

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-13-359

MARIE GUNNING,)
)
 Plaintiff,)
)
 v.)
)
 JOHN DOE,)
)
 Defendants.)

**MOTION TO QUASH SUBPOENA AND
MOTION FOR PROTECTIVE ORDER
BY NON-PARTY WITNESS RICHARD
SIMARD**

NOW COMES Richard Simard, a non-party witness in this matter who is the subject of a subpoena served on him on **April 10, 2014**, referencing the above-captioned matter. *See* attached Return of Service. It has been over a year since service of the subpoena, and since Mr. Simard delivered to Plaintiff's counsel an affidavit responsive to the issues we were told would be the focus of the deposition and the purpose for it. Plaintiff Gunning now renews her attempt to depose non-party witness Simard, without any candid explanation why. The attempt comes late, comes in contravention of a California court ruling entitled to full faith and credit by this Court that should collaterally estop Gunning's attempts at further discovery, and in relation to this stale civil action that should be dismissed for failure to state a claim under First Amendment protections of freedom of speech and expression. *See* John Doe Motion to Quash and For Additional Relief.

Mr. Simard's rights and "standing," as a nonparty witness, arise under Rules 45(c) and 26(c) of the Maine Rules of Civil Procedure. Rule 45(c) provides that "a party or an attorney responsible for the issuance and service of the subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena," and that "the court for which the subpoena was issued shall quash or modify the subpoena if it . . . (iii) requires

disclosure of privileged or other protected matter and no exception or waiver applies.” M.R. Civ. P. 45(c). Although Richard Simard has stated in his affidavit delivered to opposing counsel that he does not have personal knowledge about the identity of “John Doe,” if Plaintiff Gunning does not accept that affidavit she nonetheless still seeks disclosure of “privileged or other protected matter” in contravention of the First Amendment. Richard Simard joins in the motion to quash and motion for additional relief filed by John Doe in the wake of this latest attempt by Plaintiff Gunning to continue discovery. That motion compellingly sets forth the constitutional privilege protecting the subject matter upon which Gunning intends to depose Simard.

I. Plaintiff Has No Good Faith Basis To Attempt to Revive a Subpoena Served Over One Year Ago.

Rule 26(c) of the Maine Rules of Civil Procedure affords Richard Simard the right to protection “from annoyance, embarrassment, oppression, or undue burden or expense.” M.R. Civ. P. 26(c) (“Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, any justice or judge of the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, without limitation, one or more of the following: (1) that the discovery not be had . . .”).

This standard applies here. Richard Simard cooperated with the subpoena served over one year ago, by providing an affidavit, served upon opposing counsel, setting forth his lack of knowledge of the identity of John Doe. It is oppressive and subjects Richard Simard to annoyance and undue burden or expense, for Plaintiff Gunning to reject that affidavit over a year later, and demand a deposition of Simard. In so doing, she has not provided to counsel for Simard any indication of the reasons why she does not accept his affidavit. She does not provide

in advance of the deposition any documents, prior statements, or information she has thus far obtained that she contends may lead to additional information for her and giving rise to a need to depose Simard over a year after the subpoena was served. She has given no indication of what knowledge Mr. Simard might have to help her in her discovery effort. If she has information that leads her to believe that Mr. Simard has information that will help her cause, it is telling that she has refused to communicate that information to counsel for Mr. Simard before the deposition. In essence, this deposition has all of the hallmarks of setting up some kind of “gotcha” scenario, intended to blindside Mr. Simard, to embarrass him, or to accuse him of withholding information, when he is not prepared to know in advance what the nature of the accusation is, or even what it is. That is, candidly, the precise “annoyance, embarrassment, oppression, or undue burden or expense,” from which the Court should protect a non-party witness. Non-party witnesses are entitled to respect. M.R. Civ. P. 45(c). It should not be permitted that they be treated as hostile adverse witnesses where, over a year after a subpoena is served, a party to a case that has no identified defendant pre-plans some “Perry Mason moment” for the deposition. Richard Simard has asked Plaintiff Gunning, through counsel, to simply tell him in light of his affidavit what information she believes he may have that will actually further her efforts. Plaintiff Gunning has refused to make that disclosure, so we must assume that there is no good faith basis for the deposition in light of the affidavit that Mr. Simard has already provided.¹

II. Under the Res Judicata Doctrine of “Issue Preclusion” Plaintiff is Barred From Relitigating the Issue of Whether Her Complaint States Claim to Support Discovery.

To obtain discovery in any matter, the discovery must “relate to the claim or defense.”

¹ If the nature of the information that Gunning is withholding from Simard is in the form of a prior statement imputed to Simard, “concerning the action or its subject matter previously made by [him],” she may have been required to give and disclose that statement to him “upon request.” M.R. Civ. P. 26(c).

M.R. Civ. P. 26(b)(1) (“Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . .”). In this case, Plaintiff is legally foreclosed by *res judicata* to argue that her Complaint raises an issue upon which she is entitled to discovery. The exact same issues were presented by Plaintiff Gunning and Defendant John Doe to the court in California, in a separate proceeding relating to Gunning’s attempts to obtain disclosure of the identity of John Doe. *See* attached California Findings and Recommendation by Judge *Pro Tem* and Orders (original and amended order). Three successive judges of the California court held that Plaintiff Gunning fails to state a claim, and a final order or decree was entered. There is therefore no “discovery regarding any matter . . . relat[ing] to the claim” that is possible, because Gunning has actually litigated, and lost, the argument that her claim can provide a legally valid basis for discovery.

The Law Court has explained the preclusive effect of non-mutual collateral estoppel as follows:

The collateral estoppel prong of *res judicata* is focused on factual issues, not claims, and asks whether a party had a fair opportunity and incentive in an earlier proceeding to present the same issue or issues it wishes to litigate again in a subsequent proceeding. We have, for example, recognized that the determination of an issue by an administrative body in a licensing proceeding can collaterally estop a party from relitigating the same factual issue in a subsequent judicial proceeding, notwithstanding the fact that the two proceedings offer substantially different remedies. *Cline v. Me. Coast Nordic*, 1999 ME 72, ¶¶ 10-13, 728 A.2d 686, 688-89 (holding that collateral estoppel doctrine barred declaratory action by holders of fishing weir license where administrative proceeding determined that an aquaculture lease did not unreasonably interfere with fishing); *see also Button v. Peoples Heritage Sav. Bank*, 666 A.2d 120, 122-23 (Me. 1995) (holding that collateral estoppel barred contract claim in Superior Court where Probate Court had previously decided against plaintiff on issues he would have to prove to prevail in Superior Court action).

Macomber v MacQuinn-Tweedie, 2003 ME 121, ¶ 22, 834 A.2d 131, 139 (additional citations

(omitted).

It is important that it was this Plaintiff – Marie Gunning – who actually litigated the precise same issues, *in this case*. She had full and fair opportunity and certainly incentive in the earlier proceeding in California to litigate the issue of whether or not her claims support discovery. The California court ruled that under the First Amendment she failed to state a claim.

It is not a matter of whether this court agrees or disagrees with the California rulings. The circumstances are no different than if Gunning had brought her case first in California, and lost on a “failure to state a claim” standard. She would not, under the doctrine of *res judicata*, be permitted to bring the case again in Maine, or any other jurisdiction, regardless of whether or not that other jurisdiction agreed with the first court’s judgment. Indeed, as a decree or judgment from a sister state, the “full faith and credit” clause of the Constitution (U.S. Const., art. 4 § 1) may require a form of comity *on an issue involving the same litigants*, and thus command that this Court give full faith and credit to the final California order. *O’Malley v. O’Malley*, 338 A.2d 149, 154 (Me. 1975) (quoting in part *Durfee v. Duke*, 375 U.S. 106, 111 (1963) (a sister state’s “judgment is entitled to full faith and credit – even as to questions of jurisdiction – when the second court’s inquiry discloses that those questions have been fully and fairly litigated (as we have indicated is the situation here) and finally decided in the court which rendered the original judgment.”). *See Roy v. Buckley*, 1997 ME 155, ¶ 8 n.4, 698 A.2d 497 (“Constitutional and statutory provisions for full faith and credit apply only to decrees and judgments of domestic sister states; decrees and judgments of foreign nations are recognized pursuant to principles of comity.”). The California order was final, and not appealed. The California court applied the First Amendment to Gunning’s case. Just as this Court would be bound by the California court’s decision, for example, on a personal jurisdiction issue (even if this court would tend to disagree

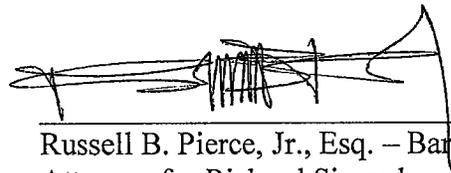
with it), or would be bound by an arbitration decision or companion case submitted by the parties on an issue in the pending matter, if the issue was fully and fairly litigated and decided in a final decree, full faith and credit should be given to the California ruling, and the party barred from relitigation of the issue.

III. John Doe's Motion to Quash Should Be Granted.

Richard Simard has standing to raise all of these issues under his rights as a subpoenaed witness under Rule 45(c) and 26(c) of the Maine Rules of Civil Procedure, as explained above. But regardless of this standing issue, John Doe has also moved to quash and seeks additional relief to bar Gunning from further process seeking disclosure of the constitutionally privileged information. Richard Simard joins in John Doe's motion to quash, for the reasons stated therein.

WHEREFORE, non-party Richard Simard respectfully requests that this Court grant this Motion to Quash in his favor, and bar Gunning from issuing any further discovery process directed against him relating to her claims in this case.

DATED: July 17, 2015



Russell B. Pierce, Jr., Esq. – Bar No. 7322
Attorney for Richard Simard

NORMAN, HANSON & DeTROY, LLC
Two Canal Plaza
P.O. Box 4600
Portland, Maine 04112-4600
(207) 774-7000

IMPORTANT NOTICE under M.R. Civ. P. 7(b)(1)(A)

Opposition to this motion must be filed not later than twenty-one (21) days after the filing of this motion. FAILURE TO FILE TIMELY OPPOSITION WILL BE DEEMED A WAIVER OF ALL OBJECTIONS TO THE MOTION, WHICH MAY BE GRANTED WITHOUT FURTHER NOTICE OR HEARING.

STATE OF MAINE

SUPERIOR COURT

Cumberland ss.
Docket No. cv-13-359

DISTRICT COURT

Location _____
Docket No. _____

WITNESS SUBPOENA FOR:

- TRIAL
- HEARING
- DEPOSITION
- INSPECTION

To: Richard Simard, of 5 Foster Ave. Freeport, ME
In the matter of Marie Gunning v. John Doe

- YOU ARE COMMANDED in the name of the State of Maine, to appear for the purpose of testifying at the (District) (Superior) Court located at _____ at _____, Maine at _____ (am)(pm) on _____ and to remain until discharged for the purpose of testifying)
- YOU ARE COMMANDED in the name of the State of Maine to appear before Colleen DiPiero, a Court Reporter, at the offices of Drummond Woodsum at 84 Marginal Way Suite 600, Portland Maine Maine at 9 (am)(pm) on 04/24/14 to testify and give evidence by deposition pursuant to the Maine Rules of Civil Procedure, an application having been filed for this deposition in this court.
- YOU ARE COMMANDED to produce and permit inspection and copying of the following designated things or premises on _____ at _____ (am)(pm) at _____
- YOU ARE COMMANDED to permit inspection and copying of the following designated things or premises:

Time and place of inspection: _____

This subpoena is issued on behalf of _____ whose attorney is _____

If you object to the subpoena, you must file a timely motion in court to quash or modify it. If you object to the inspection or copying of any of the materials or premises designated above, you must serve notice of that objection in writing upon the party or attorney, _____ before _____.

WARNING AND NOTICE

FAILURE TO COMPLY WITH THIS SUBPOENA MAY SUBJECT YOU TO ARREST AND BEING HELD IN CONTEMPT OF COURT.
SEE THE REVERSE SIDE OF THIS SUBPOENA FOR A STATEMENT OF YOUR RIGHTS AND DUTIES PURSUANT TO THIS SUBPOENA AS SET OUT IN RULES 45(c) AND (d) OF THE MAINE RULES OF CIVIL PROCEDURE.

Date: 04/07/14
Cumberland, ss

Melissa Hwey
(Clerk) (Attorney at Law)

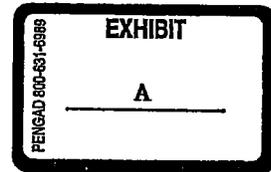
On 04/10/14, I subpoenaed the above-named Richard Simard by delivering a copy of this Subpoena.
(At the same time I tendered and paid to Richard Simard the sum of \$ 33.00 as fees for travel and one days attendance.)

Fees: Travel, \$
Service,
Copy,
Witness fee,

[Signature]
Signature

Agency

REBECCA L. WOODSON
JUDGE *PRO TEM*



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

JOHN DOE 1, an individual, and
JOHN DOE 2, an individual,

Petitioners,

vs.

MARIE GUNNING, an individual,

Respondent.

Case No. CPF-13-513271

FINDINGS AND RECOMMENDATION
BY JUDGE *PRO TEM* re PETITION TO
QUASH SUBPOENA

Hearing Date: November 22, 2013
Time: 9:00 a.m.
Dept. 301

TO THE CLERK OF THE ABOVE-ENTITLED COURT, AND ALL PARTIES
AND TO THEIR ATTORNEYS OF RECORD HEREIN:

On November 22, 2013 in Department 301 of the San Francisco Superior Court (discovery calendar), Petitioners' JOHN DOE 1 and JOHN DOE 2 ("Petitioners") Petition to Quash Subpoena came on for hearing, Judge *Pro-Tem* Rebecca L. Woodson presiding. All parties appearing were represented by their counsel of record. The parties did not stipulate to the matter being heard by a judge *pro tem*.

1 The Court issued the following tentative ruling: "*Petitioners JOHN DOE 1 and JOHN*
2 *DOE 2's Petition to Quash Subpoena is GRANTED. Respondent has failed to establish a prima*
3 *facie case for the causes of action stated in the Complaint dated August 13, 2013. Prior to*
4 *issuing its Order, the Court will hear argument concerning categories 3 and 4 of Exhibit A of the*
5 *subpoena at issue, dated September 5 2013*".

6 Based on review of the parties' moving papers, and the argument heard at the hearing on
7 this matter, THE COURT MAKES THE FOLLOWING FINDINGS:

8 1. Respondent MARIE GUNNING ("Gunning") is a Maine resident who filed an
9 action in the Maine state superior court, county of Cumberland, titled *Marie Gunning v. John*
10 *Doe*, action number CV-13-359. The complaint alleges counts for libel, false light, and
11 intentional infliction of emotional distress based on several statements made in the print and
12 online publication News as Viewed from a Crow's Nest (the "Crow's Nest"), "an anonymous
13 single sheet newsletter published and circulated in Freeport, Maine, and on the internet."
14 (Complaint p. 1, para. 3.)

15 2. Defendants to the action are "the publishers and contributing writers of" the
16 *Crow's Nest*. (Complaint p. 1, para. 3.) Defendants characterize the *Crow's Nest* as "a Freeport
17 hard copy and Internet parody." (Petitioners' MPA, 1:3.)

18 3. On or about August 20, 2013, pursuant to California *Code of Civil Procedure* §§
19 2029.100 – 2029.900, Gunning obtained a witness subpoena from the San Francisco Superior
20 Court, directed at the entity known as Automatic, Inc., the company that hosts the *Crow's Nest*
21 website.

22 4. Exhibit A of the subpoena lists four categories of information to be disclosed:

- 23 a. All names you have associated with <http://freeportcrowstest.com/>;
- 24 b. All email addresses associated with anyone covered by [a.] above;
- 25 c. IP addresses from which the <http://freeportcrowstest.com/> was created; and
- 26
- 27
- 28

1 d. IP addresses and user-agent¹ for the specific posts to sixteen separate
2 editions of the Crow's Nest.

3 5. Petitioners argue that the subpoena should be quashed in its entirety because it
4 intrudes on Petitioners' constitutional right to speak anonymously.

5 6. Respondent argues that the petition should be denied because Gunning has made a
6 prima facie showing of libel, to wit: the statements concerning Gunning at issue are not parody,
7 but rather are presented as fact. Specifically, the statements at issue are interspersed with true
8 facts such that a reasonable person cannot determine that the so called "parodic" facts are not
9 really facts, and, therefore, will be taken as true.

10 7. In support of her position, Gunning cites *Super Future Equities, Inc. v. Wells*
11 *Fargo Bank Minnesota, N.A.* 553 F. Supp.2d 680 (N.D. Tex. 2008), which discusses statements
12 purported to be satire or parody:

13 "When analyzing cases of satire or parody, the test is 'whether the
14 publication could be reasonably understood as describing actual facts.'
15 (citations omitted). 'The appropriate inquiry is objective. Thus, the
16 question is not whether some actual readers were misled, as they
inevitably will be, but whether the hypothetical reasonable reader could
be.' (citations omitted). *Super Future, supra* 553 F. Supp.2d at 689.

17 In finding that statements made on an investor's website were verifiable statements of fact
18 as opposed to protected opinions or satire or parody, the *Super Future* Court stated, "[a]
19 reasonable person would find that the Predatorix website describes actual facts. It refers to actual
20 court cases, and cites several documents for support ... it purports to gather factual information to
21 document ORIX's alleged misconduct. Accordingly, it is not satire or parody." *Id.*

22 8. In response, Petitioners argue that the Predatorix website was not a parody, as is
23 Crow's Nest (which, as a point of fact, has the statement "a parody look at the news") written
24 under its masthead. Further, Petitioners argue that no reasonable person could look at the
25 objectionable statements made in the Crow's Nest and believe them to be true; especially taken in
26

27 _____
28 ¹ The Court's understanding is that a "user-agent" is an online "browser" such as Netscape,
Safari or Explorer.

1 context with published photographs and other statements that accompany the material Gunning
2 finds actionable.

3 9. In reply, Respondent asks the Court to look at *Hustler Magazine, Inc. v. Fallwell*
4 485 U.S. 46 (1988) for the rule that a parody will not be actionable as defamation if it cannot
5 "reasonably be understood as describing actual facts about [the plaintiff] or actual events in
6 which [she] participated." *Fallwell*, 485 U.S. 46 at 57. But, a person "assaulting the reputation
7 or business of another in a public newspaper cannot justify it upon the ground that it was a mere
8 jest, unless it is perfectly manifest from the language employed that it could in no respect be
9 regarded as an attack upon the reputation or business of the person to whom it related." *Id.*

10 10. In reply, Respondent also asks the Court to look at *Chapman v. Journal Concepts,*
11 *Inc.* 2008 WL 5381353, at 11 (D. Hawai'i Dec. 24, 2008) for the rule that "The use of narrative,
12 figurative language, and the inclusion of opinion in the Magazine, however, does not render all of
13 its statements inactionable."

14 11. In sum, Respondent argues that the statements made about Gunning are plausible
15 enough that a reasonable person would believe them to be true; Petitioners argue that the
16 statements at issue, when read in context, could not be taken by a reasonable reader as serious
17 news reporting, or anything other than the parody that it is, which is speech protected by the First
18 Amendment.

19 12. The Court agrees with Petitioners. While the content of the Crow's Nest could be
20 seen as offensive, rude and distasteful, it is, in this Court's opinion, taking into account the
21 context and content of the statements at issue themselves, parody and not likely to be taken as
22 true by a reasonable person. While the Crow's Nest does mention actual facts on several
23 occasions, the statements highlighted by Gunning at hearing on the petition do not describe actual
24 facts.² For this reason, the speech at issue in the Crow's Nest is protected under the First
25

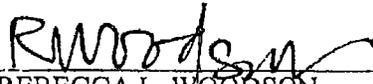
26
27 ² For example, this Court does not find that a reasonable reader would believe that Respondent is "suffering
28 from a bipolar disorder with acute depression and paranoia, amplified by substance abuse" when the statement is
prefaced with "rumors continue," accompanied by photos of Lindsay Lohan, and in the larger context of other
statements that this Court finds to be parody. Petitioners' RJN, Exh. 16.

1 Amendment of the U.S. Constitution; the statements are not actionable speech such that the
2 identities of the website owner and persons who comment or otherwise publish material printed in
3 or posted online at the Crow's Nest, or any of the information enumerated in Exhibit A to the
4 subpoena at issue, must be revealed pursuant to the subpoena.

5 NOW THEREFORE, based on review of the parties' moving papers, and the argument
6 heard at the hearing on this matter, THE COURT MAKES THE FOLLOWING
7 RECOMMENDATION:

- 8 1. The Petition to Quash Subpoena should be GRANTED.
- 9 2. Petitioners' request for attorneys' fees should be GRANTED in an amount to be
10 determined, and subject to sufficient proof to the Court.

11 Dated: December 4, 2013


REBECCA L. WOODSON
JUDGE PRO TEM

12
13 SF 27617352.1
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Mark Goldowitz, No. 96418
2 Paul Clifford, No. 119015
3 California Anti-SLAPP Project
4 2903 Sacramento Street
5 Berkeley, California 94702
6 Phone: (510) 486-9123
7 Fax: (510) 486-9708
8 Email: [pc\[at\]casp.net](mailto:pc[at]casp.net)

9 Attorneys for Petitioners
10 JOHN DOE 1 and JOHN DOE 2

ENDORSED
FILED
San Francisco County Superior Court
DEC 11 2013
CLERK OF THE COURT
BY: LESLEY FISCELLA
Deputy Clerk

11 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 IN AND FOR THE COUNTY OF SAN FRANCISCO,
13 UNLIMITED JURISDICTION

14 JOHN DOE 1, an individual, and
15 JOHN DOE 2, an individual,
16 Petitioners,
17 vs.
18 MARIE GUNNING, an individual,
19 Respondent.

California Case No. CPF-13-513271
(PROPOSED) ORDER GRANTING JOHN DOE
1 AND JOHN DOE 2'S PETITION TO QUASH
SUBPOENA
Date: December 11, 2013
Time: 9:00 a.m.
Department: 302 - DISCOVERY
Judge: Judge Marla J. Miller

20 IN THE CIRCUIT COURT OF THE STATE OF OREGON
21 FOR THE COUNTY OF MULTNOMAH

22 MARIE GUNNING, an individual,
23 Plaintiff,
24 vs.
25 JOHN DOE,
26 Defendant.

Maine Case No. CV-13-359

1 (PROPOSED) ORDER GRANTING JOHN DOE 1 AND JOHN DOE 2'S PETITION TO
2 QUASH SUBPOENA

3 On December 11, 2013, the petition to quash subpoena filed by JOHN DOE I and JOHN
4 DOE II came before this Court. Having considered the papers and arguments submitted in this
5 matter, and good cause appearing therefor, PETITIONERS JOHN DOE I'S and JOHN DOE II'S
6 Petition To Quash Subpoena [C.C.P. §§ 2029.600, 1987.1, 1987.2] is Granted. Petitioners'
7 request for judicial notice is granted.

8 On August 20, 2013, Respondent obtained a witness subpoena directed to Automattic,
9 Inc. requiring: (1) all names you have associated with <http://freeportcrownsnest.com>; (2) all email
10 address associated with anyone covered above; (3) IP addresses from which the
11 <http://freeportcrownsnest.com> was posted; and (4) IP addresses and user-agent for the specific
12 posts to sixteen separate editions of the Crow's Nest. In order to overcome Petitioners' motion
13 to quash, Respondent must make a prima facie showing of libel. (*Krinsky v. Doe 6* (2008) 159
14 Cal.App.4th 1154, 1172.) Respondent failed to make this prima facie showing. The Court finds
15 that while the content of the Crow's Nest could be seen as rude and distasteful, taking into
16 consideration the context and contents of the statements at issue, it is parody, and not likely to be
17 taken as true by a reasonable person. The speech at issue in the Crow's Nest is protected under
18 the First Amendment of the U.S. Constitution. The statements are not actionable speech such
19 that the identities of the website owner and persons who comment or otherwise publish material
20 printed in or posted online at the Crow's Nest must be revealed pursuant to the subpoena. (See
21 *Hustler Magazine, Inc. v. Falwell* (1988) 485 U.S. 46, 57 [parody is not actionable as
22 defamation if it cannot "reasonably be understood as describing actual fact about [the plaintiff]
23 or actual events in which [she] participated".]) Pursuant to C.C.P. § 1987.2(c), Petitioners may
24 make a motion for reasonable expenses incurred in making the motion, including reasonable
25 attorney's fees.

26 IT IS SO ORDERED.

27 DATED: December 11, 2013

28
Marla J Miller

Marla J. Miller
Judge of the Superior Court

1 Mark Goldowitz, No. 96418
Paul Clifford, No. 119015
2 California Anti-SLAPP Project
2903 Sacramento Street
3 Berkeley, California 94702
Phone: (510) 486-9123
4 Fax: (510) 486-9708
Email: [pc\[at\]casp.net](mailto:pc[at]casp.net)

5 Attorneys for Petitioners
6 JOHN DOE 1 and JOHN DOE 2

FILED
San Francisco County Superior Court

JAN 24 2014

CLERK OF THE COURT
BY: *[Signature]*
Deputy Clerk

7
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF SAN FRANCISCO,
10 UNLIMITED JURISDICTION

11 JOHN DOE 1, an individual, and
12 JOHN DOE 2, an individual,

13 Petitioners,

14 vs.

15 MARIE GUNNING, an individual,

16 Respondent.

California Case No. CPF-13-513271

~~PROPOSED~~ AMENDED ORDER
GRANTING JOHN DOE 1 AND JOHN DOE
2'S PETITION TO QUASH SUBPOENA

Date: December 11, 2013
Time: 9:00 a.m.
Department: 302 - DISCOVERY
Judge: Judge Marla J. Miller

17
18 IN THE CIRCUIT COURT OF THE STATE OF MAINE
19 FOR THE COUNTY OF CUMBERLAND

20 MARIE GUNNING, an individual,

21 Plaintiff,

22 vs.

23 JOHN DOE,

24 Defendant.

Maine Case No. CV-13-359

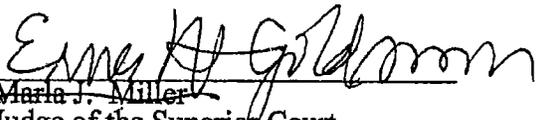
1 (PROPOSED) AMENDED ORDER GRANTING JOHN DOE 1 AND JOHN DOE 2'S
2 PETITION TO QUASH SUBPOENA

3 On December 11, 2013, the petition to quash subpoena filed by JOHN DOE I and JOHN
4 DOE II came before this Court. Having considered the papers and arguments submitted in this
5 matter, and good cause appearing therefor, PETITIONERS JOHN DOE I'S and JOHN DOE II'S
6 Petition To Quash Subpoena [C.C.P. §§ 2029.600, 1987.1, 1987.2) is Granted. Petitioners'
7 request for judicial notice is granted.

8 On August 20, 2013, Respondent obtained a witness subpoena directed to Automattic,
9 Inc. requiring: (1) all names you have associated with <http://freeportcrownsnest.com>; (2) all email
10 address associated with anyone covered above; (3) IP addresses from which the
11 <http://freeportcrownsnest.com> was posted; and (4) IP addresses and user-agent for the specific
12 posts to sixteen separate editions of the Crow's Nest. In order to overcome Petitioners' motion
13 to quash, Respondent must make a prima facie showing of libel. (*Krinsky v. Doe 6* (2008) 159
14 Cal.App.4th 1154, 1172.) Respondent failed to make this prima facie showing. The Court finds
15 that while the content of the Crow's Nest could be seen as rude and distasteful, taking into
16 consideration the context and contents of the statements at issue, it is a parody. The speech at
17 issue in the Crow's Nest is protected under the First Amendment of the U.S. Constitution. The
18 statements are not actionable speech such that the identities of the website owner and persons
19 who comment or otherwise publish material printed in or posted online at the Crow's Nest must
20 be revealed pursuant to the subpoena. (See *Hustler Magazine, Inc. v. Falwell* (1988) 485 U.S.
21 46, 57 [parody is not actionable as defamation if it cannot "reasonably be understood as
22 describing actual fact about [the plaintiff] or actual events in which [she] participated".])
23 Pursuant to C.C.P. § 1987.2(c), Petitioners may make a motion for reasonable expenses incurred
24 in making the motion, including reasonable attorney's fees.

25 IT IS SO ORDERED.

26 DATED: January 24, 2014

27 
28 ~~Marla J. Miller~~
Judge of the Superior Court

ERNEST H. GOLDSMITH