stock price is affected.²⁷⁷

D. *Swinging the Litigation Club to Silence John Doe Could Backfire*

1. The “McLibel” case: Why Suing an Anonymous Critic Might Not Make Cents

“For many companies, the most expensive, time-consuming and least-palatable option is to commence litigation against the perpetrators of disparaging Internet rumors.”²⁷⁸ The infamous McDonald’s “*McLibel*” case

far as to participate in Usenet newsgroups, message boards and chat rooms to add the company’s view to the overall mix of information.”).

274. *Id.* (recognizing that “[t]here are unique liability risks associated with using the Internet to reply to rumors.”); see also Rudman et al., *supra* note 270 (observing that “[b]y responding to a rumor, a company may assume a ‘duty to update’ or a ‘duty to correct’ the information in the response that it would not otherwise have.”).

275. Prentice, *supra* note 189, at 76 (emphasis in original omitted) (arguing that where companies undertake to correct false and detrimental rumors posted on Internet message boards, “[t]he failure to then similarly correct beneficial rumors gives rise to very plausible claims of selective disclosure.”). *Id.* “Even accurate disclosures could be viewed as illicitly ‘selective’ and,” if acted upon, could “invite insider trading liability” *Id.* at 77.

276. Ellen L. Rosen, *Savvy Investors Seek Out SEC to Stop Internet Fraud*, NAT’L L. J., Feb. 14, 2000, at B5.

277. *Id.*; see also Bell, *supra* note 8 (noting that “there may come a time when a company concludes that response to cyber-gossip is necessary In such circumstances, some companies have chosen to permit their investor relations personnel or other employees to discuss appropriate company matters in chat rooms and on message boards.”).

278. Bell, *supra* note 8 (observing that “[c]yber-libel lawsuits are not necessarily the answer” because “[a]lthough many such lawsuits have been commenced, neither their success nor their deterrent value has yet been proven.”). Alternatively, for companies that wish to go to court, “[f]ighting is relatively easy.” Robert McGawey, *Cyberlander. (Industry Trend or Event)*, ELECTRONIC BUS. TODAY, Mar. 1, 2001, at 39, available at 2001 WL 8165486 (quoting Dawn Estes, an attorney for the Dallas law firm of Gardere Wynne Sewell LLP). According to experienced litigators, the key is to “[a]ct quickly.” *Id.* (quoting Andy Serwin, lawyer at Baker & McKenzie in San Diego). First, the faster the “bad news is extinguished, the less likely destructive rumors will swirl around the business. And second, different message boards and . . . ISPs hold onto

illustrates how corporations might only be hurting themselves by brandishing the litigation club to silence a libelous critic.²⁷⁹ Describing the *McLibel* case, one commentator observed:

McDonald's filed a libel action in England over statements made in a pamphlet (that might [a]s well have been placed on a Web site by more sophisticated defendants). McDonalds won the suit but in so doing spent \$16 million in order to obtain an uncollectible \$68,000 judgment. The trial was the longest in English legal history and was a public relations disaster for the company. McDonald's would have done well [better] to just have looked the other way.²⁸⁰

Litigation provides no guarantee that the cybersmearers can actually be identified or deterred, regardless of how much time, money, and effort are spent.²⁸¹ Moreover, even if the matter can be prosecuted to a final judgment, there is a strong likelihood that the individual defendant may be judgment-proof.²⁸² Therefore, because companies cannot truly stop the smear,

access logs for varying lengths of time, but all destroy old records eventually." *Id.* (quoting Serwin as stating: "You want to act while you can still lay your hands on the records.").

279. See McGawey, *supra* note 278. Although "most lawyers view winning these actions as a slam dunk - mainly because there is a massive mismatch between the resources of an established business and those of a malcontented poster . . . not all lawyers counsel moving ahead with suits." *Id.* (quoting Bob Vieth, a lawyer with Cooley Godward LLP in Reston, Va., as stating: "I commonly advise conservatism here . . . [if a company chooses to] file [a lawsuit] . . . this news will wind up in many newspapers."). "And, in reporting those stories, newspapers will frequently repeat the content of the original, harmful postings. Suddenly, the readership of the false information has multiplied 'and you have to ask if getting this defamatory content republished in newspapers is in your interest.'" *Id.* (quoting Vieth and noting that as a final motivating factor, according to Vieth, "[i]t's very, very easy for a company to seem like a bully in these actions.").

280. Prentice, *supra* note 189, at 73. In some cases, however, looking the other way may not be a realistic option. For example, the defamatory posting on a Yahoo! financial news bulletin board stated that Skechers USA, Inc. was probably going to file for bankruptcy under Chapter 11. McGawey, *supra* note 278, at 39 (noting that "[t]he poster of the information insisted he knew this to be true because he had heard it directly from the CEO of the Manhattan Beach, CA-based manufacturer of trendy thick-soled shoes and boots."). Further, in another message, posted only forty-five minutes after the original defamatory message, designed to appear as though it was posted by Skecher's CEO, confirmed the bankruptcy allegation. See *id.* (noting that "there were two problems: Skecher's CEO, Robert Greenberg, never made the posting that supposedly came from him, and the shoemaker wasn't mulling over bankruptcy."). Because the allegations were blatantly false, Skecher's decided to file a libel claim against the defamatory posters. *Id.* (quoting Chris Reede, an attorney with the Los Angeles office of Kaye, Scholer, Fierman, Hayes & Handler LLP, the firm that represents Skecher's, as stating: "We determined we had to take action.").

281. Bell, *supra* note 8.

282. *Id.*; see also Branscomb, *supra* note 25, at 1645 n.16 (1995) (noting that many perpetrators of false and disparaging messages may be "young users just learning their computer skills, who have little or no financial capability to pay damages imposed by a legal judgment."). Although Internet users posting messages on financial message board might arguably be more sophisticated than the average Internet user, their ability to satisfy a judgment, nevertheless, remains unclear and, in many cases, unlikely.

preventative measures designed to curtail the inevitable appear to be the best policy.²⁸³

2. Beware of the Counterclaim: Do You Really Want an SEC Investigation?

“Holding true to the old saw that ‘the best defense is a good offense,’ substantive counterclaims have” become a favorite weapon of cybersmear defendants.²⁸⁴ The most notable and widely reported case of a defendant asserting a counterclaim against a smeared corporate plaintiff “involves a cybersmear suit filed by ITEX Corp. in August 1998.”²⁸⁵ Beginning in July of 1998, a series of cybersmeas were posted on a Yahoo! Finance message board that was devoted to discussion of ITEX stock.²⁸⁶ Using the aliases “colojopa,” “Investor 727,” and “Orangemuscat,” online critics engaged in a relentless smear campaign against the corporation.²⁸⁷

Subsequently, ITEX filed a complaint alleging that the posters “had engaged in unlawful trade practices, civil conspiracy and defamation.”²⁸⁸ On August 26, 1998, one of the defendants, Leslie L. French, retaliated and filed an answer providing an affirmative defense, asserted a counterclaim, and

283. Bell, *supra* note 8. As an alternative to litigation, some companies have sought the assistance of private investigative firms who specialize in obtaining the identities of anonymous Internet message posters. See Rudman et al., *supra* note 270 (noting that “private investigators use procedures such as ‘data mining’ to survey the Internet.”). For example, the Internet Crimes Group (“ICG”), a Princeton, New Jersey private investigation firm, helps corporations “smoke out angry ex-employees or stock-fraud suspects.” *Id.* (noting that approximately “one-third of ICG’s business involves tracking down anonymous online” critics). Illustrating the uncanny ability of ICG to track down an unruly, in one instance:

An Irvine, California software-leasing company hired ICG to unmask someone calling himself “ZeroBid” who had posted Message Board accusations that the company could be fraudulently promoting its stock through a pump and dump scheme. ICG staffers noticed that ZeroBid left a message on the Raging Bull stock discussion Web site saying “This board is dead. I’m going over to play chess on Yahoo!” They tracked ZeroBid down at the chess site and, using assumed names, challenged him to matches for several weeks. ICG matched the nickname to a list of the firm’s employees. The company passed on ZeroBid’s posting to securities regulators. The matter is pending.

Id.

284. Blake A. Bell, *Plaintiff Corporations Face Reprisals From Cybersmear Defendants*, THE CORPORATE COUNSELLOR, Newsletter, January 2000, available at http://www.ljx.com/newsletters/private/corpcounsellor/2000/2000_01_01.html (last visited Jan. 24, 2001).

285. *Id.* ITEX is a Nevada corporation that is based in Oregon and operates the ITEX Retail Trade Exchange. *Id.*

286. *Id.*

287. See *id.* (noting that “messages reportedly claimed, for example, that ‘current management is blind, stupid and incompetent.’”).

288. *Id.*

third-party claim against ITEX and its executives.²⁸⁹ The counterclaim alleged that the corporate plaintiff was violating various securities laws, and thus that the posted messages were essentially true.²⁹⁰ Not long after the answer and counterclaim, “the Securities and Exchange Commission got into the act.”²⁹¹ Based on their investigation, on September 27, 1998, the SEC brought a civil fraud action against ITEX and members of its management.²⁹²

3. Could the Rumors Be True?: John Doe Does Discovery to Find Out

“Another tactic that should come as no surprise is the extent to which John Doe defendants are trying to use the discovery process to bolster their positions and embarrass the plaintiff companies and their executives” that they have smeared.²⁹³ *Varian Medical Systems, Inc. v. Felch*,²⁹⁴ provides an example of a John Doe using the discovery process to attempt to prove that alleged cybersmears were actually true.²⁹⁵ In *Varian*, the plaintiff corporation alleged that defendant Michangelo Delfino, a former research scientist at Varian that had recently been fired, began posting defamatory messages and impersonating company officials on a Yahoo! Finance message board.²⁹⁶

The defendant denied the allegations and asserted that the suit was merely an attempt “to ‘use the Internet to go after’ his research and development startup company, MoBeta, Inc., which he [claimed was] the ‘real target of Varian’s suit.’”²⁹⁷ Attempting to prove their theory, “[t]he defendant’s attorneys in the Varian case have deposed Varian’s director of human resources, its human resources senior resources representative, a

289. *Id.* “The answer containing the cross-complaint was amended.” *Id.* (citing *Itex v. French*, No. 98-09-06393 (Cir. Ct. Ore., County of Multnomah)).

290. Specifically, in the “amended pleading, the defendant alleged, in effect, that the creation and issuance of bartering trade dollars in circumstances that the defendant contends were in deficit condition constitute[d] an offering and sale of unregistered securities in supposed violation of Oregon’s blue sky laws.” *Id.* (noting that in addition to requesting injunctive relief against ITEX and a receivership for the exchange, “[t]he defendant sought damages on the various counterclaims and third-party claims totaling more than \$1.5 million dollars.”).

291. *Id.*

292. *Id.* “The complaint alleged securities fraud and asserted that the company had materially inflated its revenues and earnings in financial statements filed with the Commission and in other disclosures made to the investing public.” *Id.* (citing SEC Litig. Release No. 16305 (Sept. 28)).

293. *Id.*

294. No. C-99 20256 RMW ENE (N.D. Cal. filed Feb. 25, 1999).

295. See Bell, *supra* note 284 (observing that “[t]he Varian suit is a virtual soap opera of charges and counter-charges.”).

296. *Id.*

297. According to the defendant, “[w]hat we think they’re trying to do is go after our patents.” *Id.* (citing Erik Espe, *Ex-Varian Employees Cry SLAPP*, BUSINESS JOURNAL (San Jose and Silicon Valley), Nov. 1, 1999).

supervising manager and a manager.”²⁹⁸ In the ultimate twist of irony, corporate plaintiffs, placed in such a predicament, might have equally as strong an incentive to prevent defendants from obtaining certain corporate information through the discovery process as do John Does in maintaining their anonymity.²⁹⁹

VII. CONCLUSION

As the Supreme Court in *Reno* observed, the Internet has reshaped the scope of contemporary discourse by empowering every person possessing online access with an equal opportunity to communicate “to an audience larger and more diverse than any the Framers could have imagined.”³⁰⁰ Underlying the argument that anonymous speech should not be stifled is the optimistic, and perhaps naive, notion that in the “marketplace of ideas” all ideas are of equal importance,³⁰¹ and that anonymity plays an integral role in fostering free expression.³⁰² Although such anonymity may initially appear to provide an idyllic medium of unparalleled equality and empowerment in the realm of free speech, it is one that is ripe for abuse.³⁰³

The ability to remain unknown permits those who wish to exploit their privilege to violate the rights of others while hiding under a veil of anonymity lacking any form of accountability or responsibility.³⁰⁴ As evidenced by the devastating consequences commonly caused due to corporate cybersmear, online anonymity may encourage speech that perhaps should have never been disseminated.³⁰⁵ Ultimately, a boiling point is reached where the well-founded intent to create heightened participation in public discourse simply comes at too great of a cost.³⁰⁶ More importantly,

298. *Id.* (noting that “[e]fforts reportedly are underway to depose other even more senior executives.”).

299. *See id.* (tending to suggest that, in many ways, litigation in corporate cybersmear cases can be detrimental to both parties).

300. *Reno*, 31 F. Supp. 2d at 476.

301. *See Volokh, supra* note 22, at 1086-87 (arguing that “[t]he perfect ‘marketplace of ideas’ is one where all ideas, not just the popular or well-founded ones, are accessible to all.”).

302. *McIntyre v. Ohio Election Comm’n*, 514 U.S. 334, 343 (1994).

303. *See Branscomb, supra* note 25, at 1642 (noting that “the ability to remain unknown removes many of the layers of civilized behavior as [Internet users] can escape responsibility for negligent or abusive postings.”).

304. *See id.*

305. *See Smith, supra* note 6, at 4 (arguing that “pseudonymity can provide speakers with the courage to speak in ways that they might eschew if their words were easily traceable to them.”); *see also LESSIG, supra* note 37, at 80 (observing that “[j]ust as anonymity might give you the strength to state an unpopular view, it can also shield you if you post an irresponsible view. Or a slanderous view. Or a hurtful view.”).

306. *See Lidsky, supra* note 23, at 902-903 (noting that “fostering a more participatory public

however, corporate cybersmear detracts from, rather than contributes to, the marketplace of ideas by perpetuating disparaging falsehoods to the detriment of corporations, shareholders, and the general public.³⁰⁷

Although in many cases it is a difficult distinction, constitutionally protected anonymous speech must be distinguished from unlawful cybersmear.³⁰⁸ Defamatory statements that are aimed at manipulating the stock market or harming one's reputation simply have no value in the marketplace of ideas.³⁰⁹ Instead, the pervasive spread of cybersmear threatens to engulf the very premise upon which the metaphor was originally based.³¹⁰

It is easy to sympathize with John Doe in his web-waged war against big corporate America.³¹¹ However, the rights of corporate plaintiffs victimized by relentless cybersmear campaigns must also be recognized. Clearly, corporate plaintiffs should not be permitted to abuse the discovery process by filing frivolous suits that are merely aimed at unmasking an anonymous critic as a scare tactic to chill continued criticism.³¹² But on the same token, John Does should not be permitted to use their anonymity to shield themselves from liability and leave a corporate plaintiff without a potential defendant in the face of a legitimate cause of action.³¹³ For the time being, however, courts must continue to struggle in balancing the right of corporate plaintiffs to pursue meritorious causes of action with the significant privacy concerns of John Doe.³¹⁴ In affording John Doe the process that he is due, however, courts should not deny corporate plaintiffs the process they deserve in seeking to silence a vicious critic.³¹⁵

Corporate cybersmeas raise significant issues of liability.³¹⁶ Due to the fact that most cases have been settled or dismissed, it remains unclear as to

discourse may come at a high cost. Speech from a 'multitude of tongues' may lead to truth, but it may also lead to the Tower of Babel.").

307. *See id.* at 903 (reasoning that "discourse that has no necessary anchor in truth has no value to anyone but the speaker, and the participatory nature of Internet threatens to engulf its value as discourse.").

308. *See id.*

309. *See id.*

310. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (stating that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . .").

311. "In contemporary society, the individual is often overwhelmed by the size, wealth, and power of impersonal organizations, both in the private and public sectors." Richard S. Miller, *Tort Law and Power: A Policy-Oriented Analysis*, 28 SUFFOLK U. L. REV. 1069, 1076 (1994) (citing Allen M. Linden, *Tort Law as Ombudsman*, 51 CAN. B. REV. 155 (1973)).

312. *See Boies, supra* note 82, at 1210.

313. *See Lidsky, supra* note 23, at 881 (observing that "it is perfectly legitimate for plaintiffs to seek to stop an onslaught of offensive and damaging untruths.").

314. *See, e.g., Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1997).

315. *See id.*

316. *See supra* note 114 and accompanying text.

whether a cause of action for defamation will ultimately prove to be the most successful tool for corporate plaintiffs seeking vindication.³¹⁷ Presently, the level of constitutional protection afforded to defendants in corporate cybersmear cases, predicated on defamation, remains unresolved.³¹⁸ Traditional principles fail to neatly conform to the novel issues presented by the Internet and its uncharted waters.³¹⁹ Rather, whether John Doe qualifies as a media or nonmedia defendant, whether a corporation is a public or private figure, and whether a cybersmear constitutes a matter of public or private concern are just a few of the complex questions that lower courts are left to address absent guidance from the Supreme Court.³²⁰ Of particular importance is how the message board context applies with respect to the opinion privilege.³²¹ Furthermore, it is questionable whether anti-SLAPP statutes designed to limit frivolous defamation suits will pose a viable procedural obstacle for corporate plaintiffs.³²²

Moreover, for many cybersmeared corporations, litigation may not be the answer.³²³ In addition to not making financial sense, corporations might only be hurting themselves by suing John Doe.³²⁴ Perhaps these suits will uncover an issue that will set in motion a regulatory response;³²⁵ however, their success in providing a viable means of redress for tortious conduct is presently untested. Nevertheless, the defamation claim in cybersmear cases remains arguably the best cause of action “until something better can be found.”³²⁶

317. *See id.*

318. *See supra* notes 168-203 and accompanying text.

319. *See id.*

320. *See id.*

321. *See supra* notes 204-18 and accompanying text.

322. *See supra* notes 228-41 and accompanying text.

323. *See supra* notes 293-99 and accompanying text.

324. *See id.*

325. *See* Gary T. Schartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 385 (1994) (citing A.M. Linden, *Tort Law as Ombudsman*, 51 CAN. B. REV. 155 (1973)). “Moreover, if tort can feed into regulation, regulation can also feed into tort.” *Id.* Corporate plaintiffs, such as VirtualSellers.com, a Chicago software company who sued two cybersmearers for posts that caused the company’s stock price to fall, argue that “[t]he regulations should be changed so that people who want to post on the Internet have to disclose who they are.” Lorek, *supra* note 18 (quoting Bill Sinclair, the president of VirtualSellers.com).

326. LINDEN, *supra* note 60, at 669. As Justice Linden observes:

“[D]efamation law is available to assist individuals whose reputations have been besmirched by improper methods. Other remedies are available but they are often inappropriate. . . . A defamation action, though certainly cumbersome and expensive, may offer the best blend of deterrence and compensation, without unduly inhibiting free speech. That is undoubtedly why the defamation action has survived and will continue to flourish, despite its many obvious shortcomings. Just like other areas of tort law, it just happens to serve our society and therefore is worthy of preservation until something

The common thread in all corporate cybersmear cases turns on the equipoise right of anonymous Internet users to post online messages, and the right of corporate plaintiffs to protect themselves and their shareholders from the potentially devastating consequences of such speech when it is false. Amidst the vast array of legal questions for which there are currently no answers, on this point courts have been quite clear.³²⁷ As the Supreme Court observed in *McIntyre*, “[t]he right to remain anonymous may be abused when it shields fraudulent conduct. But . . . our society accords greater weight to the value of free speech than to the dangers of its misuse.”³²⁸

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better can be found.”

Id. (citations omitted).

327. “If there is one truism in the history of constitutional defamation privilege, it is that “[w]hatever is added to the field of libel is taken from the field of free debate.” Fetzer, *supra* note 186, at 38 (citing *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942)), *quoted in* *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964).

328. 514 U.S. 334, 357 (1995) (citing *Abrams v. United States*, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting)). *See also* *United States v. Assoc. Press*, 52 F. Supp. 363, 372 (S.D.N.Y. 1943), *aff’d*, 326 U.S. 1 (1945) (noting that “the First Amendment . . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and will always be, folly; but we have staked upon it our all.”).

329. J.D. Candidate, Pepperdine University School of Law 2002. Note & Comment Editor, *Pepperdine Law Review*. The author would like to thank Megan Gray of the Baker & Hostetler LLP for her generous help and expert insight.