STATE OF MAINE
CUMBERLAND, ss.

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

MARIE GUNNING,

Plaintiff,

v.

JOHN DOE,

Defendant.

PRETI FLAHERTY'S MEMORANDUM IN OPPOSITION TO ALTERNATIVE SERVICE

In an effort to identify the author of the *Crow's Nest*, an irregularly published free parody newspaper covering local politicians, public agencies, and events in Freeport, Maine, Plaintiff served a subpoena on the California-based internet service provider ("ISP") hosting the web edition of the *Crow's Nest*. The ISP provided notice and Defendants retained counsel to quash the subpoena, which the California Superior Court duly quashed after extensive briefing and argument. The California Court recognized that the *Crow's Nest* is a parody publication protected under the First Amendment and that the subpoena, therefore, related to a claim that was prima facie without merit. Undeterred, Plaintiff is attempting to press this litigation in Maine and presumably re-litigate the First Amendment questions decided against them by the California court.

The Court should deny Plaintiffs' motion for alternative service for three reasons. First, Plaintiff has not made the necessary showing by affidavit to secure an order allowing alternative service under M.R.Civ.P. 4(g). Among other faults, Plaintiff could but apparently has chosen not to appeal the California order quashing her subpoena for personally identifying information. Second, alternative service would subvert Defendants' First Amendment rights and convert the attorney-client relationship into a conduit for litigation against the attorney's client. Third,

alternative service would be pointless where Defendants' identity is privileged and the speech at issue is non-actionable parody.

This memorandum is filed in accordance with the Court's request that Defendants' counsel be heard in connection with Plaintiff's motion for alternative service.[1]

FACTS

Plaintiff filed a complaint dated August 13, 2013 alleging that "John Doe" Defendants committed libel, false light invasion of privacy, and intentional infliction of emotional distress in connection with published statements in the *Crow's Nest* newspaper. The *Crow's Nest* masthead describes its contents as "a parody look at the news." Plaintiff issued a California subpoena dated September 5, 2013 to third-party Automattic, Inc. at 132 Hawthorne Street, San Francisco, CA 94107 for all names associated with http://freeport crowsnest.com/ and various related information designed to reveal the identity of the persons using that website. Automattic operates a popular blogging platform, wordpress, which is the platform that the *Crows Nest* used to publish internet editions. Automattic notified John Doe #1, who retained undersigned counsel. Later John Doe #2 also retained undersigned counsel.

With California counsel leading the effort, John Doe #1 and John Doe #2 filed a motion to quash the subpoena on Automattic with the California Superior Court. In accordance with California practice, a Judge Pro Tem issued a recommended decision on December 4, 2013 that the subpoena be quashed after extensive briefing and a hearing. Plaintiff objected, triggering a second round of briefing and a second hearing. Superior Court Judge Marla J. Miller issued a decision on December 11, 2013 accepting the recommendation of the Judge Pro Tem and

[1] Defendants' counsel was contacted by the clerk's office, which requested entry of a special appearance solely for purposes of being heard on the motion for alternative service. Defendants' counsel filed a special appearance, reserving all rights to require personal service as required by Rule 4.

quashing the subpoena. Judge Miller quashed the subpoena on a finding that Plaintiff had not made the prima facie showing of libel necessary to require the disclosure of the identity of an anonymous speaker. The Court ruled:

> The Court finds that while the content of the Crow's Nest could be seen as rude and distasteful, taking into consideration the context and contents of the statements at issue, it is parody. The speech at issue in the Crow's Nest is protected under the First Amendment of the U.S. Constitution. The statements are not actionable speech such that the identities of the website owner and persons who comment or otherwise publish material printed in or posted online at Crow's Nest must be revealed pursuant to the subpoena (See Hustler Magazine, Inc. v. Falwell (1988) 485 U.S. 46, 57 [parody is not actionable as defamation if it cannot "reasonably be understood as describing actual fact about [the plaintiff] or actual events in which [she] participated"].)

Judge Miller issued an amended decision on January 24, 2013 after it was brought to her attention that the prior caption on her decision mistakenly referred to the underlying case as an Oregon case rather than a Maine case.

A copy of the California orders as filed are attached for the Court's review as **Exhibit A**. The Court may take judicial notice of these records, which are also available on the internet directly from the California Court through that Court's online docketing system at http://www.sfsuperiorcourt.org/online-services (last visited Feb. 4, 2014) by searching for Marie Gunning (Case No. CPF-13-513271).

Meanwhile, Plaintiff moved this Court on November 7, 2013 for additional time to effect service, which the Court granted, and in the alternative for alternative service on the undersigned as attorney for Defendants. In support of that application Plaintiff filed an affidavit of David M. Kallin, Esq. indicating that the undersigned confirmed that he was counsel for Defendants, that Defendants intended to oppose the subpoena, and that an affidavit filed in California confirmed that John Doe #2 wrote the content in the *Crow's Nest*.

In an order dated November 20, 2013, the Court granted Plaintiff's request for an additional 30 days to effect service and wrote that alternative service would be considered after counsel for Defendants had been heard. The Court requested that the undersigned enter a limited appearance solely to be heard on alternative service and set deadlines for filing memorandums on whether the Court should allow alternative service, after an in-chambers conference with counsel.

ARGUMENT

The First Amendment protects the right to speak anonymously. *See Watchtower Bible & Tract Soc. of New York v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *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. The Supreme Court has stated:

> [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 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 U.S. at 341-342, 356. The interest in anonymous speech here is particularly significant given that Plaintiff was a 2012 candidate for elected public office, Freeport Town Council, and is, therefore, a public figure. Compl. ¶ 23.

At this stage of the case, the question before the Court is not whether Defendants' identity is protected by the First Amendment or whether Maine should join the dozen or so other states and various federal courts that have established threshold standards for assessing whether to allow discovery meant to expose the identity of an anonymous speaker. *See, e.g., Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) and Paul Alan Levy, Developments in Dendrite, 14 Fla. Coastal L. Rev. 1 (2012) (available at http://www.citizen.org/documents/Levy-Developments-in-Dendrite.pdf (last visited Feb. 4, 2014). Yet, the question here is a related one, whether to authorize service on the attorney for a party who successfully quashed a subpoena for personally identifying information.

A. Plaintiff Has Not Made The Evidentiary Showing Needed For Alternative Service.

Rule 4 specifies that service on an individual may be accomplished "by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein . . . ." M.R.Civ.P. 4(d)(1). If the plaintiff can show "that service as prescribed above cannot be made with due diligence," on motion the court may order that substitute service be made pursuant to Rule 4(g).

The motion must include a draft order indicating the requested means of service and must be supported by an affidavit showing that: (A) the moving party has demonstrated due diligence in attempting to obtain personal service of process in a manner otherwise prescribed by Rule 4 or by applicable statute; (B) the identity and/or physical location of the person to be served cannot reasonably be ascertained, or is ascertainable but it appears the person is evading process; and (C) the requested method and manner of service is reasonably calculated to provide actual notice

of the pendency of the action to the party to be served and is the most practical manner of effecting notice of the suit. M.R.Civ.P. 4(g)(1).

Plaintiff has not made a sufficient "affidavit showing" sufficient to meet any of the M.R.Civ.P. 4(g)(1) criteria.

1. No Adequate Showing of Due Diligence in Obtaining Personal Service.

Under Rule 4(g) the burden falls on Plaintiff to show due diligence by affidavit. The recent Advisory Committee Note emphasizes that due diligence is a high bar in the context of alternative service. The official comment to Rule 4 explains that a plaintiff must "demonstrate that he or she has exhausted all reasonable attempts to make service" by the ordinary methods enumerated in Rule 4 before being allowed to pursue substitute service. M.R.Civ.P. 4 (Advisory Cmte Note to July 1, 2010 amend.). The Advisory Committee wrote that the inquiry will depend on the facts and circumstances, but that a party seeking leave to effect substitute service must diligently pursue publicly available databases and sources of information as well as private sources. Public sources include "all publicly available databases (including computer databases) such as tax records, voting rolls, criminal history records, credit records, telephone directories, divorce or death records, utility records, post office records, and motor vehicle registry records in the jurisdiction where the defendant is most likely to be found." *Id.* Private sources include making "reasonable efforts to locate the current address of the party to be served by checking . . . known relatives, former employers, former educational institutions, and former neighbors." *Id.* The Court may allow alternative service only once the party seeking the order for service by alternate means "has shown through affidavit, that he or she has demonstrated due diligence and exhausted all reasonable efforts to provide actual notice of the action to the party to be served." *Id.*

Plaintiffs' four paragraph affidavit dated November 7, 2013 states that the undersigned contacted Plaintiff's counsel, requested and received an extension of the deadline to quash the California subpoena, and that John Doe #2 signed an affidavit confirming that he wrote the contents of the *Crow's Nest*. Kallin Aff. ¶¶ 3-4 (Nov. 7, 2013). The subpoena has been an effort to identify Defendants, but Plaintiff has not yet exhausted that means of uncovering information needed to effect personal service since she still has time to appeal the decision of the California Superior Court. If she decides against doing so, she will have made a decision against exhausting all reasonable efforts.

Regardless of the status of the subpoena and any appeal, Plaintiff has not shown by affidavit that the subpoena alone constitutes "all reasonable efforts" to effectuate service. Aside from the reference to the subpoena to Automattic, Inc., the affidavit does not present any facts relevant to whether plaintiffs have acted with "due diligence" in attempting to identify the author of the *Crow's Nest*. The *Crow's Nest* is an anonymous newspaper, but there are reasons to think that Plaintiff could have done more to complete service through usual means. Plaintiff alleges that the *Crow's Nest* has been placed in businesses and municipal buildings and was "available by mail upon request." Compl. ¶ 5. Yet, Plaintiff has not addressed whether they have attempted to interview any of the business owners where the *Crow's Nest* was distributed. Plaintiff has not addressed whether they have attempted to interview any municipal officials at the municipal buildings where the *Crow's Nest* was distributed. Plaintiffs have not addressed whether they attempted to make contact through the "available by mail upon request" contact information referenced in the Complaint. The subpoena alone – the only effort undertaken by Plaintiff to identify Defendant – is insufficient to demonstrate "due diligence" and meet the "all reasonable efforts" standard required under M.R.Civ.P. 4(g)(1)(A).

2. No Adequate Showing that Identity and/or Physical Location of the Person to be Served Cannot Reasonably be Ascertained.

Plaintiff has not shown by affidavit that the identity or location of the person to be served cannot reasonably be ascertained. The Complaint states that the *Crow's Nest* is an anonymous publication (Compl. ¶ 7), but that critical information is not contained in an affidavit as required by the Rule. Likewise, the affidavit contains no information about reasonable efforts to ascertain the identity of the person, aside from the reference to the California subpoena. The same considerations addressed above in the context of "due diligence" or whether "all reasonable efforts" have been exhausted apply to this element and weigh against authorizing alternative service.

3. No Adequate Showing that Service on Counsel Will Provide Actual Notice.

Plaintiff has not shown by affidavit that service on the counsel who represented the John Doe parties in the California action is "reasonably calculated to provide actual notice." The Law Court has recognized (and the Civil Rules make clear) that "service upon the original attorney of record might not be adequate to notify properly the affected parties." *Most v. Most*, 477 A.2d 250, 259 (Me. 1984) (referring to rules concerning personal service on parties to proceedings to modify divorce judgment). That is why the Rules differentiate between circumstances where "personal service" is required as opposed to those circumstances where service on counsel for a party is sufficient. To initiate a complaint by service on counsel is not sufficient, even where an attorney's client is known and the attorney's scope of representation is confirmed to include the defense of the action at issue. Instead, the Rules require personal service.

Here, Plaintiff has not made a showing by affidavit that the method and manner of service would be "reasonably calculated to provide actual notice" of the pendency of the action to the party to be served and that the method and manner selected would be the "most practical

manner of effecting notice of the suit" as required by Rule 4(g)(1)(C). The affidavit filed by Plaintiff is silent on these points.

B. The Court Should Decline To Allow Alternative Service On Counsel On First Amendment And Privilege Grounds.

Several courts have recognized that the fight over enforcement of a subpoena for personal identifying information *prior to service of process* is the critical battle in a claims against anonymous parties. *See Sony Music Entm't Inc. v. Does 1-40*, 326 F.Supp.2d 556, 566 (S.D.N.Y. 2004) ("Ascertaining the identities and residences of the Doe defendants is critical to plaintiffs' ability to pursue litigation, for without this information, plaintiffs will be unable to serve process."); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 577 (N.D.Cal.1999) ("Traditionally, the default requirement in federal court is that the plaintiff must be able to identify the defendant sufficiently that a summons can be served on the defendant."). Defendants are unaware of any authority supporting Plaintiff's position that an anonymous defendant who has successfully quashed a subpoena for personally identifying information may then be subjected to litigation by having his or her attorney served with process.

The First Amendment protection for anonymous speakers would be subverted if a party could simply issue a subpoena and then once a motion to quash has been filed serve process on the attorney who filed the motion to quash. A benefit of maintaining anonymity is not just to preserve the ability to speak unfettered by public pressure or outcry but also to avoid the burden of expensive, lengthy, and burdensome litigation. The Supreme Court recognized the burden of litigation on free speech in adopting the actual malice rule in *New York Times v. Sullivan*, 376 U.S. 254 (1964); *see, also, id.* at 294 (Douglas, J. concurring) and *Guilford Transp. Indus. v. Wilner*, 760 A.2d 580, 588 (D.C. 2000) ("the threat of being put to the defense of a lawsuit . . . may be as chilling as the exercise of First Amendment freedoms as fear of the outcome of the

lawsuit itself."). This court should adhere to the traditional rule that a party's ability to pursue litigation against the owner of website rises or falls with enforcement of a subpoena for personally identifying information.

Plaintiff's position would also subvert attorney-client relationships. Plaintiff's position, if accepted, would put parties interested in protecting their anonymity in a Catch-22 situation by giving them the choice whether to contest a subpoena and, if successful preserve their anonymity, but by retaining counsel open themselves up to service of process through their attorney, followed by the possibility of motion practice, discovery, the entry of a judgment, and the uncertain and ambiguous repercussions of being subject to a "John Doe" judgment and future attempts to disclose identity. A client faced with knowledge that her attorney is subject to a motion for alternative service might cut off contact with the attorney in an attempt to avoid personal notice of service. The Plaintiff's position would subvert the attorney-client relationship by turning the fact of engagement of counsel into a conduit for service of process. Where an attorney is engaged to protect the anonymity of a client, alternative service of process on the attorney would subvert the privilege and the proper distinction between an attorney and the client.

Here, undersigned counsel is not Defendants' general counsel and was engaged only for the limited purpose of assisting with the California subpoena, and undersigned counsel did not even enter an appearance for Defendants in California.

C. Alternative Service Would Be Pointless.

The Plaintiff's motion for alternative service is pointless given that Defendants' identity is attorney-client privileged and will not be disclosed and the speech at issue is non-actionable parody.

The name and address of clients is privileged where, as here, the protection of their identity is the very reason that clients retained counsel and, as such, the clients' identity is central to the attorney-client relationship. Many courts have recognized that the identity of a client may be protected by the attorney-client privilege:

> [T]here is no federal body of law that requires the exclusion of the identity of the client from the extent of the attorney-client privilege. . . .[I]t must be assessed on a case to case basis, depending on the particular facts of each case.

Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960). A client's identity is protected from disclosure when it is "connected inextricably with a privileged communication – the confidential purpose for which he sought legal advice." *In re Grand Jury Subpoena*, 926 F.2d 1423, 1432 (5th Cir. 1991). The client's identity has also been deemed privileged when "disclosure of a client's identity would implicate the client in the matter for which he or she sought advice." *United States v. Liebman*, 742 F.2d 807, 810 (3d Cir. 1984). Similarly, in cases where the client has communicated her address for the purpose of obtaining legal advice or representation to which the address is crucial, the courts routinely hold that the privilege must be respected. *Litton Indus. v. Lehman Bros. Kuhn Loeb*, 130 F.R.D. 25, 26 (S.D.N.Y. 1990), *citing In re Stolar*, 397 F.Supp. 520, 524 (S.D.N.Y.1975) and *Matter of Grand Jury Subpoenas Served Upon Field*, 408 F.Supp. 1169, 1173 (S.D.N.Y.1976).

Plaintiff's motion is also pointless given that the California Superior Court correctly determined that the speech at issue is non-actionable parody. It is true that the present motion does not require that the Court evaluate the merits of the underlying case. But, the Court may preview that issue in assessing the implications of Plaintiffs' proposed course of action. The *Crow's Nest* is parody. No objectively reasonable person would take as true statements in a newspaper that includes in its masthead the advisory "a parody look at the news" and juxtaposes

images of Pee Wee Herman, John Belushi, Charlie Chaplain, Homer Simpson, other humorous, inane, or silly images with content that exaggerates, makes fun of, or otherwise parodies public figures, candidates for public office, and the conduct of municipal agencies.

Plaintiff argues that whether the speech is actionable is an issue of Maine law, but the California court did not apply Maine law. It applied the First Amendment both to decide the standard for identification of anonymous speakers, which involves the First Amendment right to speak anonymously, and also to decide that Plaintiff's claims are untenable parody. A California court is equally equipped to interpret the First Amendment, and it was Plaintiff's choice to serve a subpoena in California and litigate those issues in that jurisdiction.

CONCLUSION

WHEREFORE, the undersigned counsel on behalf of himself and on behalf of non-party Defendants requests that the Court deny Plaintiff's motion for alternative service.

Dated at Portland, Maine this 6th day of February, 2014.

Respectfully submitted,

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