

1 if the Court is not prepared to do so at this point, that
2 appropriate notification be given, together with a statement
3 that the posters could appear anonymously to try and
4 vindicate their own First Amendment rights here.

5 THE COURT: Okay. Thank you, Mr. Fowler.

6 Any last words, Mr. Lovett?

7 MR. LOVETT: That sounds funereal.

8 THE COURT: On this subject.

9 MR. LOVETT: No. It seems to me that the reality
10 is that Gannett's position is not materially different than
11 mine. Nobody is suggesting that the anonymous bloggers jump
12 out after a cake stark naked and give us their Social
13 Security card.

14 THE COURT: Thank God for that.

15 MR. LOVETT: Notification should be given, and it
16 appears that there seems to be an ever evolving standard.

17 If we are going to revisit the issue, we shall,
18 whether it's at this juncture or down the road it appears.

19 THE COURT: All right. Well, here is what I'm --

20 MR. PLUNKETT: Your Honor, for the record, may I
21 just say that Defendant Phil Amicone, the Mayor, did join in
22 this motion.

23 THE COURT: Okay. All right. Well, here is what I
24 am going to do.

25 And I guess I should preface what I'm saying by

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1 saying that my learning on this issue comes from the case
2 Mr. Fowler cited, Dendrite International, Inc. v. Doe, 775
3 Atlantic 2d 756, which is a New Jersey Appellate case from
4 2001, which is sort of the granddaddy.

5 And I have also looked at Sony Music Entertainment
6 v. Does 1 through 40, 326 F.Supp. 2d, a Southern District
7 case from '04, and Doe I v. Individuals, 561 F.Supp. 2d 249,
8 which is a Connecticut case from last year. And I gather
9 from what Mr. Fowler said that Tube Sock Ted follows a
10 similar line, although, I have not absorbed that case as well
11 as the other three.

12 What we learned from these cases is that the First
13 Amendment protects Internet speech and anonymous speech, but
14 that the right to speak anonymously is not absolute and must
15 be weighed against the other party's need for discovery as to
16 identity in order to address real wrongs.

17 The cases tell us what factors should come into
18 play and procedurally how the Court should address them.

19 The first factor is that the plaintiff has to give
20 notice. I agree with Mr. Fowler that the notice given here
21 so far doesn't suffice. Placing the notice in the chain of
22 commentary on an unrelated topic is not sufficiently
23 calculated to reach those who made the complained of posts.

24 I think the notice should be on the pertinent blog
25 in some obvious place. And if that's something as a

1 technical matter the plaintiff cannot accomplish himself, in
2 other words, if the blog technology only permits the
3 plaintiff to put information in an ongoing chain of
4 commentary, the plaintiff should put the notice in a chain
5 that bears some relevance to the issues in the case, where
6 the people who participated in the original blog would be
7 likely to see it.

8 And I also am going to order Gannett to undertake
9 to place the notice for a period of at least three days in
10 some general area where it will be visible to anyone signing
11 on to the blog. And the notice should include the
12 information that anyone wishing to move to quash the subpoena
13 may do so within 21 days, and that the motion can be made
14 anonymously.

15 If either party would like to add a disclaimer,
16 that the plaintiff or the paper can't provide legal advice on
17 the subject, that's fine with me. I don't think you should
18 provide legal advice. I just think the notice has to be a
19 little more prominent than it already has, but I just don't
20 know if the -- technically, if the plaintiff can, you know,
21 put something generally at the top of the blog when people
22 sign in, or if the only place the plaintiff can do that is in
23 a chain of discussion.

24 If the latter, find a discussion that's, that's
25 more likely to get the attention of the people whose

1 attention we are trying to get.

2 The cases also tell us that the plaintiff has to
3 provide the Court with the full statements which are at
4 issue. All I have so far are the edited snippets that
5 plaintiff alleges are actionable. I do think I have seen in
6 motions in other cases the full versions. But I don't want
7 to make any assumptions about what plaintiff is talking about
8 in this case based on what other plaintiffs may be talking
9 about in other cases. So I want -- so Mr. Lovett should
10 provide the full statements at issue.

11 Third, the plaintiff has to make a concrete showing
12 of a prima facie case, which I'll discuss more in connection
13 with Mr. Amicone's -- excuse me, Mr. Edelman's motion.

14 I don't have the full statements in context. They
15 do seem to be opinion, but I don't need to get into that
16 analysis at this point. I can do that when anybody who has
17 an interest in the issue takes advantage of his or her
18 opportunity to object.

19 Also, the plaintiff has not provided anything
20 factual on whether he suffered any real injury to reputation.
21 So, something like that I think is required on a prima facie
22 case, even if it's just an affidavit from the plaintiff.

23 Fourth, the cases discuss whether alternative means
24 exist to get the information, and I think that's a big factor
25 in this case.

1 It seems to me that the plaintiff has gotten the
2 information through other means, and it may be that there is
3 other discovery that can be taken that would confirm the
4 information that Mr. Lovett believes he has, and certainly
5 maybe other people who can -- either the defendants in this
6 case or others who could be deposed on the subject.

7 And if all of the above were satisfied, then I
8 would have to balance the First Amendment interests of the
9 anonymous posters against the need for disclosure in order to
10 allow the plaintiff to proceed, taking all those factors into
11 account.

12 And in considering the first part of that balance,
13 the First Amendment interests of the posters, I would need to
14 know from Gannett what, if anything, appears on the website
15 by way of disclaimer, which you sometimes see on websites,
16 which -- you know, you often see something like, you know,
17 "you are posting your comments anonymously, but you should
18 know that if we get a court order or legal process, we may
19 have to divulge your name."

20 If there was something like that on the site, that
21 would be a factor weighing in favor of disclosure. If there
22 weren't, that would be a factor leaning the other way.

23 So, I think procedurally what I am going to do is,
24 I am going to grant the motion to quash for now.

25 The plaintiff has leave to re-serve the subpoena,

1 after he has exhausted his alternative means to get the
2 information. It may be that Mr. Lovett decides this isn't
3 worth the trouble. It may be that he has other sources.

4 So -- but if after exhausting alternative means,
5 within reason, the plaintiff chooses to re-serve the
6 subpoena, it should be done with appropriate notice as
7 outlined above, and with concurrent filing to me showing the
8 full statements, laying out the prima facie case, and
9 describing why there are no effective alternative means to
10 get the information. And the plaintiff can also add anything
11 he wishes on the subject of his need for the names, although,
12 that seems pretty obvious why he would need it.

13 And, so, the current subpoena is quashed. The
14 plaintiff can re-serve it later, in accordance with what I
15 have just said, if need be, and we will analyze the factors
16 again at that time, with the benefit of whatever opposition
17 is filed by the bloggers, if any.

18 So that I think takes care of the motion to
19 quash, and the clerk is to terminate that motion, which is
20 Number 32.

21 Which brings us to Mr. Edelman's -- I guess it
22 started as a motion for summary judgment, and maybe now it's
23 more like a motion to dismiss.

24 I gather the first, the first go-around Mr. Edelman
25 couldn't find the postings and then Mr. Zherka supplied them.