

## INTRODUCTION

The arguments advanced by the plaintiff-appellee Ronald A. Fitch ("Fitch") in his brief, such as they are, entirely miss the mark. Further, the Statement of the Case set forth in Fitch's brief contains facts that are not part of the record, as well as material misstatements of fact, and, as such, Doe objects to Fitch's recitation of the facts as set forth therein.

Doe will not attempt to track the order of Fitch's arguments as set forth in his brief; Doe is not sure that any order of argument can be ascertained. Read in totality, however, Fitch's brief appears to make four (4) primary arguments as follows:

1. Fitch appears to advance the argument that this appeal is interlocutory and, therefore, not appropriate;
2. Fitch also appears to argue that it was not clear error for the Superior Court to make a finding of fact that Doe had consented to disclosure;
3. Fitch also appears to argue that 47 U.S.C. § 551 does not prohibit disclosure; and
4. Finally, Fitch appears to argue that Maine's subpoena powers authorize disclosure and that disclosure is not prohibited by Section 551, and the First Amendment to the United States Constitution.

## ARGUMENT

Doe addresses each of what we discern to be Fitch's arguments as follows:

### **I. THIS APPEAL IS PROPER AND TIMELY**

As is more particularly set forth in Defendant-Appellant's Motion for Stay Pending Appeal Pursuant to Me. R. App. P. 10 (c) and Incorporated Memorandum of

Law dated July 6, 2004 (the "Stay Motion"), the order at issue in this appeal was a final order as to Time Warner Cable Co. ("Time Warner"). The order operates on Time Warner only, and there is nothing more that can or will happen with or to Time Warner in this case. The only issue in the case as to Time Warner is whether it can be compelled to turn over subscriber information. Resolution of that issue in this appeal will end the case for Time Warner. There is certainly nothing that could happen in any subsequent litigation that would moot any decision that this Court makes.

Further, as is also set forth in the Stay Motion, even if one were to conclude that the order at issue was not a "final order" in a traditional sense, Doe's appeal is still proper and timely since it falls within both the collateral order doctrine as well as the death knell exceptions to the final judgment rule. This is intuitively obvious, as it goes without saying that once disclosure is ordered, there is no way to undo disclosure, and no further possibility of judicial relief or appeal.

Doe will refrain from reiterating the detailed arguments set forth in the Stay Motion in their entirety. Rather, Doe hereby incorporates the Stay Motion into this brief by reference.

**II. THE SUPERIOR COURT COMMITTED CLEAR ERROR IN FINDING THAT DOE CONSENTED TO DISCLOSURE OF PERSONALLY IDENTIFIABLE INFORMATION**

Doe agrees that, ordinarily, the standard of review before this Court regarding findings of fact is "clear error". But in this case, the Superior Court erred as a matter of law by purporting to make findings of fact in the absence of any record whatsoever, in the absence of any evidence whatsoever, in the absence of any opportunity of Doe to present evidence, and in the absence of any opportunity of Doe to cross examine Fitch's

“evidence”. The Superior Court’s error was one of law, in that by purporting to make a finding of fact in the complete absence of a record, it denied Fitch due process, any opportunity to be heard, and it totally disregarded the Maine Rules of Evidence.

Moreover, as is more particularly set forth in Doe's brief, even if the total denial of due process, the total absence of any record, and the total disregard of the rules of evidence were somehow excusable, the document upon which both Fitch and the Superior Court relied to find “consent” is not a form of subscriber agreement at all. By its own terms, it is a privacy notice that refers to a subscriber. A “notice” is not, by definition, an agreement. The alleged subscriber agreement to which the notice refers was not submitted to the Superior Court at all, in any fashion, with or without due process. No one in this case knows what the subscriber agreement says, nor whether Doe actually signed one or ever saw one. Yet, the Superior Court somehow found an agreement by Doe and the requisite consent.

Furthermore, even if one could appropriately make the leap to conclude that reliance on the privacy notice without the underlying subscriber agreement was appropriate, one need only look at the language excerpted by Fitch to conclude that the language of the privacy notice does not establish that Doe consented to disclosure of personally identifiable information under these circumstances.

Indeed, the language quoted by Fitch makes it clear that the purpose of the notice was to provide subscribers with notice of when personal information could be disclosed without their consent.

Having established that there was absolutely no evidence that was submitted to the Superior Court, and it being abundantly clear that the Superior Court did not have

either a subscription agreement signed by Doe or a "standard form" of subscription agreement that one might logically conclude was similar to one signed by Doe, there is no need to delve into the specifics of Fitch's argument regarding enforceability of a contract that is nowhere to be found in the record of this case, and hypothetical at best.

While Fitch tries to make hay of fact that Doe did not raise the adhesion argument to the Superior Court, Fitch's argument in this regard is without merit and is best characterized as a red herring. In point of fact, Doe did not argue to the Superior Court that the Time Warner agreement was a contract of adhesion because, (1) there was no agreement that was submitted to the Superior Court for consideration, (2) the document that Fitch contends is the agreement was attached to a pleading to which Doe was not afforded an opportunity to respond and (3) the document itself is not an agreement; hence it is not a contract of adhesion.

### **III. 47 U.S.C. § 551 PROHIBITS DISCLOSURE OF DOE'S IDENTITY IN THE ABSENCE OF DOE'S CONSENT**

As set forth in Doe's brief, 47 U.S.C. § 551 prohibits a cable operator, such as Time Warner, from disclosing personally identifiable information in the absence of consent, except in certain limited circumstances set forth in the statute. In his brief, Fitch appears to contend both that Doe's name is not "confidential information protected by Section 551" and that even if it is, certain of the exceptions apply.

First, it is worthwhile to note that Fitch did not make either of these arguments to the Superior Court and is therefore barred from making these arguments in this Court. Persson v. Dept. Human Serv., 775 A.2d 363, 367-368 (Me. 2001). Equally important, the Superior Court did not reach the absurd conclusion that Doe's name is not personally

identifiable information protected by this Federal law nor did the Superior Court purport to rely on subsection (c)(2)(A) or (C) in issuing its order.

Setting aside these technical points, as a matter of substance Fitch's arguments must fail.

**A. Doe's Name is Personally Identifiable Information Protected By the Cable Subscriber Privacy Act.**

For Fitch to contend that someone's name, indeed their identity, is not personally identifiable information is rather astounding, inasmuch as this whole case is about Fitch's accusation that Doe misappropriated *Fitch's* name. If Fitch is correct, that someone's name is not personally identifiable information worthy of protection, then this whole case can be dismissed.

While the term "personally identifiable information" is not defined in Section 551, the statute gives some guidance as does applicable case law.

47 U.S.C. § 551(a)(2)(A) provides, in relevant part, as follows:

**(A)** the term "personally identifiable information" does not include any record of aggregate data which does not identify particular persons.

There is a compelling inference from this limitation on the definition of "personally identifiable information": by excluding data that that does not identify particular persons, the definition must include any data that *does* identify particular persons. One is hard pressed to think of anything that is more likely to identify a particular person than that person's name. In fact, Doe is seeking disclosure of Doe's name so that Fitch can try to *identify* Doe as the sender of the e-mail attached to Fitch's complaint.

Courts that have looked at this issue have reached the same conclusion. In U.S. v. Kennedy, 81 F. Supp. 2d 1103 (D. Ks. 2000), the United States District Court for the District of Kansas, was faced with the question of whether the Cable Subscriber Privacy Act was violated when the government obtained a subpoena to compel disclosure of a cable subscriber's name and address in connection with a suspected child pornography case. While the Court determined that it did not have to decide whether the Act had been violated for other reasons, in a footnote in its decision, the Court noted as follows:

The legislative history of the CCPA [the Cable Communications Policy Act codified at 47 U.S.C. §§251 *et. seq.* which includes 47 U.S.C. § 551] notes that such information 'would include specific information about the subscriber, or a list of names and addresses on which the subscriber is included.' [citations omitted] The court finds that the information regarding defendant which was given to the government [which included the subscriber's name] was such personally identifiable information.

Id. at 1111

The United States District Court for the Eastern District of New York also addressed the question of what constitutes "personally identifiable information," in the case of Parker v. Time Warner Entertainment Company, L.P., 1999 WL 1132463 (E.D.N.Y. 1999). In that case, the Court noted as follows:

This narrow category of personally identifiable information--the *names*, addresses and programming choices of subscribers -- is governed by a section 551(c)(2)(C),...

(emphasis added)

Id. at 7.

Finally, if one were not persuaded by common logic and case law that a subscriber's name is "personally identifiable information," one of the exceptions that Fitch contends applies to these circumstances, 47 U.S.C. § 551 (c)(2)(C), specifically

authorizes the disclosure of "names and addresses." If a subscriber's name is not "personally identifiable information" afforded the protections of the statute, why is there an exception to allow disclosure of that information under the circumstances described? Clearly a person's name is personally identifiable information. It may even be the paradigm case of personally identifiable information.

**B. The Exception to Disclosure Found in 47 U.S.C. § 551(c)(2)(A) is Not Applicable to this Case.**

Fitch argues in his brief that,

Under a reasonable construct of the application the disclosure by Time Warner is necessary by Time Warner to prevent its own litigation or involvement in subpoena process and/or potential direct liability if joined in the underlying Tort action. [sic]

Fitch brief pp. 10

Fitch goes on to argue that as a result of the foregoing reasoning, disclosure is authorized pursuant to 47 U.S.C. § 551(c)(2)(A).

The exception found in sub-part (A) permits disclosure if the disclosure is, "...necessary to render, or conduct a legitimate business activity related to, a cable service or other service provided by the cable operator to the subscriber;..." Nowhere in the statute, or in applicable case law, is there any suggestion that avoiding litigation rises to the level of a "legitimate business activity related to, a cable service..." Indeed, if such were the case and Fitch's interpretation were correct, the exception would swallow the rule. A cable service provider would, in every circumstance, be permitted to disclose its subscribers' names and other personally identifiable information whenever it got served with a subpoena, so as to "avoid litigation". A cable service provider would be

permitted to disclose subscribers' names whenever it wanted to, all in the name of avoiding the potential for litigation.

Fitch directs this Court to a number of cases that Fitch alleges will provide a helpful analysis of this point. Doe did not find the cases particularly illuminating; neither will the Court.

Fitch cites the case of La Societe Metro Cash & Carry France v. Time Warner Cable, 2003 WL 22962857 (Conn. Super. Dec. 2, 2003)<sup>1</sup>. This case involved French law as well as principles of Connecticut law. As far as Doe can discern, the Court never addressed the issue of whether disclosure was permitted pursuant to 47 U.S.C. § 551(c)(2)(A) (or any of the other exceptions) and no one ever argued it. Thus, while this Court may find the Connecticut Superior Court's decision interesting as a general matter, it is not likely to provide any useful analysis of 47 U.S.C. § 551.

Fitch then cites Journal Publishing Company v. Hartford Courant Co., 804 A.2d 823 (Conn. 2002). The Journal Publishing case did not involve a cable service provider, nor did it address 47 U.S.C. § 551 in any way. Rather, this case addresses disclosure of the identity of an internet user pursuant to a bill of discovery issued under Connecticut law. The case is useful in analyzing the First Amendment protections of internet users (which are addressed in more detail below) but does not provide any guidance with respect to the analyzing the Cable Subscriber Privacy Act.

Likewise, the other cases cited by Fitch, America On Line, Inc. v. Anonymous Publicly Traded Company, 542 S.E. 2d 377 (Va. 2001), In Re Subpoena Duces Tecum to

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<sup>1</sup> Fitch's citation for this case of "36 CLR 170 (Tobin, J) (CV030197400S December 2, 2003)" does not appear to be correct. Doe assumes that the case cited above as 2003 WL 22962857 (Conn. Super. Dec. 2, 2003) is the same case.

America On Line, Inc., 200 WL 1210372 (Va. 2000)<sup>2</sup> and John Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1088 (D.C. App. 2001), are not relevant in determining whether disclosure is permitted under 47 U.S.C. § 551. None of these cases involved disclosure by a cable service provider. These cases are discussed in more detail below since they do provide helpful guidance in analyzing the important First Amendment rights at stake, but since the Cable Subscriber Privacy Act only limits disclosure by cable service providers, these cases do not support the proposition that disclosure by Time Warner of Doe's personally identifiable information is permitted under 47 U.S.C. § 551(c)(2)(A).

**C. The Exception to Disclosure Found in 47 U.S.C. § 551(c)(2)(C) is Not Applicable to this Case.**

Fitch's next argument, that disclosure is permitted pursuant to 47 U.S.C. § 551(c)(2)(C), is also fatally flawed.

Subsection (c)(2)(C) provides as follows:

(2) A cable operator may disclose such information if the disclosure is--

(C) a disclosure of the names and addresses of subscribers to any cable service or other service, if--

(i) the cable operator has provided the subscriber the opportunity to prohibit or limit such disclosure, and

(ii) the disclosure does not reveal, directly or indirectly, the--

(I) extent of any viewing or other use by the subscriber of a cable service or other service provided by the cable operator, or

(II) the nature of any transaction made by the subscriber over the cable system of the cable operator; or...

By the language of the statute itself, this exception only permits disclosure of a subscriber's name and address "to any cable service or other service." Unless Fitch is now contending that he is a "cable service or other service" this exception is not applicable.

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<sup>2</sup> This case is not discussed below because it is no longer good law; the order here was reversed by the holding in America Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. March 2, 2001).

Even, however, were one to ignore the plain language of the statute and conclude that disclosure is permitted to anyone (whether they are a cable service or not) provided there is compliance with the balance of the statute, this exception still does not authorize disclosure under the circumstances of this case.

First, the language of (c)(2)(C) makes it abundantly clear that whether a subscriber's name and address is disclosed is up to the subscriber. The subscriber must be afforded the opportunity to "prohibit or limit" disclosure. In other words, the subscriber must be given the opportunity to "opt-out" of the disclosure. See Parker v. Time Warner Entertainment Company, L.P., 1999 WL 1132463 (E.D.N.Y. 1999) at 7, 8 ("Thus, in order to disclose this protected information the defendant must not reveal in any fashion the extent of plaintiffs' viewing or use of a cable service, *id.* at (C)(ii), and must provide plaintiffs with a valid 'opt-out'"). Suffice it to say that had Time Warner provided Doe with the opportunity to opt-out of disclosure, Doe would have done so. It would indeed be an odd result, at best, to say that Time Warner can be compelled to disclose Doe's name and address over Doe's objection pursuant to 47 U.S.C. § 551(c)(2)(C) if Doe could have prohibited the disclosure pursuant to the same statute if Time Warner had asked.

Second, contrary to Fitch's contention that disclosure in this case would not reveal, directly or indirectly, the type of information prohibited by sub-part (ii) of the exception, such is not the case. Disclosure of Doe's name and address would reveal "...other use by the subscriber of a cable service or other service provided by the cable operator..." Fitch's entire purpose in seeking Doe's name is to attempt to link Doe to use of the Time Warner internet service. In other words, if Fitch prevails in this appeal,

Fitch will claim that Doe used Time Warner's cable service to send the e-mail described in Fitch's complaint. There can be no question that disclosure of Doe's name and address would reveal information about Doe's use of the Time Warner services.

**IV. DISCLOSURE IS NOT PERMITTED UNDER EITHER FEDERAL OR STATE LAW**

Fitch's final argument appears to be that if 47 U.S.C. §551 does not prevent disclosure (which it does) then there is nothing else in either state or other federal law that would prevent disclosure and Time Warner can be compelled to comply with a subpoena issued pursuant to the Maine Rules of Civil Procedure. Fitch's argument in this regard cannot succeed.

In his discussion of Maine subpoena authority, Fitch argues that Time Warner is obligated to disclose Doe's personally identifiable information pursuant to Rule 34(c) of the Maine Rules of Civil Procedure. While Doe agrees that Rules 34(c) and 45 of the Maine Rules of Civil Procedure provide the foundation for issuance of a subpoena in a civil action, Doe disagrees that such a subpoena would be enforceable in this case<sup>3</sup>.

Under applicable constitutional law, absolute state subpoena power must give way to consideration of First Amendment rights. The United States Supreme Court has repeatedly held that the right to speak anonymously is among the rights prescribed by the First Amendment (“[c]ongress shall make no law...abridging the freedom of speech...”). Doe v. 2THEMART.COM Inc., 140 F.Supp.2d 1088, 1092 (W.D. Wash. 2001). This right to anonymous speech was critical to the early evolution of the United States and continues today to facilitate the exchange of ideas as well as foster important political

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<sup>3</sup> It is worth noting that Fitch did not issue a subpoena to Time Warner in this case. As such, the Law Court may not need to consider the issue of whether disclosure pursuant to a subpoena would have been warranted. Should the Law Court chose to consider the Superior Court's subpoena power, however, we respectfully submit that the factors enumerated by the Dendrite case, as discussed more fully below, should be followed.

debate. Id. The Supreme Court has repeatedly preserved an individual's right to speak anonymously, and with the evolution of the internet as a critical forum for open communication, the Supreme Court has confirmed that First Amendment protections extend to speech via the internet. La Societe Metro Cash & Carry France, v. Time Warner Cable, 2003 WL 22962857, 5 (Conn. Sup. 2003).

Depending on the facts and circumstances of each case, courts have split on the question of how to balance an individual's Constitutional right to anonymous speech against civil subpoenas seeking information regarding anonymous individuals. Sony Music Entertainment Inc. v. Does 1-40, 326 F.Supp.2d 556, 563-564 (S.D.N.Y. 2004). Courts have evolved a variety of tests, recognizing that multiple factors must be considered to properly weigh the need for disclosure pursuant to a subpoena against an individual's right to First Amendment protections. Id. at 564.

Perhaps the most comprehensive judicial test yet developed was in a case where a corporation brought an action for defamation after messages were posted on an internet service provider's bulletin board. In this case, the Superior Court of New Jersey invoked a five-part test to decide whether the Doe-defendants' identities would be disclosed pursuant to the subpoena. Dendrite Intl. Inc. v. Doe, 775 A.2d 756, 759-760 (N.J. Super. App. Div. 2001). The Dendrite analysis requires the trial court to consider the following factors : (1) whether the plaintiff made an effort to notify the anonymous posters of the subpoena to afford a reasonable opportunity to file and serve opposition to the subpoena; (2) whether the plaintiff identified each statement, purportedly made by the anonymous posters, alleged to be actionable speech; (3) whether the plaintiff set forth in pleadings a prima facie cause of action against the anonymous posters; (4) whether the plaintiff set

forth evidence sufficient to support a prima facie cause of action for each element of his claim *prior* to a court order compelling the un-named defendants to identify themselves; and (5) assuming the plaintiff has met his burden to present a prima facie cause of action, whether the defendants' First Amendment rights to anonymous free speech is sufficiently outweighed by the strength of the prima facie case, and the subsequent necessity to disclose the defendants' identities to properly proceed with the action against them. Id. at 760-761. Only if the trial court finds, after notice and hearing, that each of these factors has been satisfied, should a subpoena be permitted to be served and enforced. See also, America Online, Inc. v. Anonymous Publicly Traded Company, 542 S.E.2d 377, 385 (Va. 2001).

The Dendrite test is a reasonable test that assures that an anonymous speaker's First Amendment rights are safeguarded. In this case, the only issue presented to the Superior Court was the applicability of 47 U.S.C. § 551. There was no attempt by Fitch to serve a subpoena, no opportunity by Doe to file a motion to quash a subpoena and, therefore, no opportunity for the Superior Court to hear and consider whether the facts of this case satisfy the Dendrite test. Should this Court determine that the Cable Subscriber Privacy Act does not prevent disclosure, then the Court should remand this case to the Superior Court for a hearing on the Dendrite standards.

## CONCLUSION

There can be no doubt that the Order issued by the Superior Court should be vacated. Doe's appeal of the Order was timely and appropriate. The Superior Court had no evidence before it that would establish that Doe consented to disclosure. In the absence of consent, 47 U.S.C. § 551 protects Doe's privacy and prohibits any disclosure of personally identifiable information (including Doe's name) by Time Warner. The exceptions cited by Fitch are simply inapplicable and do not provide a basis to order disclosure. Even, however, were one able to reach the conclusion that disclosure was not prohibited by Section 551, the Order of the Superior Court should still be vacated. Doe has a clear right to anonymous free speech pursuant to the First Amendment. That right should not be invaded without some showing, supported by findings and conclusions of the Superior Court, that the five part test established by the court in Dendrite has been satisfied. Fitch has not made any such showing. As such, the Order of the Superior Court should be vacated.

DATED at Portland, Maine this \_\_\_\_ day of October, 2004.

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**CERTIFICATE OF SERVICE**

I hereby certify that I have made due service of the foregoing Brief of Defendant-Appellant, by delivering two copies therefore this date to:

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Dated at Portland, Maine this \_\_\_\_ day of October, 2004.

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