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, FOR ADDITIONAL RELIEF, AND INCORPORATED MEMORANDUM OF LAW

NOW COMES John Doe #1 and respectfully moves the court to quash the subpoena to Richard Simard, to bar Gunning from issuing any other process to compel the disclosure of the anonymous speakers named in her Complaint, and to enter an order dismissing the Complaint.

Plaintiff Marie Gunning is a local politician in Freeport, Maine complaining about parody comments published in a local hard copy and internet anonymous parody newspaper, the *Crow's Nest*, which she finds offensive. She filed a lawsuit against "John Doe" defendants alleged to be the owner of the website and the writer of the parodies, but has so far been unable to determine their identities and, thus, has yet to serve her complaint on anyone. She served a subpoena on the company that hosted the *Crow's Nest* website, Automattic, Inc., but a California court granted a motion to quash filed by the John Doe defendants on the ground that the *Crow's Nest* is non-actionable parody protected by the First Amendment to the U.S. Constitution. She is now seeking to enforce a Maine subpoena to compel depositions in an attempt to unmask the John Does.

Gunning's attempts to compel disclosure of information that would identify anonymous speakers and her alleged defamation and other speech-related claims are a First Amendment double-whammy. Anonymous speech and parody are both protected by the First Amendment.

Gunning's claims fail to state a claim on which relief may be granted because they are premised on constitutionally protected parody and, to the extent that her claims might have any conceivable merit, Gunning has not made a sufficient showing of merit to outweigh the John Doe defendants' constitutionally protected right to anonymous speech about a public figure. The time period allowed by M.R.Civ.P. 3 to achieve service of process has long since expired (the Complaint was filed two years ago) and the appropriate remedy is not only to quash the subpoena, but also to dismiss the Complaint.

For these reasons, the John Doe defendants respectfully request that the Court quash Gunning's subpoena and order that the Complaint be dismissed with prejudice.

INCORPORATED MEMORANDUM OF LAW

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiff Marie Gunning, a Local Politician and Public Figure

Marie Gunning "participate[s] in local politics of the Town" of Freeport (Compl. ¶11) and ran an unsuccessful "campaign for Town Councilor" (*id.* ¶ 23). She has repeatedly addressed the Town Council about her depictions in the Crow's Nest (*id.* ¶¶ 17, 29, 42).

B. John Doe #1

John Doe #1[1] is an individual who owns the URL for the Crow's Nest website, but did not write any of the content that appears on the site. Doe #1 Decl. ¶¶ 1-4. Doe #1 contracted with Automattic, Inc. to host the website on its servers. Doe #1 Decl. ¶ 5. Doe #1 is named a defendant in the underlying action in that it alleges that unnamed defendants are "the publishers" of the allegedly offensive content. Compl. ¶ 3.

[1] Gunning has filed her Complaint against "one or more Defendants collectively referred to herein as 'John Doe'" Compl., preface. Because there is more than one such person, petitioners herein refer to themselves as John Doe #1 and John Doe #2.

C. John Doe #2 and The Crow's Nest

Petitioner John Doe #2 is the author of the content on the *Crow's Nest* website. Doe #2 Decl. ¶ 7. The *Crow's Nest* has appeared periodically in Freeport over the past 25 years. *Id.* at ¶ 7. The *Crow's Nest* is a parody and identifies itself as such in its masthead – "a parody look at the news" – for those to whom it is not apparent. Compl. Ex. 1-16. Doe #2 is purportedly a defendant in the underlying action in that it alleges that unnamed defendants are the "contributing writers" of the allegedly offensive content. Compl. ¶ 3.

D. *Gunning v. Doe*

Gunning filed her Complaint in August 2013, alleging causes of action for libel, false light invasion of privacy and intentional infliction of emotional distress. Compl. ¶¶ 38-70 Each of Gunning's purported causes of action is based exclusively on content published in the *Crow's Nest*. Compl. ¶¶ 12-15, 18-28, 30-35, 38-41, 45-48, 52-55, 59-62, 64-66, 68-69.

ARGUMENT

I. THE COMPLAINT FAILS TO STATE AN ACTIONABLE CLAIM.

A. The *Crow's Nest* is parody protected by the First Amendment.

Parody is a form of speech squarely protected by the First Amendment. It cannot be actionable because, by definition, it cannot reasonably be interpreted as conveying actual facts. *See Hustler Magazine v. Falwell*, 418 U.S. 46, 57 (1988) (a state emotional distress "claim cannot, consistent with the First Amendment, form a basis for the award of damages when the conduct in question is the publication of a caricature such as the ad parody involved here"); *Victoria Square, LLC v. Glastonbury Citizen*, 891 A.2d 142, 145 (Conn. Sup. Ct. 2006) ("Defamation is, by its nature, mutually exclusive of parody."). Parody is defined as a:

> literary or musical composition imitating the characteristic style of some other work or of a writer or composer, but treating a serious subject in a nonsensical manner in an attempt at humor or ridicule.

Webster's New Universal Unabridged Dictionary (3d ed., 1983), p. 1304. A classic example of parody is fake news reporting, a form of expression honed to a fine art by, for example, the Onion website which has published parody news articles that were so successful that they have been reported as real news by mainstream news media. *See New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 157 n.7 (Tx. 2004). This case involves parody speech by a media defendant, the *Crow's Nest*, involving a public figure, a local politician and candidate for elected office.[1] *See Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 686-687 (U.S. 1989) (candidate for public office is a public figure); *Mangual v. Rotger-Sabat*, 317 F.3d 45, 66 (1st Cir. 2003) ("political candidates unquestionably" fall under the rubric "public figure").

As the Supreme Court has held, statements that "cannot reasonably [be] interpreted as stating actual facts" are entitled to "receive full constitutional protection." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-21 (1990). Statements in this category may involve "loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining" an actual fact, or where the "general tenor of the article" negates the impression that actual facts are being asserted. *Milkovich*, 497 U.S. at 21. Along the same lines, the Law Court has held, "Statements are protected as opinion unless provably false and capable of being reasonably interpreted as making or implying false and defamatory statements concerning actual facts." *Lester v. Powers*, 596 A.2d 65, 71 n.9 (Me.1991). The Supreme Court emphasized the need for protecting this sort of speech to ensure "that the public debate will not suffer from lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Milkovich*, 497 U.S. at 22.

[1] The First Amendment protection for parody exists even when the plaintiff is neither a public figure nor the speech a matter of public concern. *Mink v. Knox*, 613 F.3d 995, 1006 (10th Cir. 2010).

Whether a statement is one of objective fact is ordinarily a question of law. *See Riley v. Harr*, 292 F.3d 282, 291 (1st Cir. 2002) ("[C]ourts treat the issue of labeling a statement as verifiable fact or as protected opinion as one ordinarily decided by judges as a matter of law."); *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 728 (1st Cir.1992) (affirming Rule 12(b)(6) dismissal of defamation claim based on opinion defense); *Ballard v. Wagner*, 2005 ME 86, ¶ 11, 877 A.2d 1083 (whether a statement is fact is a question of law unless average reader could reasonably understand the statement as either fact or opinion).

In *Milkovich*, the Court cited its decision in *Hustler Magazine v. Falwell*, 418 U.S. 46, 57 (1988), where it held that the First Amendment barred recovery in an emotional distress claim for an advertisement parody in Hustler Magazine lampooning the sexual background of Rev. Jerry Falwell because parody "could not reasonably have been interpreted as stating actual facts" and was "not reasonably believable." *Id.*; *see also L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 33 (1st Cir. 1987) ("Although, as we have noted, parody is often offensive, it is nevertheless 'deserving of substantial freedom -- both as entertainment and as a form of social and literary criticism.'"); *Pan Am Sys. v. Hardenbergh*, 871 F. Supp. 2d 6, 12 (D. Me. 2012) ("The Supreme Court has also imposed constitutional limits on the type of speech which is actionable, carving out exceptions for statements which are not provable as false such as rhetorical hyperbole, imaginative expression, and parody.").

As *Falwell* demonstrates, First Amendment immunity for parody extends not just to libel claims, but also to other speech based claims, such as infliction of emotional distress and false light invasion of privacy. *Falwell*, 418 U.S. at 50; *see also Rippett v. Bemis*, 672 A.2d 82, 87-88 (Me.1996) (if statements are privileged, "there can be no recovery for the emotional distress allegedly sustained" and, if not, "any damages sustained . . .are subsumed by any award for

defamation"); *Norris v. Bangor Publ. Co.,* 53 F. Supp. 2d 495, 508-09 (D. Me. 1999) (emotional distress claim "grounded solely in Defendant's allegedly defamatory publications" is "swallowed by" defamation claims); *Veilleux v. NBC*, 206 F.3d 92, 134 (1st Cir. 2000) (refusing to allow false light claim to proceed where defamation claim could not); *see also Browning v. Clinton*, 292 F.3d 235, 248 (D.C. Cir. 2002) ("the privileges and defenses applicable to a defamation claim apply to a false light claim based on the same facts"). As a result all of the claims alleged by Gunning in her Complaint are subject to the same First Amendment defense.

The *Falwell* opinion also shows that even offensive, vituperative, and malicious statements are protected by the First Amendment if not reasonably understood as statements of fact. The First Amendment protects speakers engaged in parody, satire, humor, and similar speech "even when [they are] motivated by hatred or ill-will" and even when making "slashing and one-sided" statements that are "outrageous" and "offensive." *Id.*, 485 U.S. at 53-55 (describing history of "caustic" political caricature beginning with George Washington). The First Amendment, thus, protects even those statements of parody, satire, humor, or opinion that a court may find "gross, unpleasant, crude [and] distorted" and lacking in any "redeeming features whatever." *Pring v. Penthouse Int'l Ltd.*, 695 F.2d 438, 443 (10th Cir. 1983); *see also San Francisco Bay Guardian, Inc. v. Superior Court*, 17 Cal.App. 4th 655, 656 (Cal. Ct. App. 1993 ("[i]t is not for the court to evaluate the parody as to whether it [goes] 'too far'") and *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994) ("First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.").

To determine whether a reasonable fact-finder would conclude that the statement is an assertion of objective fact, courts employ a "totality of the circumstances" test. *Lester v. Powers*, 596 A.2d 65, 71 (Me. 1991). Under this test, courts must evaluate the context in which a

statement is made to determine whether the speech is protected by the First Amendment. *Phantom Touring, Inc. v. Affiliated Publications,* 953 F.2d 724, 727 (1st Cir. 1992) ("context in which language appears must be evaluated" in addition to the challenged speech itself). The court must consider the full context of the statements, and analyze the publication in its entirety; it may not be divided into segments and each portion treated as a separate unit. The court must consider: (1) "whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact"; (2) "whether the defendant used figurative or hyperbolic language that negates that impression"; and (3) "whether the statement in question is susceptible of being proved true or false." *Partington v. Bugliosi*, 56 F.3d 1147, 1152-53 (9th Cir.1995); *see also Riley*, 292 F.3d at 290 (1st Cir.1992) (factors are: (1) "the specific statements complained of"; (2) "the general tenor" of the publication; and (3) "the context in which the challenged statements are set").

The reasonable reader standard is a robust one in the context of First Amendment screening of parody, satire, and similar forms of speech:

> As the relevant cases show, the hypothetical reasonable person – the mythic Cheshire cat who darts about the pages of the tort law – is no dullard. He or she does not represent the lowest common denominator, but reasonable intelligence and learning. He or she can tell the difference between satire and sincerity.

Patrick v. Superior Court, 27 Cal.Rptr.2d 883, 887 (Cal.Ct. App. 1994). The reasonable reader is a person of "ordinary intelligence" who "exercises care and prudence, but not omniscience when evaluating allegedly defamatory communications." *New Times,* 146 S.W.3d at 157. "The appropriate inquiry is objective, not subjective." *Id.* "[T]he question is not whether some actual readers were mislead, as they inevitably will be, but whether the hypothetical reasonable reader could be." *Id.*

The question then is whether a reasonable reader would consider the challenged statements in the *Crow's Nest* to be loose, figurative, or hyperbolic language or parody rather than statements

of actual fact. The signposts in the particular *Crow's Nest* article (Compl. Ex. 16) which seems to be the focus of Gunning's claim, decisively point to the former:[2]

- The *Crow's Nest* includes a prominent disclaimer (on the first page above the article in question) that it is "a parody look at the news." *See San Francisco Bay Guardian v. Superior Court*, 21 Cal.Rptr.2d 464, 466 (Cal.Ct.App. 1993 (fact that phony letter to editor was in a section of the newspaper labeled "special parody section" was significant).

- The headline is unorthodox, "Lindsay Lohan Freeport's Own Marie Gunning" and the comparison of a middle-aged local politician to a Hollywood star is patently absurd, irreverent, and bespeaks caution about the intent of the article to represent real news.

- The article includes photos of Lindsay Lohan in various states of distress, photos having nothing to do with Gunning.

- The article includes exaggerated or extreme statements, comparing Gunning to the "iron will and force of a bulldozer" and characterizing her as having "snarled."

- The fabricated quotes attributed to Gunning are over-the-top and ludicrous, "I drove that crooked dirt bag manager out of town and that Council is next[;]" and "I'll make them sorry they didn't elect me."

- The article refers to Gunning as crazy, describing as "rumor" that she is "suffering from a bipolar disorder with acute depression and paranoia, amplified, by substance abuse." The fact that four disorders are layered one on top of the other suggests that the statement is hyperbole as does the description of the conditions as "rumor," i.e., having no basis in verifiable fact. *See New Times*, 146 S.W.3d 144 at 158 ("exaggeration or distortion" are means by which "the satirist clearly indicates to his audience that the piece does not purport to be a statement of fact but is rather an expression of criticisms or opinion"); and *Lester*, 596 A.2d at 71 (caveating a statement as "totally unsubstantiated fact", i.e., rumor, supports conclusion that statement is not factual).

- The inclusion of illogical and bizarre fabricated statements that Gunning accused Town employees of having an "inherent conflict of interest" merely by approving anything proposed by the Town Council and suggesting that it is somehow a conflict or a secret that Town employees are "getting paid with thousands of tax payer's dollars" or that "no one wants to talk about it."

- The unorthodox use of four exclamation points in the article, punctuation rarely if ever found in serious news articles.

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[2] This discussion is focused in Issue #72, Compl. Ex. 16 in the interest of brevity (Compl. ¶¶ 33-35, 53-54), but identical or similar indications and clues that the *Crow's Nest* is parody appear in each edition of the *Crow's Nest* and apply to all of the statements at issue in the Complaint.

- The inclusion in the same edition and on the same page of the *Crow's Nest* of a ludicrous article announcing that the Freeport Fire Department "is now in the Whoppie business and we're not talking about pies." The article goes on to say that the Department is sponsoring "conjugal activities" and "SLEEP OVER'S" at the fire station. *See Walko v. Kean College*, 561 A.2d 680, 684 (N.J. Super. Ct. Law Div. 1988) (fact that parody was surrounded by other, humorous articles supported interpretation that reasonable reader would not have taken it seriously).

- The following page contains a photo of a one-eyed zombie above an article saying that Gunning has "doggedly scrutinized every step" Freeport's Town Council makes, and attributing to her the fabricated quote that Town government is "rife with conspiracies and financial tomfoolery."

With all of these indications on the face of the *Crows Nest* edition in question a "reasonable reader" would not conclude that the *Crow's Nest* was stating actual facts about Gunning. The statements at issue here are, therefore, protected under the First Amendment. Having failed to state an actionable claim, Gunning's attempt to discover the identity of speakers behind the *Crow's Nest* should be denied and this case dismissed with prejudice.

B. John Doe #1 Is Immune From Liability Under Section 230 of the Communications Decency Act.

Doe #1 is simply the owner of the *Crow's Nest* website and cannot be held liable for comments posted on the website by third parties because of the immunity granted pursuant to 47 U.S.C. § 230 of the Communications Decency Act (CDA). Section 230 of the CDA provides, inter alia, that providers of an interactive computer service are immune from civil liability for publishing third party content on the Internet. *See Barrett v. Rosenthal* 40 Cal.4th 33, 39-40. (2006) Section 230(f)(2) broadly defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server. . . ." Websites are interactive computer services under section 230. *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC* 521 F.3d 1157, 1162 (9th Cir. 2008). Doe #1 did not create any of the content on Crow's Nest and has been sued for simply

owning the website upon which the allegedly wrongful content was posted. Therefore, Doe #1 cannot be liable to Gunning for any of the wrongs alleged in the Complaint. Doe #1's personally identifying information should not be disclosed to Gunning, because the claim against it fails.

II. GUNNING HAS NOT MADE A SUFFICIENT EVIDENTIARY SHOWING OF MERIT TO OUTWEIGH DEFENDANTS' CONSTITUTIONALLY PROTECTED RIGHT TO MAINTAIN THEIR ANONYMITY.

Courts in twelve states and the District of Columbia now demand a showing beyond the filing of a facially valid complaint before a plaintiff can deprive an anonymous speaker of the First Amendment right to speak anonymously. So, too, have many federal courts. This court should hold, in agreement with courts elsewhere, that the right to speak anonymously cannot be breached without a sufficient evidentiary showing by Plaintiff that she has a meritorious claim and, in addition, that her interest in pursuing damages for alleged actionable speech outweighs, on balance, defendants' First Amendment interest in speaking about a public figure while remaining anonymous. As the Supreme Court has held, a court order to compel production of individuals' identities in a situation that would threaten the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama ex rel. Patterson* 357 U.S. 449, 461 (1958).

The Court should apply a standard that reflects a balance of the right to obtain redress from tortfeasors against the right of those who have done no wrong to communicate anonymously, a right protected by the First Amendment. In cases such as this one, these rights come into conflict when a plaintiff complains about the content of speech and seeks relief against its author, including an order compelling disclosure of a their identity, which relief would, if successful, irreparably destroy the defendant' First Amendment right to remain anonymous. *See Elrod v. Burns* 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes [an] irreparable injury."). Once a speaker has been identified, that bell cannot be unrung.

Suits against anonymous speakers are unlike most tort cases because disclosure of the identity of the speaker, by itself, is an important measure of relief. In a typical tort suit, the identity of the defendant is known and is simply one fact among many needed to establish liability for damages. In a suit against an anonymous speaker, by contrast, identifying the speaker is itself an important – if not the primary – goal of the lawsuit.[3] Our legal system does not ordinarily give substantial relief of this sort, even on a preliminary basis, absent proof that the relief is justified because success is likely and the balance of hardships favors granting the relief. As a result, the Court should apply a heightened standard of proof before allowing Gunning to take steps to attempt to compel disclosure of the Does' identities and balance the parties' competing interests.

A. The Constitution Limits Compelled Identification of Anonymous Speakers.

The First Amendment protects the right to speak anonymously. *Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from Shakespeare and Mark Twain to the authors of the Federalist Papers:

> [A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to

[3] The main point of much of the litigation against anonymous speakers is to identify the speaker. Some lawyers admit that the mere identification of their clients' anonymous critics is all that they desire to achieve through litigation. Alternatively, a tactic recommended by some lawyers to clients concerned with online criticism is simply to file suit and pursue the identity of the speakers on the theory that doing so will slow or deter further criticism, regardless of whether the action is pursued to a conclusion. The lawsuit and the threat of being identified has a chilling effect, as is the case here. The *Crow's Nest* website was taken offline shortly after this lawsuit was filed. Once identified, the speaker may be at substantial risk of harm. For example, an employer might discharge a whistleblower, a public official might use his powers to retaliate against the speaker, or knowledge of the speaker's identity may be used in the political arena. A prime example of how exposure of the identity of a speaker may cause real harm, regardless of the merits of the underlying lawsuit, occurred in *Swiger v. Allegheny Energy*, 2006 WL 1409622 (E.D.Pa. May 19, 2006), aff'd 540 F.3d 179 (3d Cir. 2008), where a company filed a Doe lawsuit, obtained the identity of the employee who criticized it online, fired the employee, and then dismissed the lawsuit without obtaining any judicial remedy other than the removal of anonymity.

> preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.
> . . . .
> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

McIntyre, 514 US at 341-342, 356 (emphasis added).

Speakers may choose to speak anonymously for a variety of reasons. They may wish to avoid having their views stereotyped according to their race, ethnicity, class, or gender. They may be associated with an organization but want to express an opinion of their own, without running the risk that, despite the standard disclaimer against attribution of opinions to the group, readers will assume that the group feels the same way. They may want to say things about themselves that they are unwilling to disclose otherwise. And they may wish to say things that might make other people angry and stir a desire for retaliation.

Because compelled identification trenches on the First Amendment right of anonymous speakers to remain anonymous, justification for infringing that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre*, 514 U.S. at 347. As one court said in refusing to order identification of anonymous Internet speakers whose identities were allegedly relevant to the defense of a shareholder derivative suit, "If Internet users could be stripped of . . . anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights." *Doe v. 2theMart.com*, 140 F.Supp.2d 1088, 1093 (W.D.Wash. 2001); *see also Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D.Cal. 1999) ("People who have committed no wrong should be able to

participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identities.").

B. The Court Should Require that Gunning Make a Legal and Evidentiary Showing and Balance the John Does' First Amendment Rights Against the Harm to Gunning If They Are Not Identified.

The fact that a plaintiff has sued over certain speech does not create a compelling government interest in taking away a defendant's anonymity. The challenge for courts is to find a standard that makes it neither too easy nor too hard to identify anonymous speakers. Setting the bar "too low will chill potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all." *Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005).

The Law Court touched on whether to require a "heightened standard" before a plaintiff may compel disclosure of the identity of an anonymous speaker, but the Court left the issued undecided because the "recognized right to anonymous speech" under the First Amendment had not been raised before the trial court. *Fitch v. Doe*, 2005 ME 39, ¶ 26, 869 A.2d 722, 729. In *Fitch*, plaintiff alleged that his identity had been stolen by an anonymous defendant who sent an e-mail from a fictitious "Ronald Fitch" damaging to the real Ronald Fitch. *Id.* ¶¶ 3-4. In an effort to discover the identity of the person who sent the e-mail as "Ronald Fitch," the real Fitch sued Time Warner, an internet service provider, to force it to identify the person behind the "Ronald Fitch" e-mail. Time Warner and counsel for the anonymous "Ronald Fitch" made various arguments against having to disclose the identity of the fictitious "Ronald Fitch," but did not raise a First Amendment objection before the trial court. Because the First Amendment issue had not been preserved for review, the Law Court found that the argument had been waived – but in doing so, the Court observed, "[o]ther courts have adopted [heightened] standards to ensure that

court orders do not infringe up on the First Amendment and the recognized right to anonymous speech[,]" *Id.* ¶ 27. The Law Court cited the leading case on the subject, *Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756 (N.J. App. 2001), and two federal cases *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999).

Dendrite established a five-part standard that became a model followed or adapted throughout the country:

> 1. **Give Notice:** Require the plaintiff (and sometimes the Internet Service Provider) to provide reasonable notice to the potential defendants and an opportunity for them to defend their anonymity before issuance of any subpoena.
>
> 2. **Require Specificity:** Require the plaintiff to allege with specificity the speech or conduct that has allegedly violated its rights.
>
> 3. **Ensure Facial Validity:** Review each claim in the complaint to ensure that it states a cause of action upon which relief may be granted based on each statement and against each defendant.
>
> 4. **Require An Evidentiary Showing:** Require the plaintiff to produce evidence supporting each element of its claims.
>
> 5. **Balance the Equities:** Weigh the potential harm (if any) to the plaintiff from being unable to proceed against the harm to the defendant from losing the First Amendment right to anonymity.

Id. 775 A.2d at 760-61. Some jurisdictions employ the fifth balancing stage, while others do not.

The following state appellate courts have endorsed the *Dendrite* test, including the final balancing stage: *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. 2007); *Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009); *Mortgage Specialists v. Implode-Explode Heavy Industries*, 999 A.2d 184 (N.H. 2010); *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. Super. 2011); *In re Indiana Newspapers*, 963 N.E.2d 534 (Ind. App. 2012). These Courts conclude that "the *Dendrite* test is the appropriate standard by which to strike the balance between a defamation plaintiff's right to

protect its reputation and a defendant's right to exercise free speech anonymously." *Mortgage Specialists,* 999 A.2d at 193.

The leading case declining to require the fifth, explicit balancing stage of the *Dendrite* standard is *Cahill,* 884 A.2d at 457. In *Cahill* the Court required that plaintiff put forward summary judgment-like evidence to establish a prima facie case on all elements of a defamation claim within plaintiff's control without discovery. A number of state appellate courts have followed a *Cahill*-like summary judgment standard without express balancing: *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231 (Cal. App. 2008); *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007); *Solers v. Doe*, 977 A.2d 941 (D.C. 2009); *Doe v. Coleman*, 436 S.W.3d 207, 211 (Ky. Ct. App. 2014).

Earlier this month, a Washington appellate court held that whether to require mere facial validity (the third *Dendrite* element), a prima facie standard, a summary judgment-like standard, or some other standard depends on the nature of the speech at issue. *Thomson v. Doe*, 2015 Wash. App. LEXIS 1434, *17-18 (Wash. Ct. App. July 6, 2015). Commercial speech is entitled to the lowest level or protection, while political speech warrants the highest protection, with the protection afforded to other speech falling in-between. *Id.* Unless the speech is merely commercial in nature, "supporting evidence should be required before the speaker is unmasked." *Id.* *19-*20. As for the *Dendrite* balancing prong, the court found that "certain cases present facts that could necessitate application of the balancing prong" but that the prong is unnecessary in a "straightforward libel claim" involving a private figure plaintiff (an attorney) suing an anonymous online reviewer for defamation. *Id.* *23.

Intermediate appellate courts in three other states have refused to create special procedures pursuant to the First Amendment because they concluded that existing state procedural rules provide equivalent protections by giving Doe defendants the opportunity to avoid being identified

by subpoena if the plaintiff cannot establish a prima facie case. *See Maxon v. Ottawa Pub. Co.*, 929 N.E.2d 666 (Ill. App. 2010); *Stone v. Paddock Pub. Co.*, 961 N.E.2d 380 (Ill. App. 2011); *Thomas M. Cooley Law School v. John Doe 1*, 833 N.W.2d 331 (Mich. App. 2013); *Ghanam v. Does,* 845 N.W.2d 128 (Mich. App. 2014); *Yelp, Inc. v. Hadeed Carpet Cleaning*, 752 S.E.2d 554 (Va. App. 2014), *rev'd*, 770 S.E.2d 440 (Va. 2015).

"[M]any federal district courts" have also employed heightened standards "to benchmark whether an anonymous speaker's identity should be revealed." *In re Anonymous Online Speakers*, 2011 U.S. App. LEXIS 487, 2011 WL 61635, at * 5 (9th Cir. 2011) (discussing various standards).[4]

When in 2005 the Law Court in *Fitch* left open the possibility of adopting the *Dendrite* standard to protect the "recognized right to anonymous speech," only New Jersey and a few other courts had addressed the precise issue. The consensus has grown since then that the *Dendrite* test, or a close cousin of it, should be applied before granting a plaintiff's request for court-ordered disclosure of information identifying anonymous speakers. The Superior Court should follow the weight of authority by applying the *Dendrite* standard here.

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[4] *See, e.g., Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969, 976 (N.D. Cal. 2005) (required an evidentiary showing followed by express balancing of "the magnitude of the harms that would be caused to the competing interests"); *Art of Living Foundation v. Does 1-10*, 2011 WL 5444622 (N.D. Cal. Nov. 9, 2011) (endorsing the *Highfields Capital* test); *Fodor v. Doe*, 2011 WL 1629572 (D. Nev. Apr. 27, 2011) (following *Highfields Capital*); *Koch Industries v. Doe*, 2011 WL 1775765 (D. Utah May 9, 2011) ("The case law . . . has begun to coalesce around the basic framework of the test articulated in *Dendrite*," *quoting SaleHoo Group v. Doe*, 722 F. Supp.2d 1210, 1214 (W.D. Wash. 2010)); *Best Western Int'l v Doe*, 2006 WL 2091695 (D. Ariz. July 25, 2006) (court used a five-factor test drawn from *Cahill*, *Dendrite* and other decisions); *In re Baxter*, 2001 WL 34806203 (W.D. La. Dec. 20, 2001) (preferred *Dendrite* approach, requiring a showing of reasonable possibility or probability of success); *Sinclair v. TubeSockTedD*, 596 F. Supp.2d 128, 132 (D.D.C. 2009) (court did not choose between *Cahill* and *Dendrite* because plaintiff would lose under either standard); *Alvis Coatings v. Does*, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004) (court ordered identification after considering a detailed affidavit about how certain comments were false); *Doe I v. Individuals*, 561 F. Supp.2d 249 (D. Conn. 2008) (identification ordered only after the plaintiffs provided detailed affidavits showing the basis for their claims of defamation and intentional infliction of emotional distress).

C. Gunning Has Failed to Make the Required Evidentiary Showing.

The fourth prong of the *Dendrite* standard,[5] a requirement also followed in those jurisdictions that have adopted the *Cahill* summary judgment-like standard, requires that that plaintiff produce sufficient evidence to support each element of a claim and show a realistic likelihood of prevailing, at least with respect to those facts to which the plaintiff should reasonably have access (such as falsity and damages). Merely alleging a facially adequate complaint is not enough to obtain major relief in the form of identification of an otherwise anonymous speaker.

Here, Gunning has not presented any evidence in support of any of her claims. She has not established that any of the statements are false or that she was damaged, or if so how or in what amount. She can hardly claim surprise that she might be put to the burden of presenting evidentiary support for her claims because the Doe defendants made much the same First Amendment argument presented here before the California court in the proceeding to quash the subpoena on Automattic, Inc.

D. Plaintiff Has Not Shown That the Balance Tips in Favor of Disclosure.

Even if Gunning had properly alleged her claims and even if she had presented evidence in support of them:

> [t]he final factor to consider in balancing the need for confidentiality versus discovery is the strength of the movant's case . . . . If the case is weak, then little purpose will be served by allowing such discovery, yet great harm will be done by revelation of privileged information. In fact, there is a danger in such a case that it was brought just to obtain the names . . . . On the other hand, if a case is strong and the information sought goes to the heart of it and is not available from other sources, then the balance may swing in favor of discovery if the harm from such discovery is not too severe.

[5] The third prong (facial validity) has already been addressed, above, in Section I of the Argument.

Missouri ex rel. Classic III v. Ely, 954 S.W.2d 650, 659 (Mo. App. 1997). Similarly, *Dendrite* called for individualized balancing when the plaintiff seeks to compel identification of an anonymous speaker:

> [A]ssuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.

775 A.2d at 760. This standard is comparable to the test for the grant of a preliminary injunction, where the court considers the likelihood of success and balances the equities. Unlike a preliminary injunction, however, the outcome of discovery to compel disclosure of a speaker's identity is final. Once speakers lose anonymity, they cannot get it back.

The Court should weigh the strength of plaintiff's evidence, the nature of the allegations, the likelihood of significant damage to the plaintiff, whether plaintiff is a public figure,[6] whether the speech in question relates to issues of public concern, and the nature of the speech (whether the speech is commercial speech, for example, entitled to lesser protection), among any other salient factors.

The balance here tips in favor of quashing the subpoena and any further attempts to discover the identity of the Doe defendants. As a candidate for public office, Gunning is a public figure. *See Harte-Hanks*, 491 U.S. at 686-687. The speech is non-commercial parody speech by a media defendant entitled to protection of the highest order. Gunning has presented no evidence of damage, nor would it be reasonable to conceive of any economic harm to her as a result of the ludicrous and ridiculous parody in the *Crow's Nest*. The *Crow's Nest* is no longer available on the Internet and, therefore, any potential harm to Gunning is mitigated by the fact that the

[6] The First Amendment recognizes that commentary about public figures is entitled to special constitutional protection, the more stringent actual malice standard in defamation cases. *New York Times Co. v. Sullivan*, 376 U.S 254, 279-80, (1964).

statements are no longer available. The *Crow's Nest* is also a small home-made publication with no financial resources to defend an exhaustive litigation. Even if the Court wavers as to whether the Complaint states a claim, the likelihood of success is too remote to outweigh Defendants' constitutionally protected right to anonymous speech about a public figure.

CONCLUSION

WHEREFORE, John Doe #1 respectfully requests that the Court: (A) quash the subpoena; (B) dismiss the complaint with prejudice; and (C) grant such other and further relief as may be just and proper.

Dated at Portland, Maine this 17th day of July, 2015.

Respectfully submitted,

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ANY OPPOSITION (PURSUANT TO RULE 7(c) OF THE MAINE RULES OF CIVIL PROCEDURE) TO THE FOREGOING PLEADING, INCLUDING ANY RELATED MEMORANDA OF LAW, MUST BE FILED NOT LATER THAN TWENTY-ONE DAYS AFTER THE DATE ON WHICH THE FOREGOING PLEADING WAS FILED. FAILURE TO FILE ANY SUCH OPPOSITION WILL BE DEEMED A WAIVER OF ALL OBJECTIONS TO THE FOREGOING PLEADING, WHICH MAY BE GRANTED BY THE COURT WITHOUT FURTHER NOTICE OR HEARING.

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Attorneys for Petitioners
JOHN DOE 1 and JOHN DOE 2

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

JOHN DOE 1, an individual, and JOHN DOE 2, an individual, Petitioners, vs. MARIE GUNNING, an individual, Respondent.	California Case No. DECLARATION OF JOHN DOE 1 IN SUPPORT OF PETITION TO QUASH SUBPOENA (C.C.P. § 1987.1) Date: November 15, 2013 Time: 9:00 a.m. Department: 302 - DISCOVERY Judge: Hon. Marla J. Miller

IN THE CIRCUIT COURT OF THE STATE OF MAINE

FOR THE COUNTY OF CUMBERLAND

MARIE GUNNING, an individual, Plaintiff, vs. JOHN DOE, Defendant.	Maine Case No. CV-13-359

DECLARATION OF JOHN DOE 1

I, John Doe 1, declare,

1. I am an individual. I have personal knowledge of the facts contained in this declaration, unless otherwise indicated. If called upon to testify I am competent to do so.

2. I own the URL used by the Crow's Nest parody newspaper, http://freeportcrowsnestcom. I contracted with Automattic, Inc. to host the Crow's Nest site on its servers.

3. The content of the Crow's Nest was provided by a third-party.

4. I did not write the content.

5. I object to disclosure of information that would reveal my identity.

I declare under penalty of perjury under the laws of the State of California that foregoing is true and correct.

DATED: October 17 , 2013

John Doe 1

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Attorneys for Petitioners
JOHN DOE 1 and JOHN DOE 2

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

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

Petitioners,

vs.

MARIE GUNNING, an individual,

Respondent.

California Case No. CPF-13-513271

SUPPLEMENTAL DECLARATION OF JOHN DOE 1 IN SUPPORT OF PETITION TO QUASH SUBPOENA (C.C.P. § 1987.1)

Date: November 22, 2013
Time: 9:00 a.m.
Department: 302 - DISCOVERY
Judge: Hon. Marla J. Miller

IN THE CIRCUIT COURT OF THE STATE OF MAINE

FOR THE COUNTY OF CUMBERLAND

MARIE GUNNING, an individual,

Plaintiff,

vs.

JOHN DOE,

Defendant.

Maine Case No. CV-13-359

SUPPLEMENTAL DECLARATION OF JOHN DOE 1

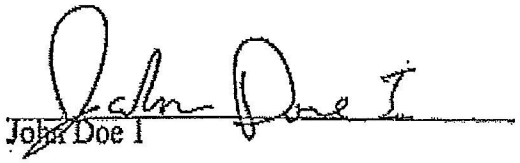
I, John Doe 1, declare:

1. I am an individual. I have personal knowledge of the facts contained in this declaration, unless otherwise indicated. If called upon to testify I am competent to do so.

2. As I stated in my original declaration, which was confirmed by the declaration of John Doe 2, I did not write any of the content posted on the Crow's Nest website. It was provided to me by a third party specifically so that I would post it on the Internet, because I had the technical ability to do so. That was my only role. I have never been involved in the publication of the hard copy editions. I was provided with an electronic version of the hard copies (such as a pdf or Word document), for the purpose of posting on the Internet, which I then converted to Web format and posted to the website. I did not edit the content, nor did I provide any editorial comments or suggestions regarding said content.

I hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: November 15, 2013



John Doe 1

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

JOHN DOE 1, an individual, and JOHN DOE 2, an individual, Petitioners, vs. MARIE GUNNING, an individual, Respondent.	California Case No. DECLARATION OF JOHN DOE 2 IN SUPPORT OF PETITION TO QUASH SUBPOENA (C.C.P. § 1987.1) Date: November 15, 2013 Time: 9:00 a.m. Department: 302 - DISCOVERY Judge: Hon. Marla J. Miller

IN THE CIRCUIT COURT OF THE STATE OF MAINE

FOR THE COUNTY OF CUMBERLAND

MARIE GUNNING, an individual, Plaintiff, vs. JOHN DOE, Defendant.	Maine Case No. CV-13-359

DECLARATION OF JOHN DOE 2

I, John Doe 2, declare,

1. I am an individual. I have personal knowledge of the facts contained in this declaration, unless otherwise indicated. If called upon to testify I am competent to do so.

2. I understand that Marie Gunning has filed a lawsuit against "John Doe" in Cumberland County, Maine Superior Court, Docket No. PORSC-CV-13-00359, alleging that she was defamed and that her privacy was invaded by the Crow's Nest parody newspaper.

3. Ms. Gunning is an unsuccessful 2011 candidate for Town Council in Freeport, Maine, a Town of about 8,000 inhabitants.

4. Ms. Gunning has also repeatedly appeared before the Town Council on issues of local public concern, including controversy related $2 million plus in funding of new athletic fields in Freeport.

5. The Crow's Nest is a parody newspaper, including parody of many local politicians, not just Ms. Gunning.

6. I wrote all of the content in the Crow's Nest that Ms. Gunning complains about in her lawsuit.

7. The Crow's Nest has appeared periodically in Freeport, Maine over the past 25 years and has consistently included parody of local politicians, public figures, Town politics, and local events.

8. I value my anonymity and object to disclosure of information that would reveal my identity.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: October 17 , 2013

John Doe 2