STATE OF MAINE
CUMBERLAND, SS.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-13-359

MARIE GUNNING,

Plaintiff,

v.

JOHN DOE,

Defendant.

PLAINTIFF'S OBJECTION TO RICHARD SIMARD'S MOTION TO QUASH AND INCORPORATED MEMORANDUM OF LAW

NOW COMES Plaintiff Marie Gunning, by and through counsel, and hereby objects to the Motion to Quash filed by non-party witness Richard Simard. As demonstrated in the following Memorandum of Law, Mr. Simard's Motion to Quash should be denied since: (1) the subpoena imposes no undue burden upon him; (2) he lacks standing to challenge the merits of Plaintiff's case; (3) the California court's order quashing Plaintiff's subpoena is not a final judgment and can have no preclusive effect; and (4) there is no constitutional privilege that could prevent him from testifying as to, *inter alia*, the identities of the *Crow's Nest* authors.

MEMORANDUM OF LAW

I. The subpoena imposes no undue burden upon Mr. Simard.

In his Motion to Quash, Mr. Simard vociferously argues that the subpoena for his deposition is unduly burdensome and seeks to annoy, embarrass, oppress and subject him to undue expense. Nothing in the Motion supports those assertions.

In point of fact, the subpoena requires very little of Mr. Simard. His deposition will almost certainly take less than two hours to complete and all reasonable efforts will be made

to accommodate his schedule and preference as to location. The subpoena does not seek production of any documents.

The sole argument advanced in support of the claim that the subpoena is unduly burdensome seems to be that Mr. Simard signed an affidavit in May 2014 (in which he denied any knowledge of who owned or contributed to the *Crow's Nest* publications) and that, as a result, he should not be deposed. No legal authority is proffered for this novel theory.

By way of relevant background (and subject to the qualification that the undersigned was not involved in this case at the time), when the subpoena was first served, Mr. Simard had various health issues which he claimed made it difficult for him to be deposed. Then, by letter dated May 2, 2014, Mr. Simard's counsel laid out various objections to the subpoena (the same "undue burden" arguments advanced in the present Motion to Quash) and enclosed Mr. Simard's May 1, 2014 Affidavit – copies of which are attached as Exhibit A. There was no *quid pro quo* with respect to the Affidavit: *i.e.*, Plaintiff's then-counsel never agreed that the Affidavit would be accepted in lieu seeking to depose Mr. Simard in the future and Mr. Simard's counsel makes no such claim.[1]

---

[1] On or about April 21, 2015, the undersigned spoke with Mr. Simard's counsel and advised that recently discovered evidence tended to call into question some of the statements in his client's Affidavit and Plaintiff now wanted to depose Mr. Simard. Although Mr. Simard's counsel advised that his client would likely object to being deposed, it was agreed that the original subpoena would be deemed by the parties to be valid pending a decision from the Court on the anticipated motion to quash. In light of counsels' agreement to deem the original subpoena as valid (a practical concession to avoid the time and expense attendant to re-service), Mr. Simard's argument that the subpoena is stale or untimely is rather curious. In any regard, it cannot be seriously argued that a party does not have the right – consistent with the controlling Scheduling Order – to subpoena witnesses at any time the party so chooses. Nothing in the Rules of Civil Procedure conveys standing to a witness to object to the timing of when, in the course of a pending lawsuit, a subpoena may issue.

It should also be noted that during the same April 21, 2015 conversation with Mr. Simard's counsel, the undersigned advised that due to the nature of the newly discovered information, same would not be disclosed prior to Mr. Simard's deposition. Plaintiff submits that the substance of the new evidence is not germane to the issues implicated by the pending Motions. Mr. Simard's arguments to the

In sum, there is absolutely no basis to conclude that the subpoena imposes an undue burden on Mr. Simard. The deposition will be very brief and conducted at a mutually agreed upon time and place. Whether it ultimately yields a true "Perry Mason" moment is anyone's guess, but a careful review of the case law has failed to identify that as being relevant to this Court's disposition of the pending Motion.

II. Mr. Simard lacks standing to challenge the merits of Plaintiff's case.

At the time of the June 18th telephone conference of counsel, the undersigned repeatedly stated the argument that Mr. Simard lacked standing to challenge the subpoena on grounds other than those specified in Rule 45(c). In response, the Court suggested that the issue of standing to assert such objections would presumably be briefed in Mr. Simard's Motion to Quash.

Despite the Court's suggestion, Mr. Simard's Motion to Quash contains not a single reference to the threshold issue of standing.

Plaintiff has identified no case law from Maine (or any other jurisdiction) which stands for the proposition that a subpoenaed non-party witness has standing to contest the merits of the underlying case or to raise challenges which are not set forth in the relevant procedural rules governing motions to quash. In Maine, the limited and specific bases for challenging a subpoena are set forth in M.R. Civ. P. 45(c)(3):

> (A) On timely motion, the court for which a subpoena was issued shall quash or modify the subpoena if it
>
> (i) fails to allow a reasonable time for compliance;

---

contrary notwithstanding, there is absolutely no legal authority (nor any cited) that would require Plaintiff to disclose any information to Mr. Simard prior to his deposition. That said, and as stated during the June 18th telephone conference with the Court, Plaintiff would – if requested – make an *ex parte* proffer of this evidence to the Court.

(ii) requires a resident of this state who is not a party or an officer of a party to travel to attend a deposition outside the county wherein that person resides or is employed or transacts business in person or a distance of more than 100 miles one way, whichever is greater, unless the court otherwise orders; requires a nonresident of the state who is not a party or an officer of a party to attend outside the county wherein that person is served with a subpoena, or farther than 100 miles from the place of service, unless some other convenient place is fixed by an order of court;

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles one way to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

Nothing in the foregoing affords a non-party the ability to challenge a subpoena by attacking the merits of the underlying case. Accordingly, the Court should not reach Mr. Simard's *res judicata* argument. *See, e.g., First Mariner Bank v. Resolution Law Group, P.C.*, 2014 U.S. Dist. LEXIS 19565 (D. Md. Feb. 14, 2014) ("Absent standing, a motion to quash a subpoena issued to a nonparty should be denied without reaching the motion's merits.").

III. The California court's order quashing Plaintiff's subpoena is not a final judgment and can have no preclusive effect.

Assuming *arguendo* that the Court does consider Mr. Simard's *res judicata* argument, the issue should be quickly dispatched: the California ruling which granted the Doe Defendants' motion to quash is a discovery order, not a "final judgment."

In principle, *res judicata* is "designed to ensure that the same matter will not be litigated more than once." *Kurtz & Perry, P.A. v. Emerson*, 2010 ME 107, P16 (Me. 2010). The doctrine, however, is applicable only where all of the following elements are present: "(1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been litigated in the first action." *St. John v. Jordan*, 2008 ME 68, P5 (Me. 2008) (emphasis added).

Since the California order in this case is a discovery order and not a final judgment, the doctrine is by definition inapplicable.

As the Law Court explained in *Bd. of Overseers of the Bar v. Warren*, 2011 ME 124, P19 (Me. 2011) (citations omitted) (emphasis added):

> The general rule is that discovery orders are deemed interlocutory and therefore are reviewable only on appeal from the final judgment. We recognized as much in *In re Motion to Quash* [2009 ME 104, ¶¶ 9-11, 982 A.2d 330], but reviewed the court's interlocutory order denying the motion pursuant to the death knell exception to the final judgment rule because the failure to conduct an immediate review would have rendered impossible any review of Verrill Dana's claim. The order from which the appeal was taken in this case was the one that granted Verrill Dana's motion to quash. This order was an interlocutory discovery order, and Bar Counsel acted appropriately by delaying the appeal until the entry of a final judgment.

The fact that the California order in this case *granted* the Doe Defendants' Motion to Quash further negates any argument that the ruling could be considered a final judgment. *See*

Warren, P19 *supra*; *see, also Fiber Materials, Inc. v. Subilia*, 2009 ME 71, P16 (Me. 2009) (internal quotations and citations omitted) ("The death knell exception is available only when the injury to the appellant's claimed right, absent appeal, would be imminent, concrete and irreparable. For example, the exception may apply when a court orders a party to disclose information that the party seeks to keep confidential. If such a party is denied the opportunity to have the matter reviewed on appeal prior to trial, the information will be disclosed and its secrecy forever lost."); *Lewis v. Keegan*, 903 A.2d 342, 346 (Me. 2006) ("One of the few narrow exceptions to the final judgment rule is the death knell exception, which permits immediate review when a party's substantial rights will be irreparably lost if we delay review until the entry of a final judgment.).

Since the California court granted the Doe Defendants' Motion to Quash – thereby barring any appeal under a "death knell" exception – the order is not as a matter of law a "final judgment" and can have no preclusive effect.

IV. There is no constitutional privilege which could prevent Mr. Simard from testifying as to, *inter alia*, the identities of the *Crow's Nest* authors.

In the interest of brevity, Plaintiff incorporates herein by reference the arguments set forth in her Objection to Defendant John Doe #1's Motion to Quash as to the merits or her claims. There are, however, a few points which warrant consideration in relation to Mr. Simard's claim that the subpoena should be quashed due to a constitutional privilege (*see* Simard Mot., p. 2).

If Mr. Simard does not know the identities of the authors/publishers of the *Crow's Nest* as he avers in his Affidavit, and Doe #1 makes no claim that Mr. Simard does, how can either claim that a constitutional privilege bars Mr. Simard's testimony?

And even if Doe #1 does have a constitutional basis for maintaining his anonymity – a contention Plaintiff contests – Doe #1 cannot preclude Plaintiff from learning his identity through properly adduced, non-privileged evidence. By way of hypothetical illustration, if John Doe #1 stood up before a room full of people and proudly declared "I am the *Crow's Nest* author!" – neither he nor anyone else would have a legal basis to prevent Plaintiff from taking the deposition of any witness to that statement.[2] Similarly, if a third-party happened to sit in on a meeting of the *Crow's Nest* editorial board – at which Doe #1 eloquently likened their publication to the anonymous classic works of Shakespeare, Mark Twain, and the authors of the Federalist Papers – nothing could prevent Plaintiff from deposing that witness.[3]

Taking the averments in Mr. Simard's Affidavit at face value, he can hold no privilege of Doe #1. Accordingly, there is no legal basis to prevent Plaintiff from seeking to discover any relevant evidence he may possess.

---

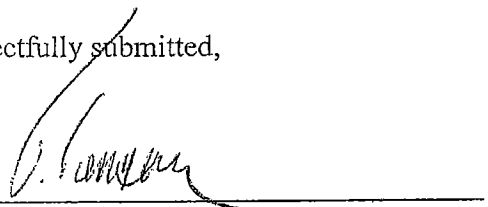
[2] Even assuming the existence of a privilege, the hypothetical statement would constitute a clear waiver. *See* Me. R. Evid. 510(a) ("A person who has a privilege under these rules waives the privilege if the person or the person's predecessor while holding the privilege voluntarily discloses or consents to the disclosure of any significant part of the privileged matter.").

[3] *See In re Letellier*, 578 A.2d 722, 724 (Me. 1990) ("No person has a privilege to refuse to be a witness except as provided by the Maine Constitution or statute or by the Maine Rules of Evidence or other rules promulgated by the Supreme Judicial Court. Neither the Maine Rules of Evidence nor the Maine statutes provide any reporter privilege.").

For the foregoing reasons, and those set forth in Plaintiff's Objection to Defendant Doe #1's Motion to Quash filed herewith, it is respectfully submitted that Richard Simard's Motion to Quash should be denied.

DATED at Portland, Maine, August 7, 2015.

Respectfully submitted,



L. John Topchik, Bar No. 8492
Attorney for Plaintiff Marie Gunning

LAW OFFICE OF L. JOHN TOPCHIK, LLC
477 Congress Street, 5th Floor
Portland, ME 04101
(207) 523-3427
jtopchik@topchik-law.com

NORMAN HANSON DETROY

Russell B. Pierce, Jr.

Norman Hanson & DeTroy, LLC
Attorneys at Law
Two Canal Plaza
P.O. Box 4600
Portland, ME 04112-4600

T 207.774.7000
F 207.775.0806
www.nhdlaw.com

May 2, 2014

Melissa A. Hewey, Esq.
Drummond Woodsum
84 Marginal Way, Suite 600
Portland, Maine 04101-2480

Re: Our File: Richard Simard 889756.89756
Marie Gunning v. John Doe, Cumberland Cty. Superior Court, Docket No. CV-13-359

Dear Melissa:

As we have discussed, I represent Richard Simard, a Town of Freeport employee who has been served with a subpoena for deposition in the above matter.

Pursuant to Rule 45(c), this letter will serve as Mr. Simard's objection to the subpoena. Under Rule 45, Marie Gunning as the party responsible for issuance of the subpoena "shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena." M.R. Civ. P. 45(c)(1). Attached to this letter is Mr. Simard's affidavit, setting forth in essence that he is neither the defendant in this matter nor does he know who the defendant is. You have conveyed to me that Ms. Gunning nonetheless insists upon a deposition proceeding in order to compel Mr. Simard to testify to these facts by deposition instead of by affidavit. That position is unreasonable, puts Mr. Simard to undue burden and expense, and violates the provisions of Rule 45 requiring reasonable steps to avoid undue burden and expense.

Further, Ms. Gunning's recent conduct in confronting other town employees has been disruptive, reinforcing that her discovery efforts are unreasonable in light of Mr. Simard's proffer of an affidavit that responds directly to her asserted purpose of the discovery. Mr. Simard considers his having been singled out by Ms. Gunning in this fashion to be intended to subject him to harassment and to embarrassment within the meaning of Rule 26(c), especially in light of the substance of the affidavit he has offered in lieu of deposition.

Finally, Ms. Gunning's complaint in this action fails to set forth a prima facie case of defamation or related torts, given First Amendment protections of freedom of expression under the Maine and U.S. Constitutions. This discovery process therefore also violates the First Amendment protections afforded to anonymous speech in society. While Mr. Simard has no knowledge to share on who the speaker in issue is or might be, it is nonetheless patently unreasonable to require a deposition of him under the circumstances, when the deposition process itself is of suspect constitutional validity.

Please let us know if Ms. Gunning will agree to refrain from further efforts to compel a deposition in this matter, or whether she will be moving to compel.

Very truly yours,

Russell B. Pierce, Jr.

RBP/
cc: Richard Simard

STATE OF MAINE
CUMBERLAND, SS.

SUUPERIOR COURT
CIVIL ACTION
Docket No. CV-13-359

MARIE GUNNING

Plaintiff

v.

JOHN DOE

Defendant

AFFIDAVIT OF RICHARD SIMARD

I, Richard Simard, having been first duly sworn, hereby depose and say:

1. I am a resident of the Town of Freeport, County of Cumberland, State of Maine. I am employed by the Town of Freeport.

2. I do not own or publish the "Crow's Nest" publication. I do not know who owns or publishes the "Crow's Nest" publication, nor do I have any knowledge of who may own or publish it.

3. I do not own the "Crow's Nest" website (http://freeportcrowsnest.com). I do not know who owns the website, nor do I have any knowledge of who may own it.

4. Since I have no knowledge of who owns, publishes, or contributes to the "Crow's Nest" in hard copy or online, I testify here that I have never participated or assisted in any fashion in owning, publishing, or contributing to, the "Crow's Nest" ~~either in~~ hard copy or online.

DATED: ~~April~~ May 1, 2014

Richard Simard

STATE OF MAINE
Cumberland, ss.

~~April~~ May 1, 2014

Personally appeared the above-named Richard Simard and took oath that the foregoing Affidavit signed by him is true to his own personal knowledge and that, to the extent matters are asserted therein on information and belief, he believes such information to be true.

Before me,

Notary Public/~~Attorney at Law~~

TRACEY L. STEVENS
Notary Public, Maine
My Commission Expires 8/16/2019