STATE OF MAINE
CUMBERLAND, ss.

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

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

REPLY IN SUPPORT OF JOHN DOE #1'S MOTION TO QUASH

NOW COMES, John Doe #1, by and through undersigned counsel, and files this reply memorandum. Gunning does not address *Dendrite*, *Cahill*, or the relevant standard for screening whether to allow discovery to reveal the identity of an anonymous speaker. The Court should, therefore, adopt the five-part *Dendrite* standard urged by John Doe #1 and apply that standard to Gunning's attempt at discovery here. Gunning focuses, instead, on two arguments: (A) John Doe #1 lacks standing and should not be afforded the opportunity to be heard; and (B) the *Crow's Nest* is not a parody but rather serious news reporting about a private person uninvolved in matters of public concern. For the reasons that follow, Gunning's arguments are unpersuasive and John Doe #1's motion to quash should be granted.

I. John Doe #1's First Amendment Interest Affords Him Standing To Be Heard.

Gunning argues that John Doe #1 only has a right to be heard on the motion to quash *if* Mr. Simard has relevant information. Opp. at 1-2. But if Mr. Simard has no such information, then there is no reason for Gunning to have subpoenaed his testimony or for the Court to overrule his own objection to his deposition. The subpoena should be quashed for that reason alone. If, on the other hand, Mr. Simard does have information that might directly or indirectly pose a risk of identifying Defendants, as Gunning implies he may, then Gunning appears to

concede that John Doe #1 has a First Amendment interest and must be given a right to be heard. By Gunning's own logic the subpoena should be quashed either as a fishing expedition or John Doe #1 has standing to be heard by virtue of his First Amendment interest.

But assessing what Mr. Simard may know, if anything, on the front end to determine whether to allow an anonymous speaker to be heard on an objection to discovery designed to reveal his or her identity is contrary to *Dendrite/Cahill*. The first element of the *Dendrite/Cahill* standard is to require notice to an anonymous speaker and to afford a right to be heard *before* discovery is allowed into his or her identity. A right to be heard is only meaningful if timely, i.e., *before* discovery has been pursued. A hearing *after* discovery has taken place is too late. A wait-and-see approach would invariably lead to discovery that ends up revealing a party's identity before that party has been notified or given a right to be heard. Gunning's position is contrary to relevant authority, impractical, and would eviscerate the First Amendment rights in anonymous speech recognized by *Dendrite/Cahill*. The question is not whether particular discovery will be fruitful, but whether Gunning should be able to pursue *any* discovery at all.

For these reasons, John Doe #1 has a right to be heard on whether Gunning's attempt to pursue discovery, including the Simard subpoena, infringes on First Amendment interests.

II. The Crow's Nest is non-actionable parody speech.

In support of her argument that a reasonable reader would consider the *Crow's Nest* to be a serious newspaper reporting actual facts (i.e., not parody), Gunning points to an "Op-Editorial Summary" announcing that *Crow's Nest* had reappeared following the swearing in of a new Freeport Town Council on November 15, 2011 and explaining that "[f]rom that night on you could clearly hear Banjo music when certain people went to the podium. (Note: the close set nature of the eyes. The bib overalls, one eyebrow and no neck.) … They are called 'THE

LOONYs' they live among us." A reasonable reader would not accept as factual reporting that banjo music is actually played when people called "LOONY's" speak at Town Council meetings or that such persons have close set eyes, wear bib overalls, have one eyebrow, and no neck. Nor would a reasonable reader perceive "LOONY's" to be a statement of fact that such persons are legally insane. The "Op-Editorial Summary" supports John Doe #1's position that the *Crow's Nest* is non-actionable parody on Town affairs.

Gunning argues that a reasonable reader would take the fictitious parody in Issue #72 literally[1], but she is doing exactly what courts have cautioned against. She is cherry picking only the text to which she objects. Any parody could be edited in such a way to make it seem as if some snippet is factual. The question is not whether the particular text she finds objectionable contains "facially assertions of fact" but rather whether "because of the context, they would have been understood as part of a satire or fiction." *Ollman v. Evans*, 750 F.2d 970, 1000 (D.C.Cir. 1984). The Court must review the *Crow's Nest* as a whole and the article in its entirety in context to assess whether the statements Gunning complains about are actionable as a matter of law. *Id.* The fact that Gunning is offended proves nothing. *See Farah v. Esquire Magazine*, 736 F.3d 528, 536 (D.C.Cir. 2013) ("it is the nature of satire that not everyone 'gets it' immediately"). That the *Crow's Nest* is parody is inescapable when the article is read as a whole.

Gunning argues that the article does not relate to a matter of public concern, but the article itself establishes otherwise.[2] The article begins, "The last lost election has not slowed Marie Gunning down one bit." The article is commenting on the continued involvement of a local politician in Town business. The article proceeds to parody Gunning's positions and

---

[1] As John Doe #1 had argued, and as Gunning now appears to concede, the focus of this lawsuit is an article in Issue #72, Compl. Ex. 16. This is the article quoted in Gunning's memorandum and mentioned in her affidavit.

[2] The burden of proof to show a likelihood of success by admissible evidence falls on Gunning under the *Dendrite/Cahill* standard. Mot. to Quash at 14.

conduct and interactions with the Town Manager, Town Council, and Town employees. By her own admission she participates in Town Council meetings. Opp. at 5 (Gunning exercises her right to speak at "open town meetings"). Because Town Council meetings by definition involve issues of public concern and she speaks at Council meetings, it is reasonable to infer that she has been addressing issues of public concern. Her interactions, as a local politician, with the Town Council are of public concern as are her public positions taken before the Town Council. For a matter to be of public concern "the relevant community need not be very large and the relevant concern need not be of paramount importance or national scope[;] ... it is sufficient that the speech concern matters in which a relatively small segment of the general public might be interested. *Levinsky's Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 132 (1st Cir.1997) (quotation marks omitted). The article is not a parody of Gunning's involvement in a private matter, but rather her public involvement in public issues before the Town Council.

Gunning also argues that after she lost the election for Town Council her public figure status disappeared and she immediately became a private figure.[3] Her argument is contrary to relevant authority, which is that public figures maintain their status when it comes to commentary relevant to what makes them public figures no matter when that commentary may occur. *See Street v. Nat'l Broadcasting Co.*, 645 F.2d 1227, 1235 (6th Cir. 1981), *cert. denied*

[3] Gunning's self-serving and conclusory statement that she is a private citizen is insufficient to establish exactly what her scope of activities have been within Freeport. Her filing states that she has exercised her right "to speak at open town meetings." Opp. at 5. In fact, she has participated in at least 26 meetings (between 2011 and 2014) of the Freeport Town Council according to minutes of meetings and other information on the Town's website. She is the Treasurer of the Freeport, Pownal and Durham Education Foundation, which describes itself as a "volunteer group of citizens working to help the RSU5 public schools achieve and maintain the vision of academic excellence." See http://www.fpad5.org/about-us.html (last visited Aug. 11, 2015). She is a Director of the Environmental Health Strategy Center, which describes itself as "leading national efforts to promote human health and safer chemicals in a sustainable economy – led by a Board of Directors "made up of scientists, community leaders, and health professionals." See http://www.ourhealthyfuture.org/whowe-are (last visited Aug. 11, 2015). Gunning is neither a scientist nor a health professional.

454 U.S. 815 (1981) ("once a person becomes a public figure in connection with a particular controversy, that person remains a public figure thereafter for purposes of later commentary or treatment of *that controversy*") (emphasis in original). "There is no reason for the debate to be any less vigorous when events that are the subject of current discussion occurred several years earlier. The mere passage of time does not automatically diminish the significance of events or the public's need for information." *Id.*; *see also Partington v. Bugliosi,* 56 F.3d 1147, 1152 n.8 (9th Cir.1995) ("it appears that every court of appeals that has specifically decided [whether an individual's status as a public figure can change over time] has concluded that the passage of time does not alter an individual's status as a limited purpose public figure"); *Contemporary Mission, Inc. v. New York Times Co.,* 842 F.2d 612 (2d Cir. 1988) (same); *Newson v. Henry*, 443 So.2d 817, 823 (Miss. 1983) (candidate for deputy sheriff who retired from public life remained a public figure for purposes of commentary in 1980 about his 1967 campaign). As a candidate for Town Council, Gunning put her character, qualifications, temperament, and positions before the voters as a public issue. She has continued to speak out on matters before the Town Council. She was and remains a public figure for purposes of the parody commentary in the *Crow's Nest.*

More fundamentally, the extent to which Gunning is a public figure or the relevant *Crow's Nest* parody relates to a matter of public concern does not change the relevant analysis.[4] The "Supreme Court has not yet squarely addressed whether fantasy, parody, rhetorical

[4] Gunning cites *Galarneau v. Merrill Lynch, Pierce, Fennder & Smith, Inc.*, 504 F.3d 189, 199 (1st Cir.2007) for the proposition that the statements at issue "can be accorded no constitutional protection." Opp at 6. But *Galarneau* was a defamation action brought by a former stockbroker against a non-media defendant (her employer) and had nothing to do with parody or the extent to which challenged statements were reasonably understandable as fact. In addition, any First Amendment arguments the Merrill Lynch may have had in *Galarneau* were waived "because Merrill Lynch failed to argue in the trial court that this case had any First Amendment implications." *Id.* at 189. The Court went on to find, "Because Merrill Lynch failed to make a case for a 'First Amendment privilege' at trial, and instead relied exclusively on the conditional privileged afforded by Maine common law, it has forfeited the argument that the First Amendment imposes a special burden on [Plaintiff]." *Id.* at 200.

hyperbole, or imaginative expression is actionable in a case where a plaintiff is neither a public figure nor the speech on a matter of public concern," but the Tenth Circuit, the First Circuit, and the D.C. Circuit have done so by holding that the First Amendment protection for these forms of speech applies to private figures just as it does public figures. *Mink v. Knox*, 613 F.3d 995, 1006 (10th Cir. 2010); *Levinsky's Inc. v. Wal-Mart Stores, Inc.*, 27 F.3d 122, 130, 132-34 (1st Cir.1997); *Ollman v. Evans*, 750 F.2d 970, 975 (D.C.Cir. 1984), *cert. denied* 471 U.S. 1127 (1985) ("The distinction in our law between public and private figures, however, does not directly bear on the distinction between fact and opinion."). "[I]n all cases involving fantasy, parody, rhetorical hyperbole, or imaginative expression, the constitutional inquiry in deciding whether a statement is actionable remains the same: whether the charged portions, in context, could be reasonably understood as describing actual facts about the plaintiff or actual events in which he participated." *Mink,* 613 F.3d at 1006. "[I]f a statement of fact is clearly a spoof . . . it matters not if the outrageously stated facts are false because no one would believe them to be true." *Id.*

In *Levinsky's* the First Circuit held that the word "trashy" was hyperbole and therefore shielded from defamation liability "notwithstanding the court's inability to determine whether the context of the statement involved a matter of public concern." *Mink, 613 F.3d at 1006, see also Levinsky's,* 127 F.3d at 132-34 ("Although we have the authority to resolve public concern issues *ab initio* at the appellate level, we choose not to exercise that authority in this situation."). The First Circuit noted that the Restatement applies the federal *Milkovich* standard "to defamation actions regardless of whether the challenged statements address issues of public or private concern." *Levinsky's,* 127 F.3d at 127 n.2.

The First Amendment protection for parody and similar forms of speech is consistent with the common law in Maine that "defamation does not allow recovery for statements of opinion alone." *Lester v. Powers*, 596 A.2d 65, 71 (Me.1991). This principle is the necessary corollary to the Maine common law rule that a "statement of fact" is "an essential element in an action for defamation." *Lightfoot v. Matthews*, 587 A.2d 462 (Me.1991) (accusation that members of a board of directors were "lackluster" could not "reasonably be construed as a statement of objective fact"). The result is the same whether the First Amendment or Maine common law applies: there is no liability for statements that a reasonable person would conclude are non-factual. *See Mink*, 613 F.3d at 1012 (Gorush, J., concurring) (observing that "state tort law already imposes" limitations on defamation liability for a parody or spoof regardless of First Amendment considerations); *Levinsky's* 127 F.3d at 127 n.2.

As the California Superior Court found in quashing Gunning's subpoena in that jurisdiction for the same sort of information at issue here, a reasonable reader would not take the *Crow's Nest* article in question as a statement of objective fact and, thus, the article about which Gunning complains is not actionable as a matter of law.

CONCLUSION

WHEREFORE, Defendant John Doe #1 respectfully requests that the Court grant the motion to quash and order such other and further relief as may be just and proper.

Dated at Portland, Maine this 14th day of August, 2015.

Respectfully submitted,

Sigmund D. Schutz, Bar No. 8549
Preti Flaherty Beliveau & Pachios LLP
One City Center
P. O. Box 9546
Portland, ME 04112-9546
Telephone: (207) 791-3000
Facsimile: (207) 791-3111
E-Mail: sschutz@preti.com