

**SPRAGUE & SPRAGUE**

RICHARD A. SPRAGUE, ESQUIRE (I.D. #04266)  
JOSEPH R. PODRAZA, JR., ESQUIRE (I.D.#53612)  
CHARLES J. HARDY, ESQUIRE (I.D. #16912)  
LOUIS CHARLES SHAPIRO, ESQUIRE (I.D. #82242)

THE WELLINGTON BUILDING, SUITE 400  
135 SOUTH 19<sup>TH</sup> STREET  
PHILADELPHIA, PA 19103  
(215) 561-7681

ATTORNEYS FOR PLAINTIFF  
JOHN J. DOUGHERTY

JOHN J. DOUGHERTY,

Plaintiff,

v.

FBPDPLT,

Defendant.

IN THE COURT OF COMMON PLEAS  
PHILADELPHIA COUNTY

OCTOBER TERM, 2012

NO. 003755

**PLAINTIFF'S PETITION TO COMPEL  
DISCLOSURE OF DEFENDANT'S IDENTITY**

Plaintiff, John J. Dougherty, by his counsel, Sprague & Sprague, files this petition to compel disclosure of defendant's identity pursuant to *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. 2011). In support of this petition, Plaintiff avers as follows:

**A. Background**

1. Plaintiff, John J. Dougherty (hereinafter, "Dougherty"), is a citizen and resident of Philadelphia residing at 1933 E. Moyamensing Avenue, Philadelphia, Pennsylvania 19107.
2. Dougherty is the business manager of Local 98 of the International Brotherhood of Electrical Workers ("Local 98").
3. Dougherty, both individually and in his capacity as business manager of Local 98, has engaged in numerous civic and philanthropic endeavors, including work with numerous

organizations and events such as the American Red Cross, Magee Rehabilitation Center, Susan G. Komen Race for the Cure (breast cancer), Run for Your Life (prostate cancer), Delaware Valley Stroke Council, City of Hope, Geoffrey Lance Foundation (Spinal Cord Injury), Special Olympics, Philadelphia Chapter of the Variety Club, Police Athletic League, Philadelphia Golden Gloves, Pennsylvania Golden Gloves, CORA and many others.

4. “fbpdplt” is an internet screen name or pseudonym for an individual, whose identity is presently unknown to Dougherty, who made a defamatory blog post against Dougherty as described herein.

5. On Friday, August 10, 2012 at 3:00 a.m., Chris Brennan posted an article entitled “Giordano versus Johnny Doc in Chick-fil-A cluster-cluck” on his blog, on Philly.com (the “Brennan blog”). A copy of the Brennan blog is attached hereto and incorporated herein by reference as Exhibit “A.”

6. The Brennan blog described, among other things, the reaction of Philadelphia City Councilman James Kenney to the national controversy occasioned by the comments of Dan Cathy, company president of the chain chicken fast-food restaurant, Chick-fil-A. Cathy had made controversial statements in the media reflecting opposition to gay marriage.

7. According to the Brennan blog of August 10, 2012, WPHT-AM radio talk-show host Dom Giordano (“Giordano”) several days earlier wrote a column in the Philadelphia *Daily News*, in which Giordano called Councilman Kenney a “government bully” engaged in “pathetic pandering.”

8. The Brennan blog described Kenney as someone who, eyeing a run for mayor of Philadelphia in 2015, had established his “bona fides” with Philadelphia’s gay, lesbian, bisexual and

transgender community, and by contrast described Giordano as a “culture warrior.”

9. As recounted in the Brennan blog, Dougherty allegedly posted a “series of slams” about Giordano on social media site Facebook and then submitted them to be published as a letter to the editor in the *People Paper*.

10. These “slams,” according to the Brennan blog, were statements by Dougherty and directed at Giordano, which included, among other things, “Only hope Dom comes home one night to find his son holding hands on the sofa with a male companion while watching ‘Brokeback Mountain,’” and “Wonder if the embroidered ‘D.G.’ initials on Dom’s custom-tailored shirts actually stand for ‘Demi-God’?”

11. In apparent response to the banter contained in and resulting from the Brennan blog, the anonymous defendant blog poster known only as “fbpdplt” crossed the line into defamation *per se* with the following missive, which upon information and belief, was posted shortly thereafter at 9:43 a.m. on August 10, 2012:

Johnny Doc .. the pedophile. alias ... “sparky boy”  
should not be ridiculing anyone ... his hope that Dom  
Giordano comes home an [sic] finds his son with  
another boy watching “Brokeback mountain” is  
probably more like his own experience ... except he  
was the sofa sitter  
- fbpdplt

[bracketed material and emphasis added].

### **B. Procedural Posture**

12. As set forth in the electronic mail string of August 14, 2012, attached hereto and incorporated herein by reference as Exhibit “B,” counsel for Dougherty wrote to Suzanne Parillo, Esquire (“Parillo”), Associate General Counsel to Philadelphia Media Networks (Digital), LLC

("PMN"), requesting that "fbpdplt"'s posting be taken down. Parillo indicated in response that this would be done. Upon information and belief, the defamatory blog posting by "fbpdplt" has been removed from the Brennan blog as it currently exists online.

13. On October 26, 2012, Dougherty filed a Praecipe to Issue Writ of Summons against "fbpdplt." Set forth in Exhibit "C" are copies of the time-stamped praecipe and the summons, which are incorporated herein by reference.

14. On November 19, 2012, Dougherty served PMN with a subpoena which requested information on the identity of "fbpdplt." Copies of the November 19, 2012 subpoena and return of service are attached hereto and incorporated herein by reference as Exhibit "D."

15. By letter dated December 7, 2012, a copy of which is attached hereto and incorporated herein by reference as Exhibit "E," Parillo advised counsel for Dougherty that PMN would not provide the information requested by the subpoena unless an application was made pursuant to *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. Super. Ct. 2011).

#### **C. The Factors Relating to Disclosure of Anonymous Internet Posters**

16. The *Pilchesky* decision represented the first time a Pennsylvania appellate court had addressed the appropriate standard by which the identity of a person who chooses to speak pseudonymously may be disclosed. *Pilchesky*, 12 A.3d at 439. The court in that case approved a modified version of the test formulated in *Dendrite Int'l, Inc. v. Doe, No. 3*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001) and *John Doe No. 1 v. Cahill*, 884 A.2d 451 (Del. 2005). There are four requirements to be addressed to ensure a proper balance between a speaker's right to remain anonymous and a defamation plaintiff's right to seek redress. *Pilchesky*, 12 A.3d at 442.

**(1) Notification**

17. First, a reviewing court must ensure that a “John Doe defendant” receives proper notification of a petition to disclose his or her identity and a reasonable opportunity to contest the petition. *Id.* While service by publication may be appropriate, depending on the circumstances, a court should inquire of the proprietor of a website to determine the most effective means of notification. *Id.* (citations omitted). In *Pilchesky*, the appellant maintained identifying information on those who posted messages on his message board. The trial court ordered appellant to forward to each John Doe defendant a copy of its order requiring appellee to set out information relating to its claims against the “John Doe” message posters and the identity information appellee was seeking about them, appellee’s petition, and all materials relevant to the additional defendant. The trial court granted such John Doe defendants thirty days upon receipt of the notification to file an objection to disclosure of their identities. The Superior Court found the trial court’s procedures to be reasonable. *Id.*

18. In this case, PMN has suggested a notification procedure in compliance with *Pilchesky*. As set forth in the December 7, 2012 Parillo letter (Exhibit “E”), PMN has agreed to forward Dougherty’s petition to the email address PMN has for the poster, who could then raise an objection to disclosure if he or she so desires. As in *Pilchesky*, Dougherty requests this Court to order PMN to send this petition in its entirety to “fbpdplt” via the e-mail address PMN has for this poster and further direct the poster, “fbpdplt,” to file objections, if any, to Dougherty’s petition within 30 days after PMN complies with the Court’s order. A period of thirty days from receipt of this petition (which is complete virtually upon the sending of the email by PMN) by “fbpdplt” would likewise be an appropriate response time here.

## **(2) Prima Facie Case**

19. Second, a plaintiff “who petitions the court to disclose the identity of an anonymous or pseudonymous communicator must present sufficient evidence to establish a *prima facie* case for all elements of a defamation claim, within the plaintiff’s control, such as would survive a motion for summary judgment.” *Pilchesky*, 12 A.3d at 442-43 (emphasis in original) (citing *Cahill, supra*, 884 A.2d at 464 (noting that a public figure plaintiff need not provide evidence of actual malice in a petition to disclose because “[w]ithout discovery of the defendant’s identity, satisfying this element may be ... impossible”); *Curran v. Philadelphia Newspapers, Inc.*, 497 Pa. 163, 439 A.2d 652, 662 (1981) (“The proof of ‘actual malice’ calls a defendant’s state of mind into question, and does not readily lend itself to summary disposition.”) (citation omitted) (quoting *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979))). It should go without saying that at this very early stage, Dougherty does not have discovery information relevant to his case at his disposal. Yet Dougherty in this case can meet the identical *prima facie* and summary judgment tests, as stated in *Pilchesky*, with the information he has “within ... [his] control.” See *Pilchesky*, 12 A.3d at 442-443, 444.

20. To state a defamation claim under Pennsylvania law, a plaintiff has the burden of showing:

- (1) the defamatory character of the communication;
- (2) its publication by the defendant; (3) its application to the plaintiff; (4) the understanding by the recipient of its defamatory meaning; (5) the understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm resulting to the plaintiff from its publication; and (7) abuse of a conditionally privileged occasion.

See 42 Pa. C.S.A. §8343. Dougherty addresses these elements of the *prima facie* case below.

21. A statement is defamatory if it “tends so to harm the reputation of another as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her.” *U.S. Healthcare v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 923 (3d Cir.), *cert. denied*, 498 U.S. 816 (1990). It is for the court to determine whether the statement at issue is defamatory. *Cornell Companies, Inc. v. Borough of New Morgan*, 512 F. Supp. 2d 238, 271 (E.D. Pa. 2007).

22. In this case, the anonymous defendant plainly and simply called Dougherty a “pedophile” on a public internet message board of a widely circulated Philadelphia media outlet. As such, this Court easily can conclude that such a statement is of defamatory character. *See Linnelli v. Grattan*, 2000 Pa. Dist. & Cnty. Dec. LEXIS 379, \*5-6 (Allegh. Cty. 2000), *appeal dismissed*, 797 A.2d 380 (Pa. Super. Ct. 2002) (“... Plaintiff, who is a teacher and boys’ basketball coach, alleged that Defendant called him a pedophile while other people were in the vicinity. If true, the statement is of a defamatory character ...”); *Morgenstern v. Fox Television Stations of Philadelphia*, 2008 U.S. Dist. LEXIS 92990, \*19-20 (E.D. Pa. 2008) (“... ‘Inappropriate communications with a 15-year old’ girl is capable of defamatory meaning. It implies that Morgenstern’s communications were of a pedophile nature ... [A] statement including the allegation that the person receiving the communications was a minor would harm the reputation of plaintiff in the estimation of the community or deter third persons from associating or dealing with him as they would likely believe him to be accused of being a pedophile.”) (citation omitted). As described in the Affidavit of John J. Dougherty, attached hereto and incorporated herein by reference as Exhibit “F,” the allegation that he is a “pedophile” is categorically untrue.

23. Though the “pedophile” posting has since been removed, its removal only potentially

mitigates damages - - it does not legally excuse the defamation. There can be little doubt that defendant "fbpdplt" did make the defamatory comments online, as reflected in the e-mail string of August 14, 2012 (Exhibit "B"). The sole purpose of this petition is to discover the identity of that person.

24. There also should be no question that "fbpdplt"'s publication applies to plaintiff, John J. Dougherty. Dougherty is specifically referenced in the Brennan article, and fbpdplt's posting calls plaintiff "Johnny Doc," plaintiff's well-known nickname. *See* Exhibit "F."

25. Turning to factors (4) and (5) of the *prima facie* defamation tort - - understanding by the recipient of the statement's defamatory meaning, and the understanding by the recipient of it as intended to be applied to the plaintiff - - Dougherty addresses these issues in his attached Affidavit. Suffice it to say, referring to anyone as a pedophile satisfies factors (4) and (5) of the *prima facie* defamation tort.

26. Next, as to the "special harm" element of the defamation cause of action, proof of the same is not required here, as this is a case of defamation *per se*. Defamation *per se* can be either "words imputing (1) criminal offense, (2) loathsome disease, (3) business misconduct, or (4) serious sexual misconduct." *Cornell Companies*, 512 F. Supp. 2d at 271 (citations and internal quotation marks omitted). Quite clearly, accusing someone of being a pedophile qualifies as accusing someone not only of a criminal offense but also of serious sexual misconduct. *See* Restatement (Second) of Torts §574 cmt. d (1977) (stating that statements that are actionable because they impute serious sexual misconduct may also be actionable under the rule that statements that impute a crime are defamatory *per se*); *Foretich v. Capital Cities/ABC*, 37 F.3d 1541, 1558 n.15 (4<sup>th</sup> Cir. 1994) (citing Restatement of Torts (Second) §§571(a) and 574).



27. Finally, as to the last element of the defamation cause of action, a conditional privilege would arise if: (1) some interest of the publisher were involved; (2) some interest of the recipient of the communication, or a third party, were involved; or (3) when a recognized interest of the public were involved. *Beckman v. Dunn*, 419 A.2d 583, 587 (Pa. Super. 1980).

28. A review of “fbpdplt”’s posting of the “pedophile” accusation demonstrates that none of these instances can be satisfied here. Furthermore, Pennsylvania courts have recognized the existence of a conditional privilege in a number of circumstances. *See Moore v. Cobb-Nettleton*, 889 A.2d 1262, 1269-70 (Pa. Super. 2005) (social worker’s report to law enforcement officials of potential sexual abuse of her subject); *American Future Sys., Inc. v. Better Business Bureau*, 872 A.2d 1202, 1211 (Pa. Super. 2005), *aff’d on other grounds*, 923 A.2d 389 (Pa.) (non-profit organization’s publication of consumer complaints about a particular business), *cert. denied*, 552 U.S. 1076 (2007); *Vargo v. Hunt*, 398 Pa. Super. 600, 604-606, 581 A.2d 625, 627-629 (1990) (student’s statement to college authorities that a classmate violated the honor code); *Chicarella v. Passant*, 343 Pa. Super. 330, 337, 494 A.2d 1109, 1113 (1985) (investigation firm’s report to an insurance company concerning the results of its investigation of the plaintiff); *Gresh v. Potter McCune Co.*, 235 Pa. Super. 537 (1975) (former employer’s statement to the former employee’s new employer that the employee was subject to a covenant not to compete); *Rankin v. Phillippe*, 206 Pa. Super. 27, 32-33, 211 A.2d 56, 58-59 (1965) (church commission’s investigation report concerning an elder’s conduct in connection with church affairs, which was mailed to all church members); *Daywalt v. Montgomery Hosp.*, 393 Pa. Super. 118, 123, 573 A.2d 1116, 1118 (1990) (conditional privilege applied to private communications among employers regarding discharge and discipline). Unlike in the above cases, in which courts applied conditional privilege protection in sensible

situations, this situation is different. One does not have a privilege - - conditional or otherwise - - to gratuitously accuse someone in the public media of serious criminal and sexual misconduct.

**(3) Necessity**

29. Attached as Exhibit “G” and incorporated herein by reference is an Affidavit from Joseph R. Podraza, Jr., Esquire, counsel to Dougherty. This Affidavit demonstrates the third prong of the *Pilchesky* inquiry - - that the information sought by this petition is fundamentally necessary to secure relief in this case, and sought in good faith.

**(4) Balancing**

30. Finally, under *Pilchesky*, a court must expressly balance the defendant’s First Amendment rights against the strength of a plaintiff’s *prima facie* case. *Pilchesky*, 12 A.3d at 445 (citation omitted). In balancing the equities, the reviewing court should examine the defamatory nature of the comments, the quantity and quality of evidence presented, and whether the comments were privileged. *Id.* (citation omitted). A court should also consider the forum in which the actionable comments arose. *Id.* For example, comments on matters of public importance or those which criticize public officials are entitled to robust protection, for it is in the public forum that the First Amendment right of speech is strongest. *Id.* (citing *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (recognizing our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”)).

31. Here, whatever so-called “rights” that “fbpdplt” may have are not of the sort protected by the lofty principles of cases like *New York Times v. Sullivan*. While the Brennan blog was originally about the national Chick-fil-A gay marriage controversy, and local reaction to it, the

context of “fbpdplt”’s calling Dougherty a “pedophile” went beyond that context. Rather, in response to comments by Dougherty which may have been, at times, sarcastic towards radio host Dom Giordano, the anonymous poster took the conversation out of the realm of legitimate public debate, transforming it into a plainly defamatory personal vendetta. One does not call someone else a pedophile without a factual foundation unless the intent is solely to injure the reputation of another. This, the First Amendment does not protect.

32. Given that Dougherty’s case meets two of four possible categories to qualify as a case of defamation *per se*, his position is a strong one. As such, to deny disclosure of “fbpdplt”’s identity would in effect completely prevent this lawsuit from going forward and ever being decided on the merits. Plaintiff would never be able to determine whom to name as a defendant in this lawsuit.

33. Dougherty has attempted to serve a subpoena on the operator of the website, PMN, only to receive a response that he must comply with the application procedures outlined in *Pilchesky*.

34. Thus, to not require the disclosure of the identity of “fbpdplt” under the circumstances would not only delay this lawsuit indefinitely, but it would send the wrong message: that anyone can, with utter impunity, misuse the benefits of modern technology to accuse another of the most base and defamatory things simply by hiding behind a computer screen and an anonymous identity tag, never to be held accountable.

35. In this day and age, and particularly here in Pennsylvania where the Jerry Sandusky child-molestation scandal is felt most acutely, to call someone a “pedophile” is about the worst label with which to smear another person.

36. The “privilege” - - such as it is - - to hide behind the curtain of anonymity of a computer screen pales in comparison to the right to seek redress for such a clear abuse of the right

to free speech, where the statement in question bears no resemblance to legitimate public debate.

**D. Conclusion**

37. For all of these reasons, Dougherty's *prima facie* case for defamation *per se* meets the *Pilchesky* test, and disclosure is warranted.

WHEREFORE, plaintiff John J. Dougherty respectfully requests that this Honorable Court grant his petition to disclose the identity of "fbpdplt," and grant him such other relief as the Court deems just.

Respectfully submitted,  
**SPRAGUE & SPRAGUE**

By: /s/ Richard A. Sprague  
Richard A. Sprague, Esquire (I.D. #04266)  
Joseph R. Podraza, Jr., Esquire (I.D. #53612)  
Charles J. Hardy, Esquire (I.D. #16912)  
Louis Charles Shapiro, Esquire (I.D. #82242)  
Suite 400, The Wellington Building  
135 South 19<sup>th</sup> Street  
Philadelphia, PA 19103  
(215) 561-7681

*Attorneys for Plaintiff*

DATED: February 25, 2013

**SPRAGUE & SPRAGUE**

RICHARD A. SPRAGUE, ESQUIRE (I.D. #04266)  
JOSEPH R. PODRAZA, JR., ESQUIRE (I.D.#53612)  
CHARLES J. HARDY, ESQUIRE (I.D. #16912)  
LOUIS CHARLES SHAPIRO, ESQUIRE (I.D. #82242)

THE WELLINGTON BUILDING, SUITE 400  
135 SOUTH 19<sup>TH</sup> STREET  
PHILADELPHIA, PA 19103  
(215) 561-7681

ATTORNEYS FOR PLAINTIFF  
JOHN J. DOUGHERTY

JOHN J. DOUGHERTY,

Plaintiff,

v.

FBPDPLT,

Defendant.

IN THE COURT OF COMMON PLEAS  
PHILADELPHIA COUNTY

OCTOBER TERM, 2012

NO. 003755

**AFFIDAVIT OF JOHN J. DOUGHERTY**

COMMONWEALTH OF PENNSYLVANIA

COUNTY OF PHILADELPHIA

I, John J. Dougherty, being duly sworn according to law, do hereby depose and say as follows:

1. I am the plaintiff in this action. I am a citizen and resident of Philadelphia, Pennsylvania, residing at 1933 E. Moyamensing Avenue, Philadelphia, Pennsylvania 19107. I am the business manager of Local 98 of the International Brotherhood of Electrical Workers ("Local 98").

3. I have reviewed the appended Petition to Compel Disclosure of Defendant's Identity, and I verify that the factual statements made therein are true and correct to the best of my knowledge, information, and belief. I make the statements herein voluntarily and with full understanding that the statements herein are made subject to the penalties of 18 Pa.C.S. §4903 relating to sworn

falsification to authorities.

4. I have, both individually and in my capacity as business manager of Local 98, engaged in numerous civic and philanthropic endeavors, including work with numerous organizations and events such as the American Red Cross, Magee Rehabilitation Center, Susan G. Komen Race for the Cure (breast cancer), Run for Your Life (prostate cancer), Delaware Valley Stroke Council, City of Hope, Geoffrey Lance Foundation (spinal cord injury), Special Olympics, Philadelphia Chapter of the Variety Club, Police Athletic League, Philadelphia Golden Gloves, Pennsylvania Golden Gloves, CORA, and many other organizations.

5. In response to my posting on the blog article entitled "Giordano versus Johnny Doc in Chick-fil-A Cluster-cluck," I was accused of being a "pedophile" by an anonymous poster known only at this time as "fbpdplt." There is no question that the posting by "fbpdplt" applies to me. I am specifically referenced in the Chris Brennan blog which gave rise to this dispute, and I responded to the blog. In addition, by referring to someone known as "Johnny Doc," the anonymous poster was very clearly referring to me personally. I have been known by the nickname "Johnny Doc" for a number of years and it is a nickname I am used to hearing and seeing in print.

6. It is also clear that I, and anyone reading the anonymous blog posting would understand that it is intended to accuse me of serious sexual misconduct with young children, which also suggests that I have engaged in criminal conduct that is punished very seriously by the law.

7. I can further state that the accusation made by "fbpdplt" that I am a pedophile, or have any such tendencies, is categorically false. Anyone who saw the offensive blog posting by "fbpdplt" would know that it was intended to accuse me of such serious criminal and sexual misconduct.

8. For all of these reasons, and those set forth in the Affidavit of my counsel and in the

petition itself, I respectfully request that the Court order the disclosure of the identity of "fbpdplt"  
so that this lawsuit may proceed.

  
John J. Dougherty

Sworn and subscribed to before me  
this 21 day of FEBRUARY, 2013.



