

STATE OF MAINE  
CUMBERLAND, ss

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

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

**MEMORANDUM IN SUPPORT OF  
MOTION FOR SERVICE BY  
ALTERNATE MEANS AND MOTION  
FOR LEAVE TO TAKE DEPOSITIONS  
PURSUANT TO ME. R. CIV P. 30(a)**

Pursuant to the Order of this Court dated December 13, 2013 Plaintiff submits this memorandum in support of her motion dated November 13, 2013 to make service by alternative means upon Defendants by serving their attorney in this matter, Sigmund Schutz. Alternatively, Plaintiff moves this Court for leave pursuant to Me. R. Civ. P 30(a) to take up to three depositions upon oral examination prior to service of the complaint on defendants..

Plaintiff filed this action on August 13, 2013, seeking, *inter alia*, damages for defamation, false light, and intentional infliction of emotional distress for false written statements made by Defendants and published anonymously in several issues of the newsletter the News as Viewed from the Crow's Nest (the "Crow's Nest"), which were circulated in paper form in Freeport, Maine, and posted on the internet at <http://freeportcrowsnest.com>. In an attempt to learn Defendant's name in order to effectuate service of process, on September 6, 2013, Plaintiff served Automattic, Inc. ("Automattic") with a California-issued subpoena for production of business records, requesting all names associated with <http://freeportcrowsnest.com>, all email addresses associated with the website, the IP address from which the website was created, and the IP address and user-agent for specific posts cited in

the Complaint. In moving to quash Plaintiff's subpoena, an individual represented in this matter by Maine Attorney Sigmund Schutz filed an affidavit under the name John Doe 2 stating under penalty of perjury that he "wrote all of the content in the Crow's Nest that Ms. Gunning complains about in her lawsuit." Plaintiff's subpoena was quashed by Order of the Superior Court of California, County of San Francisco dated December 11, 2013, which, presumably predicting Maine Law (while erroneously captioning Plaintiffs suit as originating in Oregon rather than Maine), concluded that Plaintiff failed to make a prima facie showing of defamation because the allegedly defamatory statements could not reasonably be understood as anything other than parody protected by the First Amendment.

Whether or not Plaintiff has a cognizable claim under Maine law for defamation, false light, and intentional infliction of emotional distress for false written statements circulated in anonymous paper newsletter in Freeport, Maine should be decided by a Maine court. The anonymous Defendant has caused the Plaintiff substantial injury through the publication of false statements within the community in which the Plaintiff lives, and those defamatory statements and the threat of additional such statements chills Plaintiffs participation as a citizen in the political process of her Town. Because the Defendant remains anonymous, Plaintiff remains unable to effectuate personal service pursuant to Rule 4.

**1. Plaintiff Should Be Permitted to Effectuate Service By Alternative Means By Serving a Copy of the Summons and Complaint on Attorney Sigmund Schutz.**

Because Plaintiff has exhausted all reasonable attempts to make personal service on the Defendant but is unable to do so because the Defendant remains anonymous, Plaintiff should be permitted to effectuate service by alternative means pursuant to M. R. Civ. P 4(d)(1) and 4(g).

As the advisory committee notes to M. R. Civ. P. 4 state:

The Constitution does not require any particular means of service of process, only that the method selected be reasonably calculated to provide actual notice and an opportunity to respond. *Lewien v. Cohen*, 432 A.2d 800, 804 (Me. 1981) (citing, *inter alia*, *Mulane v. Cent. Hanover Bank and Trust Co.*, 339 U.S. 306 (1950)). Service of process serves the dual purposes of giving adequate notice of the pendency of an action, and providing the court with personal jurisdiction over the party properly served. *Gaeth [v. Deacon]*, 2009 ME 9, ¶ 20, 964 A.2d at 626 (citing *Brown v. Thaler*, 2005 ME 75 ¶ 10, 880 A.2d 1113, 1116).

M.R. Civ. P. 4 advisory committee's note to 2010 amend (West 2013). The notes continue:

The motion for service by alternative means must be supported by a draft order making the necessary findings and specifying the proposed method of alternative service.

Before a party can obtain an order allowing service by any alternate means, that party must first demonstrate that he or she has exhausted all reasonable attempts to make service in one of the other ways prescribed by Rule 4.

*Id.* Maine Courts have in certain circumstances permitted service of process to be effectuated through service on an individual's attorney. *Chalmers v. Hack*, 19 Me 124 (1841) (if a Plaintiff in equity can make out a cognizable claim for a remedy but is unable to personally serve the Defendant who is out of state but represented by an attorney in a related proceeding at law, then "serving [Defendant's] attorney at law with a subpoena would be a good substituted service to subject [Defendant] to the jurisdiction of this Court"); *Nelson v. Omaley*, 6 Me. 218 (1829). The *Nelson* Court recognized that when the Court would otherwise have personal jurisdiction over the Defendant, the law could permit service of process on an in-state attorney, regardless of whether Plaintiff could collect on a successful judgment:

The law has in this case made a service upon his attorney equivalent to a service upon himself. There is nothing unreasonable in this. Notice reaches him by the agency of his attorney, if he is faithful to his duty, which must be presumed. For any thing that appears, there may be property within the State, of which the plaintiff may avail himself. If there is not, and the plaintiff cannot enforce satisfaction of his judgment, if he should obtain one, he, and not the defendant, would be prejudiced thereby.

*Nelson v. Omaley*, 6 Me. 218, 219 (1829).

The same reasoning should be applied in this case. Where, as here, the Plaintiff has exhausted all efforts to sufficiently identify the Defendant in order to personal serve him, Plaintiff should be permitted to serve the Defendant by alternative means through his attorney, and proceed against Defendant anonymously. Because Attorney Schutz is in communication with his client, his client will receive actual knowledge of actions in the suit, satisfying any constitutional issue regarding process. If Plaintiff is successful in establishing a claim for damages for defamation, false light, or intentional infliction of emotional distress for false written statements, or injunctive relief to prevent republication of the statements on the internet (which have been removed from the internet as a result of this lawsuit) then Plaintiff could enforce that judgment by demanding removal of the republished statements, or by seeking disclosure of the Declarant's identity in order to determine whether the Declarant violated the judgment. Thus, a declaration by this Court that the statements are defamatory provides the Plaintiff with tangible relief. Moreover, if the Plaintiff establishes that the claims are defamatory, then that preliminary ruling by the Court would be sufficient for the Plaintiff to seek the name of the Defendant from other sources, including other web domains, which would allow for personal service, and a monetary judgment against the named Defendant once that name is discovered. As the *Nelson* court recognized, any difficulty in enforcing Plaintiff's judgment prejudices the Plaintiff and not the Defendant.

**2. Plaintiff Should Be Granted Leave Pursuant to M.R. Civ. P. 30(a) to Take Up to Three Depositions Prior to Personal Service of the Summons and Complaint.**

Alternatively, because the Defendant remains anonymous, preventing personal service, this Court should grant Plaintiff leave pursuant to M.R. Civ. P. 30(a) to take up to three depositions prior to personal service of the Summons and Complaint. By providing a copy of all

such deposition notices to attorney Sigmund Shutz, the Defendant who admits that he “wrote all of the content in the Crow’s Nest that Ms. Gunning complains about in her lawsuit.” will receive actual notice of all such deposition by Plaintiff, and Defendant will therefore have the opportunity to participate and will not be prejudiced by this procedure in any way. Moreover, to the extent the Defendant feels that his identity is constitutionally protected from discovery, Defendant would have an opportunity to move this Court for a protective order pursuant to M.R.Civ.P. 26(c) on those grounds. To the extent that Defendant feels his speech is constitutionally protected from the actions asserted under Maine Law, Defendant would be able to move for summary disposition pursuant to M.R. Civ. P. 12(b), (c) or 56 on those grounds. This approach allows Plaintiff her day in court before a Maine Court deciding issues of Maine Law, and it protects Defendant’s ability to assert any and all constitutional claims to anonymity or protected speech.

Plaintiff anticipates that Defendant will raise First Amendment defenses in Maine as he did in California. The First Amendment protects the right to speak rather than the right to remain anonymous or to avoid the consequences of one's statements. *Doe v. Reed*, 130 S. Ct 2811, 2831 n.4 (2010). The First Amendment does not protect defamatory speech. *Ashcroft v. Free Speech Coal.*, 122 S. Ct. 1389, 1399 (2002). Where, as here, there is an avenue through which the anonymous defendant can or does receive actual knowledge of the defamation claim, and the defamatory statements are pled with particularity, Courts have recognized that that the generally applicable rules of civil procedure adequately protect Defendant’s ability to assert constitutional claims. *Thomas M. Cooley Law Sch. v. Doe I*, 300 Mich. App. 245, 269, 833 N.W.2d 331, 345 (2013) (when anonymous declarant receives actual notice of a defamation suit, the ability to

petition for an order protecting discovery of his name is sufficient to allow the suit to proceed).

The *Cooley* Court further stated that protective orders are extremely flexible:

[a] trial court may tailor the scope of its protective order to protect a defendant's First Amendment interests until summary disposition is granted. For instance, a trial court may order ... that as a condition of discovering a defendant's identity, a plaintiff not disclose that identity until after the legal sufficiency of the complaint itself is tested.

*Cooley*, 300 Mich.App at 265; accord *Deer Consumer Products, Inc. v. Little*, 35 Misc. 3d 374, 393, 938 N.Y.S.2d 767, 783 (Sup. Ct. 2012) (directing parties to enter into confidentiality agreement that would allow disclosure of the anonymous defendant's name); *see also Maxon v. Ottawa Pub. Co.*, 402 Ill. App. 3d 704, 715, 929 N.E.2d 666, 676 (2010) (a Complaint that pleads defamation with factual particularity sufficient to establish a prima facie claim of defamation under state law require disclosure of anonymous declarant).

Here, Plaintiff has pled with specificity the defamatory statements admittedly made by Defendant John Doe 2. Those vicious and false attacks, circulated in print in the Town of Freeport have damaged Plaintiff and chilled her participation as a citizen in Freeport's political process. They will and are having a similar chilling effect on others. Plaintiff deserves her day in Court and should be permitted to proceed by taking up to 3 depositions pursuant to M.R.Civ. P. 30(a). By serving all notices of discovery on attorney Sigmund Schutz, Defendant will receive actual knowledge of such discovery and have the opportunity to seek what protection Defendant believes he is entitled to.

WHEREFORE, Plaintiff Marie Gunning respectfully requests leave to serve Defendants by delivering a copy of the Summons and Complaint on Defendants' attorney in this matter, Sigmund D. Schutz. Alternatively, pursuant to Me. R. Civ. P 30(a) Plaintiff respectfully requests

leave to take up to three depositions upon oral examination prior to the expiration of 30 days after service of the summons and complaint upon the Defendant, or such other relief this Court deems just and proper.

DATED: January 15, 2014



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