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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.

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF PETITION
TO QUASH SUBPOENA (C.C.P. §§ 1987.1,
1987.2, 2029.600)

Date: November 15, 2013
Time: 9:00 a.m.
Department: 302 - DISCOVERY
Judge: Hon. 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

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8 *Highfields Capital Management L.P. v. Doe* (2004) 385 F.Supp.2d 969 5, 6

9 *Hustler v. Falwell* (1998) 485 U.S. 46 7

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12 **STATE CASES**

13 *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254 7, 8

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16 *DVD Copy Control Association v. Bunner* (2003) 31 Cal.4th 864 4

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1 **INTRODUCTION.**

2 Plaintiff Marie Gunning (Gunning) is a local politician in the small town of Freeport,
3 Maine. A Freeport hard copy and Internet parody, the Crow's Nest, published comments about
4 her that she found offensive. In response, she filed a lawsuit in Maine against the owner of the
5 website and the writer of the parodies. She subsequently served a subpoena on the company that
6 hosted the website, Automattic, Inc. (Automattic), seeking the personally identifying information
7 of the website owner and the writer.

8 Petitioners John Doe 1, the owner, and John Doe 2, the author, request that the subpoena
9 to Automattic be quashed in its entirety. This Court should not allow Gunning's attempt to
10 unmask the publisher and author of what is clearly constitutionally-protected parody. Gunning's
11 attempt to chill free speech must be strictly scrutinized. Gunning must show, inter alia, that she
12 has legitimate claims and that information she seeks is necessary to her pursuit of such claims.
13 She will not be able to do so. This petition should be granted and petitioners should be awarded
14 the attorneys' fees and costs incurred in making this petition.

15
16 **I. FACTUAL AND PROCEDURAL BACKGROUND.**

17 **A. Plaintiff Marie Gunning.**

18 Marie Gunning, the plaintiff in the underlying action filed in the State of Maine, alleges
19 that she has "from time to time, participated as a private citizen in the local politics of the Town
20 of Freeport [Maine] and occasionally attends meetings of the Town Council," and that she
21 "participate[s] in the local politics of the Town." (Petitioners' Request for Judicial Notice
22 (RJN), Exhibit A, ¶¶ 10-11; see Declaration of John Doe 2 (Doe 2 Decl.), ¶ 4.) Gunning was an
23 unsuccessful candidate in 2011 for Town Council in Freeport, a town with approximately 8,000
24 inhabitants. (Doe 2 Decl., ¶ 3.) Indeed, Gunning even addressed the Town Council about the
25 depictions of her in the Crow's Nest. (RJN, Exhibit A, ¶¶ 17, 29, 42.)

26 **B. Petitioner John Doe 1.**

27 John Doe 1 (Doe 1) is an individual who owns the URL for the Crow's Nest website, but
28 did not write any of the content that appears on the site. (Declaration of John Doe 1 (Doe 1

1 Decl.), ¶¶ 1-4.) Doe 1 contracts with the witness, Automattic, Inc. to host the website on its
2 servers. (Doe 1 Decl., ¶ 2.) Doe 1 is purportedly a defendant in the underlying action in that it
3 alleges that the unnamed defendants therein are “the publishers” of the allegedly offensive
4 content.¹ (RJN, Exhibit A, ¶ 3.)

5 **C. Petitioner John Doe 2 and The Crow’s Nest.**

6 Petitioner John Doe 2 (Doe 2) is the author of the content on the Crow’s Nest website.
7 (Doe 2 Decl., ¶ 6.) The Crow’s Nest has appeared periodically in Freeport over the past 25
8 years. (*Id.* at ¶ 7.) The Crow’s Nest is clearly parody and even specifically identifies itself as
9 such in its masthead -- “a parody look at the news” -- for those to whom it is not apparent. (RJN,
10 Exhibit A, exhibits attached thereto.) Doe 2 is purportedly a defendant in the underlying action
11 in that it alleges that the unnamed defendants therein are the “contributing writers” of the
12 allegedly offensive content. (RJN, Exhibit A, ¶ 3.)

13 **D. *Gunning v. Doe* and the Subject Subpoena.**

14 Gunning filed a lawsuit in the Superior Court for the State of Maine in August 2013,
15 purportedly alleging causes of action for libel, false light invasion of privacy and intentional
16 infliction of emotional distress. (RJN, Exhibit A.) Each of Gunning’s purported causes of
17 action is based exclusively on content published in the Crow’s Nest. (RJN, Exhibit A, ¶¶ 12-15,
18 18-28, 30-35, 38-41, 45-48, 52-55, 59-62, 64-66, 68-69.) The subject subpoena requests that
19 Automattic provide “All names you have associated with <http://freeportcrowsnest.com/>
20 (including but not limited to the owner, anyone who has made a payment toward hosting the site,
21 anyone who has contributed content to the specific posts identified . . . below),” “all email
22 addresses associated with anyone covered [by the previous request] (including but not limited to
23 the owner, anyone who has contributed content to the specific posts identified . . . below),” the
24 “IP address from which the <http://freeportcrowsnest.com/> was created,” and the “IP address and
25 user-agent for” specific posts. (Clifford Decl., Exhibit B, Exhibit A to the Maine Subpoena.)

26
27 ¹ Gunning has filed her Complaint against “one or more Defendants collectively referred
28 to herein as ‘John Doe’.” (RJN, Exhibit A.) Because there is more than one such person,
petitioners herein refer to themselves as John Doe 1 and John Doe 2.

1 **II. THIS COURT SHOULD QUASH THE SUBPOENA TO AUTOMATTIC**
2 **BECAUSE IT INTRUDES ON THE CONSTITUTIONAL RIGHT TO SPEAK**
3 **ANONYMOUSLY.**

4 **A. This Court Has the Authority to Quash the Subpoena to Automatic.**

5 Code of Civil Procedure² section 2029.500 provides that the laws of California governing
6 discovery requests shall apply to discovery to be conducted in California for use in an out of
7 state action. Section 2029.600 provides that if a dispute relating to discovery to be conducted in
8 California in an out-of-state case, a request to quash or modify a subpoena, or for other relief
9 may be filed in the county in which discovery is to be conducted. Section 1987.1, subdivision
10 (a), provides that if “a subpoena requires . . . the production of . . . documents,” a court upon
11 motion reasonably made, or on its own motion, “may make an order quashing the subpoena
12 entirely, modifying it, or directing compliance with it upon those terms or conditions as the court
13 shall declare, including protective orders.” Section 1987.1, subdivision (b), provides that a
14 witness, or a consumer described in section 1985.3, or a person whose personally identifying
15 information is sought in connection with an underlying action involving that person’s exercise of
16 free speech rights, may make a motion pursuant to section 1987.1. (§ 1987.1, subds. (b)(3) and
17 (5); see also *Rittenhouse v. Superior Court* (1991) 235 Cal.App.3d 1584, 1587, 1591.)

18 **1. Petitioner John Doe 1 is a Consumer Described in Section 1985.3.**

19 Section 1985.3, subdivision (a)(2), provides that a “consumer” is “any individual,
20 partnership of five or fewer persons, association, or trust which has transacted business with, or
21 has used the services of, the witness . . .” Doe 1 has transacted business with and used the
22 services of the witness, Automatic, to host the Crow’s Nest website on which the allegedly
23 wrongful comments were posted. (Doe 1 Decl., ¶ 2.)

24 **2. The Personally Identifying Information of Petitioners Is Sought in**
25 **Connection with an Underlying Lawsuit Arising From Their Exercise**
26 **of Free Speech Rights.**

27 The publication and creation of the Crow’s Nest website are clearly exercises of free
28 speech in that the website is commentary on current events and politics in the form of parodies.

² Subsequent statutory section references herein are to this Code unless otherwise indicated.

1 Civil Code section 1798.79.8, subdivision (b) defines personally identifying information to
2 include names and addresses, email addresses and Internet protocol addresses or host names.
3 Here, Gunning requests that Automattic produce such information of the owner, publisher and
4 writer of the Crow's Nest, as discussed above. Gunning's subpoena clearly requests personally
5 identifying information of petitioners involving petitioners' exercise of free speech rights.

6 **B. The First Amendment Protects the Right to Speak Anonymously.**

7 The United States Supreme Court has recognized that there is a First Amendment right to
8 speak anonymously and remain anonymous. (*Buckley v. American Constitutional Law*
9 *Foundation* (1995) 525 U.S. 182, 197-200 (*Buckley*); *McIntyre v. Ohio Elections Commission*
10 (1995) 514 U.S. 334, 341-42 (*McIntyre*).) *McIntyre, supra*, at pp. 341-42, states:

11 The decision in favor of anonymity may be motivated by fear of economic or official
12 retaliation, by concern about social ostracism, or merely by a desire to preserve as much
13 of one's privacy as possible. Whatever the motivation may be, at least in the field of
14 literary endeavor, the interest in having anonymous works enter the marketplace of ideas
15 unquestionably outweighs any public interest in requiring disclosure as a condition of
16 entry. Accordingly, an author's decision to remain anonymous, like other decisions
17 concerning omissions or additions to the content of a publication, is an aspect of the
18 freedom of speech protected by the First Amendment.

19 This right of anonymous free speech also applies to speech on the Internet. "Internet
20 speech and publications are fully protected by the First Amendment." (*DVD Copy Control Ass'n*
21 *v. Bunner* (2003) 31 Cal.4th 864, 900; see *Reno v. ACLU* (1997) 521 U.S. 844, 870.) The
22 Internet "constitutes a vast platform from which to address and hear from a worldwide audience
23 of millions . . . Through the use of chat rooms, any person with a phone line can become a town
24 crier with a voice that resonates farther than it could from any soapbox. Through the use of
25 Webpages . . . the same individual can become a pamphleteer." (*Reno v. ACLU, supra*, at p.
26 870.) As in any other public forum, censorship on the Internet is stringently limited. (*Ibid.*)

27 Because the First Amendment protects anonymous speech, efforts to pierce such
28 anonymity are subject to a qualified privilege and courts "must be vigilant . . . [and] guard
against undue hindrances to . . . the exchange of ideas." (*Buckley, supra*, 525 U.S. at p. 192.)
Here, Gunning seeks to identify individuals who have lampooned her involvement in local
politics. She does so not because she has legitimate claims, but to suppress her critics.

1 **C. The Court Should Require Gunning to Demonstrate a Valid Claim Relating**
2 **to the Speakers' Comments and Balance Her Purported Need for the**
3 **Information with the Speakers' Constitutional Rights.**

4 **1. The Identities of Anonymous Speakers Must Be Protected.**

5 When the identities of anonymous speakers are sought, “[c]ourts carefully balance the
6 ‘compelling’ public need to disclose against the confidentiality interests to withhold, giving great
7 weight to fundamental privacy rights.” (*Rancho Publications v. Superior Court* (1999) 68
8 Cal.App.4th 1538, 1549 (*Rancho Publications*) [subpoena seeking names of non-party
9 anonymous authors of “advertisements”].) A court order to compel production of individuals’
10 identities in a situation that would threaten the exercise of fundamental rights “is subject to the
11 closest scrutiny.” (*NAACP v. Alabama ex rel. Patterson* (1958) 357 U.S. 449, 461.) This is
12 because “[t]he loss of First Amendment freedoms, for even minimal periods of time,
13 unquestionably constitutes [an] irreparable injury.” (*Elrod v. Burns* (1976) 427 U.S. 347, 373.)
14 “Anonymity, once lost, cannot be regained.” (*Rancho Publications, supra*, 68 Cal.App.4th at p.
15 1541.)

16 Further, despite codified discovery procedures, “there is a non-statutory qualified
17 immunity, grounded in the free speech and privacy provisions of the United States and
18 California Constitutions, that limits what courts can compel through civil discovery.” (*Rancho*
19 *Publications, supra*, at p. 1547 [denying disclosure of the true identities of anonymous speakers
20 because plaintiffs’ purported interest in the information was outweighed by the right to speak
21 anonymously].)

22 When a plaintiff seeks to discover the personally identifying information of an
23 anonymous Internet speaker, courts must weigh the interests of the plaintiff against that of the
24 right to anonymity. Courts apply a two part test, first requiring the plaintiff to make a prima
25 facie showing of legitimate claims and second, a showing that the harm caused to a plaintiff by
26 protecting the anonymity of the speaker outweighs the harm to the speakers’ First Amendment
27 rights. (*Highfields Capital Management L.P. v. Doe* (2004) 385 F.Supp.2d 969, 974-976
28 (*Highfields*).)

///

1 First:

2 the plaintiff must adduce competent evidence -- and the evidence plaintiff adduces must
3 address all of the inferences of fact that plaintiff would need to prove in order to prevail
4 under at least one of the causes of action plaintiff asserts. . . . The court may not enforce
the subpoena if, under plaintiff's showing, any essential fact or finding lacks the requisite
evidentiary support.

5 (*Id.* at pp. 975-976.) Plaintiffs must make a showing of the legitimacy of their purported claims
6 to "ensure [] that the plaintiff is not merely seeking to harass or embarrass the speaker or stifle
7 legitimate criticism." (*Krinsky v. Doe* (2008) 159 Cal.App.4th 1154, 1171.)

8 If the plaintiff satisfies the first prong, "the court [must] assess and compare the
9 magnitude of the harms that would be caused to competing interests by a ruling in favor of
10 plaintiff and by a ruling in favor of defendant." (*Id.* at p. 976.) The court must also consider
11 "whether a discovery request is likely to result in chilling protected activity" of other speakers as
12 well. (See *Highfields, supra*, 385 F.Supp.2d at pp. 980-981 [enforcing subpoena requiring
13 disclosure of identities of anonymous speakers can have a chilling effect on other speakers].)

14 Here, Gunning's attempt to discover the identities of persons who criticized her with
15 regard to her active involvement in the politics of a very small town should be strictly
16 scrutinized. Gunning should be required to establish a legitimate need for the information and
17 that disclosure of the information will not chill free speech.

18 **2. Gunning Will Not Be Able to Show that She Has Viable Claims.**

19 As just discussed, this Court must consider whether Gunning has viable claims, because,
20 if not, Gunning does not have any legitimate need for the information she seeks. (See § 1987.2,
21 subdivision (b).) Gunning has no such claims against petitioners for the reasons discussed
22 below, among others.

23 **a. Gunning Will Not Be Able to Show that She Has Viable Claims**
24 **Against John Doe 1.**

25 Doe 1 is simply the owner of the Crow's Nest website and cannot be held liable for
26 comments posted on the website by third parties because of the immunity granted pursuant to 47
27 U.S.C. section 230 of the Communications Decency Act (CDA). Section 230 of the CDA
28 provides, inter alia, that providers of an interactive computer service are immune from civil

1 liability for publishing third party content on the Internet. (See *Barrett v. Rosenthal* (2006) 40
2 Cal.4th 33, 39-40.) Section 230(f)(2) broadly defines “interactive computer service” as “any
3 information service, system, or access software provider that provides or enables computer
4 access by multiple users to a computer server. . . .” Websites are interactive computer services
5 under section 230. (*Fair Housing Council of San Fernando Valley v. Roommate.com, LLC* (9th
6 Cir. 2008) 521 F.3d 1157, 1162.) John Doe 1 did not create any of the content on Crow’s Nest
7 and has been sued for simply owning the website upon which the allegedly wrongful content was
8 posted. Therefore, Doe 1 cannot be liable to Gunning for any of the wrongs alleged in the
9 Complaint. Doe 1’s personally identifying information should not be disclosed to Gunning.

10 **b. Gunning Will Not Be Able to Show that She Has Viable Claims**
11 **Against John Doe 2.**

12 Not only does The Crow’s Nest specifically identify itself as “a parody look at the news,”
13 the context in which the allegedly wrongful comments were posted clearly shows that no
14 reasonable person could understand them to be anything but parody. (RJN, Exhibit A, exhibits
15 attached thereto.) For example, the Crow’s Nest, inter alia, uses images of characters in the
16 Wizard of Oz, Flash Gordon, Muppet and other movies, and characters from cartoons and the
17 like, to parody local politicians. (See RJN, Exhibit A, Exhibits 1-3, 5-11, 14-16.)

18 Parody is a form of speech squarely protected by the First Amendment. It cannot be
19 actionable because it does not convey a provably false assertion of fact. The California Supreme
20 Court, in protecting a parody, emphasized that the requirement that a defamation plaintiff
21 demonstrate an actual falsehood “is grounded in the First Amendment itself.” (*Baker v. Los*
22 *Angeles Herald Examiner* (1986) 42 Cal.3d 254, 259 (*Baker*).) As the United States Supreme
23 Court explained, holding that a Hustler Magazine parody ad was protected expression under the
24 First Amendment:

25 At the heart of the First Amendment is the recognition of the fundamental importance of
26 the free flow of ideas and opinions on matters of public interest and concern. . . . The
27 First Amendment recognizes no such thing as a “false” idea. . . . Freedoms of expression
28 require “breathing space.”

(*Hustler v. Falwell* (1998) 485 U.S. 46, 50, 52.)

Our courts have recognized this fundamental satirical attribute of parody and have held

1 accordingly that such speech is protected by the First Amendment.

2 In *Baker, supra*, 42 Cal.3d at p. 258, the producer of a television documentary on sex
3 education sued a reviewer, who stated in a television program review:

4 My impression is that [the producer] . . . told his writer/producer . . . “We’ve got a hot
5 potato here – let’s pour on titillating innuendo and as much bare flesh as we can get away
with. Viewers will eat it up!”

6 The California Supreme Court held that this parody was not actionable because a reasonable
7 listener or reader would understand that the purported quotation was a statement of opinion,
8 rather than fact. (*Id.* at pp. 261-62, 269.)

9 In *San Francisco Bay Guardian v. Superior Court* (1993) 17 Cal.App.4th 655, 657, a
10 landlord sued the Bay Guardian newspaper for publishing a fake letter, purportedly written by
11 the plaintiff landlord, which said:

12 I don’t understand why Vince Bielski is so upset about electroshock therapy. I find that
13 my tenants who have undergone this treatment are much more cooperative.

14 Even though the plaintiff found five people to declare under oath that they did not recognize the
15 letter as parody, the court nonetheless concluded that “the average reader, as a matter of law,
16 would recognize that the letter was a . . . parody and not actually written by [plaintiff].” (*Id.* at p.
17 659.) Therefore, the court held, “the letter does not defame [plaintiff] by false attribution or
18 presentation of false facts.” (*Id.* at p. 661.)³

19 Gunning will not be able to establish that she has legitimate claims because the allegedly
20 wrongful statements upon which she bases her claims are clearly protected by the First
21 Amendment. Her witch hunt should not be permitted to proceed.

22 **III. GUNNING SHOULD BE ORDERED TO PAY PETITIONERS’ FEES AND** 23 **EXPENSES IN MAKING THIS PETITION.**

24 Here, the subject subpoena requests personally identifying information from an Internet

25 ³ Although Gunning is clearly a public figure given that she was a candidate for elective
26 office and has been involved in local politics (*Harte-Hanks Communications v. Connaughton*
27 (1989) 491 U.S. 657, 686-687), First Amendment protection of parody is not limited to suits by
28 public figures. (See, e.g., *Couch v. San Juan Unified School District* (1995) 33 Cal.App.4th
1491, 1494-96, 1503-04 [high school campus security officer could not recover for publication
of a parody].)


1 service provider or a provider of an interactive computer service, for use in an action pending in
2 another state, which action arises from petitioners' exercise of free speech rights on the Internet.
3 Gunning will not be able to make a prima facie showing of a cause of action. Therefore, should
4 this petition be granted, Section 1987.2 provides that an award of attorneys' fees and costs to
5 petitioners is mandatory.

6
7 **CONCLUSION.**

8 The subject subpoena seeks the identities of persons who have been critical of her and her
9 political positions on the Crow's Nest parody website. Parody is by definition not factual and no
10 objectively reasonable reader of the Crow's Nest would take as fact the statements about which
11 Gunning complains. The Crow's Nest is clearly protected by the First Amendment, as are the
12 persons who publish and write it.

13 This Court must strictly scrutinize Gunning's request for the personally identifying
14 information of the persons associated with the Crow's Nest. Gunning will not be able to
15 establish that she has a legitimate need for the requested information. This petition should be
16 granted and the subpoena should be quashed. Petitioners should also be found to be entitled to
17 an award of attorneys' fees and costs related to this motion, in an amount to be proven.

18
19 DATED: October 18, 2013


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21 CALIFORNIA ANTI-SLAPP PROJECT
22 Attorneys for Petitioners
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