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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 Automattic, 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://freeportcrowsnest.com/>;
  - 24                   b. All email addresses associated with anyone covered by [a.] above;
  - 25                   c. IP addresses from which the <http://freeportcrowsnest.com/> was created; and
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1 d. IP addresses and user-agent<sup>1</sup> 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  
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27 \_\_\_\_\_  
28 <sup>1</sup> 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.<sup>2</sup> For this reason, the speech at issue in the Crow's Nest is protected under the First  
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27 <sup>2</sup> 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

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