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MARIE GUNNING, Maine Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

JOHN DOE 1, an individual, and JOHN DOE 2, an individual, Petitioners, vs. MARIE GUNNING, an individual, Respondent.	Case No. CPF-13-513271 **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' PETITION TO QUASH SUBPOENA** Date: November 15, 2013 Time: 9:00 a.m. Dept.: 302 - Discovery Judge: Hon. Marla J. Miller

IN THE CIRCUIT COURT OF THE STATE OF MAINE

FOR THE COUNTY OF CUMBERLAND

MARIE GUNNING, an individual, Plaintiff, vs. JOHN DOE, Defendant.	Case No. CPF-13-359

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I. INTRODUCTION

Plaintiff Marie Gunning has for the past several years been the target of a virulent smear campaign carried out in the pages of the "News as Viewed from a Crow's Nest" (the "Crow's Nest"), an anonymous single sheet newsletter published both in hard copy form in Freeport, Maine and across the Internet. The operators of the Crow's Nest have spread extremely damaging misinformation about Ms. Gunning by falsely accusing her, of among other things, "substance abuse," "suffering from a bipolar disorder with acute depression and paranoia," organizing a boycott of Freeport businesses where the Crow's Nest was placed for distribution, and making disparaging statements regarding local Freeport politicians. (Petitioners' Request for Judicial Notice (RJN), Ex. A, Exs. 3, 11, 16 (Complaint).) These lies have harmed Ms. Gunning's professional and personal reputation, have disrupted her relationships, and caused Ms. Gunning significant emotional distress.

In an attempt to avoid scrutiny for their falsehoods, the operators of the Crow's Nest operate in the Internet's shadows, publishing their rambling, hateful screeds in anonymity. Unable to stomach the Crow's Nest's defamation any longer, Ms. Gunning filed suit against the operators of the Crow's Nest as Doe Defendants in Maine and served a subpoena on their California-based Internet Service Provider ("ISP") Automattic, Inc. ("Automattic"), demanding that it disclose the identities of the owner and author of the Crow's Nest site. The Doe Defendants filed a motion to quash Ms. Gunning's subpoena, arguing that the First Amendment to the United States Constitution gives them the right to anonymously publish libelous statements on the Internet with impunity.

However, under well-settled California law "when there is a factual and legal basis for believing libel may have occurred, the writer's message will not be protected by the First Amendment," and the court should not quash the subpoena seeking the writer's identity. *Krinsky v. Doe 6*, 159 Cal.App.4th 1154, 1172 (2008). It is well-settled under California law that in order to get the Doe discovery Ms. Gunning requires to serve her Complaint and initiate her action in Maine, all she needs to do is make a *prima facie* case for libel against the Defendants. Defendants' statements that Ms. Gunning is a drug user, who suffers from mental illness, and

who is promoting boycotts against local businesses plainly meets this standard.

Petitioners' Communications Decency Act ("CDA") argument fails for three independent reasons and is equally frivolous. Defendants would like to block discovery of their identities in order to frustrate Ms. Gunning's service of the complaint. But this would in effect be a case dispositive finding as to Defendants' misinformation campaign and should be avoided at this early stage. Indeed, the Maine court presiding over the principal action is equally capable of making a First Amendment finding and interpreting the CDA. It should be permitted to decide this controversy at home.

II. BACKGROUND

A resident of Freeport, Maine since 2000, Plaintiff Marie Gunning has, from time to time, participated as a private citizen in public discussions about municipal affairs in the town of Freeport. (RJN Ex. A at 10; Declaration of Marie Gunning ("Gunning Decl.") at ¶ 2.) In 2011, Ms. Gunning ran for the Freeport Town Council, but has not run in any other political race and has held no political office in Freeport. (*Id.* at ¶ 3.) Beginning in November 2011, an anonymous single sheet newsletter published and circulated in Freeport, the Crow's Nest, began publishing false and defamatory statements regarding Ms. Gunning and others in Freeport. Titled "The News As Viewed From A Crow's Nest: A Parody Look At The News," the Crow's Nest features articles on individuals and events in Freeport, interspersed with disparaging commentary and "humorous" photographs. (*See, e.g.*, RJN, Ex. A, Exs. 1-16.) The Crow's Nest was published on the Internet beginning in 2012 at the domain http://freeportcrowsnest.com/, though the domain is no longer active. (Gunning Decl. at ¶ 4.) The Crow's Nest was also distributed in hard copy form in Freeport, placed anonymously in the Town Hall and at various local Freeport businesses. (*Id.*)

The Crow's Nest frequently reports on actual happenings in Freeport. For example, in a "Special Edition," the Crow's Nest reported on discussions at the Town Council including the Crow's Nest's libelous content. (RJN, Ex. A, Ex. 2.) That issue included a hyperlink to a website hosting a video of the meeting, which allowed readers to view the meeting for themselves. (*Id.*) The Crow's Nest also publishes actual excerpts from legal and political

documents, including, for example, a complaint brought by another citizen of Freeport (who was at that time an employee of the Maine State Ethics Commission). (Gunning Decl. ¶ 5, Ex. 1 (Issue # 18); RJN, Ex. A, Ex. 7 (Issue # 19).) Issue # 18 consists of a copy of an unsigned letter sent by former Freeport citizen Ed Campbell to Maine Governor Paul LePage, describing his reaction to the aforementioned ethics complaint. Issue #19 includes an article describing the ethics complaint and quotes two of its paragraphs. (RJN, Ex. A, Ex. 7.) These recitations of actual fact in the Crow's Nest are accompanied by obvious jokes or parody, such as photographs of fictional characters or celebrities in place of photographs of the various citizens of Freeport discussed in the newsletter, which punctuate or ridicule the actual facts that are presented. No reasonable reader would believe that Freeport Citizens Ken Mann, Joe Migliaccio, and Susan Campbell, *actually* look like Homer Simpson, Charlie Sheen, and Helen Thomas. (*See, e.g.* RJN, Ex. A, Ex. 10 (depicting).) In contrast to its recitations of fact, which the Crow's Nest presents as truthful, these flourishes of "humor" (or lack thereof) are transparent for what they are.

The Crow's Nest also publishes editorials that expressly convey *actual facts* regarding the history of Freeport and its politics, and then provide opinion commentary on those actual facts. As an example, one editorial exhorts the Town Council to push forward with the construction of the Seacoast Sports Complex despite opposition to the project. (RJN, Ex. A, Ex. 11.) This editorial presents the underlying facts accurately: the construction of the Seacoast Sports Complex was a contentious issue in Freeport; at the February Council Meeting, less than 50 people objected to the Seacoast Sports Complex; "The population of Freeport is about 8,000 people,'" and in 1973, Freeport adopted a Town Charter changing to a "Council Manager form of Government." (*Id.*; Gunning Decl. ¶ 6.) It then provides opinion commentary on these facts.

Interwoven within the Crow's Nest recitations of *actual* facts and clear humor or parody has been a deceptive and pernicious campaign of misinformation and falsehoods targeted at Ms. Gunning and others. These statements assume the appearance of fact (as opposed to humor or parody), but are blatantly false. As described more fully in the Complaint, the operators of the Crow's Nest have repeatedly published such falsehoods regarding Ms. Gunning under the guise of truthfulness. (RJN, Ex. A.)

In Issue #10 of the Crow's Nest, for example, the Defendants falsely asserted that Ms. Gunning proposed a boycott of Freeport businesses where the Crow's Nest was distributed. (*Id.* at Exs. 2 and 3.) The article also falsely quoted Ms. Gunning, claiming that she said at a Town Council meeting "Any business that allowed the CROW'S NEST news letter to be on their property, [sic] would be targeted for a total boycott." (*Id.* at Ex. 3.) The article further falsely claimed that several business owners complained to the Crow's Nest that Ms. Gunning threatened them with a boycott. (*Id.*) Later issues of the Crow's Nest also featured numerous false quotations attributed to Ms. Gunning, including asserting that Ms. Gunning made disparaging statements regarding another Freeport resident, Charlotte Bishop. (*Id.* at Ex. 11) ("Gunning's description of Bishop is 'she's just an old cow who needs to be put to pasture.'")

The Crow's Nest also made multiple false reports that Ms. Gunning suffers from various mental illnesses and is a substance abuser:

> "Rumors continue that, [sic] Marie is suffering from a bipolar disorder with acute depression and paranoia, amplified by substance abuse."

(RJN, Ex. A, Ex. 16);

These false statements often include falsely attributed quotes:

> "She continues to deny it saying that 'it's just the same rotten people, my opponents always trying to discredit me and stop me from exposing the truth!'"

(*Id.*)

> "Asked about persisting rumors, that she is abusing mood altering Drugs, Gunning replied, 'I only use what my doctors prescribe for me. If you have any more questions you'll have to ask them through my Attorney or Doctor."

(RJN, Ex. A, Ex. 1.) These falsehoods do not have the appearance of humor or joke; rather they are disguised as fact, and are thus deceptive, and, indeed, defamatory.

By publishing the Crow's Nest anonymously, the perpetrators of these falsehoods have been able to hide and thereby prevent Ms. Gunning from serving the Complaint to initiate her action. (RJN, Ex. A, ¶ 7.) As such, Ms. Gunning served a subpoena on the ISP that hosts the Crow's Nest website, Automattic, demanding identification of the individuals responsible for the libelous statements published in the Crow's Nest. The Doe Defendants have brought the present

petition to quash the subpoena, arguing that that the First Amendment of the United States Constitution protects their right to publish the Crow's Nest anonymously and that Ms. Gunning has failed to present a prima facie case for defamation because the Crow's Nest is a "parody," and therefore cannot give rise to defamation liability.

III. ARGUMENT

The Doe Defendants are not only unwilling to accept responsibility for their libelous publications, they are unwilling to even attempt defending themselves publicly, instead attempting to hide their identities in the shadows. Because California law permits a plaintiff to subpoena information about an anonymous speaker's identity, provided she can make a prima facie case that the speaker has committed libel, and because Ms. Gunning has made such a showing, the court should reject Defendants' petition to quash.

A. California Standard for Subpoenaing Anonymous Speaker Information

"The First Amendment protects the right to anonymous speech on the Internet, but this right is not absolute." *Directory Assistants, Inc. v. Does 1-10*, 2011 WL 5335562, at *1 (D.Ariz. Nov. 4, 2011) (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 353 (1995)). It is well-established that the First Amendment "does not embrace certain categories of speech, including defamation ...." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-246 (2002); *see also*, *Beauharnais v. People of State of Ill.*, 343 U.S. 250, 266 (1952) ("[l]ibelous utterances" are not constitutionally protected speech.); *Bently Reserve L.P. v. Papaliolios*, 218 Cal.App.4th 418, 429 (2013) ("the mere fact speech is broadcast across the Internet by an anonymous speaker does not ipso facto make it nonactionable opinion and immune from defamation law.")

Recognizing that the anonymity that the Internet provides to speakers "opens the door to libel and other tortious conduct" that "is often so recklessly communicated that the harm to its targets...may extend far beyond what is covered by rules applicable to oral rhetoric and pamphleteering," a California Court of Appeals, in *Krinsky v. Doe 6*, 159 Cal.App.4th 1154, 1163-1164 (2008) ("*Krinsky*"), set forth a simple test for determining whether to allow discovery of the personally identifying information of Doe Defendants in a libel case.

The *Krinsky* court looked for guidance to a four-part test put forward by a New Jersey

Appellate Court in *Dendrite International Inc. v. John Doe No. 3*, 775 A.2d 756 (2001).[1] The *Krinsky* court adopted half of the *Dendrite* elements to establish a two-part test: "[T]he first requirement [is] an attempt to notify the defendant...." *Id.* at 1171.[2] For the second part, "the plaintiff [must] make a prima facie showing of the elements of libel in order to overcome a defendant's motion to quash a subpoena seeking his or her identity." *Id.* at 1172.[3] Thus, the court concluded, "where there is a factual and legal basis for believing libel may have occurred, the writer's message will not be protected by the First Amendment," and the court should not quash the subpoena seeking the writer's identity. *Id.* The plaintiff need only put forth evidence "'which will support a ruling in favor of its proponent if no controverting evidence is presented. It may be slight evidence which creates a reasonable inference of fact sought to be established but need not eliminate all contrary inferences.'" *Id.* at n. 14 (citations omitted). Furthermore, the plaintiff is only obligated to "produce evidence of only those material facts that are accessible to her." In the specific context of "an Internet libel case" such a showing requires evidence showing "the statement that was made and...evidence of its falsity and the effect it had on her." *Id.* at 1172.[4] *See also, Doe I v. Individuals*, 561 F.Supp.2d 249, 257 (D. Conn. 2008) (applying *Krinsky* to deny motion to quash subpoena seeking identities of anonymous Internet speakers because "plaintiff has shown sufficient evidence supporting a prima facie case for libel, and thus the balancing test of the plaintiff's interest in pursuing discovery in this case outweighs the

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[1] "First, the plaintiff must make an effort to notify the anonymous poster that he or she is the subject of a subpoena or application for a disclosure order, giving a reasonable time for the poster to file opposition. The plaintiff must also set forth the specific statements that are alleged to be actionable. Third, the plaintiff must produce sufficient evidence to state a prima facie cause of action. If this showing is made, then the final step should be undertaken: to balance the strength of that prima facie case against the defendant's First Amendment right to speak anonymously." *Krinsky*, 159 Cal.App.4th at 1167.

[2] Here, since there is no question that the Doe Defendants have knowledge of the subpoena, the only the second element of the *Krinsky* test is at issue. *Krinsky* 159 Cal.App.4th at 1171 ("in the procedural posture presented here, where the defendant is moving to quash the subpoena, the notification requirement benefits no one.")

[3] Petitioners here incorrectly argue that the "two part test" described in *Highfields Capital Management L.P. v. Doe*, 385 F.Supp.2d 969 (2005) should govern this petition. The *Krinsky* court *explicitly rejected* the *Highfields* court's modification of the four-part *Dendrite* test. *Krinsky*, 159 Cal.App.4th at 1168 (noting that *Highfields* applied "the third and fourth ingredients of the *Dendrite* analysis.") Indeed, the *Krinsky* court expressly rejected the fourth *Dendrite* element, noting that "a further balancing of interests should not be necessary to overcome the defendant's constitutional right to speak anonymously." *Id.* at 1172 (accepting first and third *Dendrite* elements).

[4] As described more fully *infra*, any showing of actual malice that Ms. Gunning may need to make if Petitioners can demonstrate in subsequent Maine proceedings that she is a "public figure," is obviated for purposes of this petition to quash, as evidence of actual malice "could be impossible" without knowing defendants' identities. *Krinsky,* 159 Cal.App.4th at n. 12.

defendant's First Amendment right to speak anonymously.")

B. Plaintiff Has Made a Prima Facie Showing of Libel

Defendants argue that, under California law, Ms. Gunning cannot make a prima facie case for libel against them because their statements in the Crow's Nest were parody and therefore protected under the First Amendment from libel liability. (Memorandum in Support of Petition to Quash ("Memo") at 7-8.) As a preliminary matter, Defendants are simply incorrect that the court should consider whether Ms. Gunning can make a prima facie claim for libel under California law. Rather, because the underlying case is pending in Maine, the court should consider whether Ms. Gunning can present a prima facie case for libel, publication in false light, or intentional infliction of emotional distress under Maine law. *Krinsky*, 159 Cal.App.4th at 1173 ("In examining the law of defamation, the court correctly determined that plaintiff's prima facie burden must be defined and satisfied according to Florida law.")

Under Maine law, "[t]o make out a claim for libel, the plaintiff must show that there has been publication to a third party of a false and defamatory statement." *Bakal v. Weare,* 583 A.2d 1028, 1029 (Me. 1990). "A communication is defamatory if it is provable as false, and 'tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" *Levesque v. Doocy*, 560 F.3d 82, 88 (1st Cir. 2009) (citations omitted). "Whether a statement is susceptible to a defamatory meaning is a question of law." *Id.* "To appropriately 'construe [the statement] in the light of what might reasonably have been understood therefrom by the persons who [heard] it', a court should consider the context in which the challenged statement is made, viewing it within the communication as a whole." *Id.* (citations omitted).

Thus, in order for Ms. Gunning to present a prima facie claim for libel against the Doe Defendants sufficient to warrant rejecting their motion to quash the subpoena seeking their identities, she must show that the Defendants published provably false statements that harmed Ms. Gunning's reputation, lowered her estimation in the community, and/or deterred third parties from associating with her.

1. The Defendants Published Statements Regarding Ms. Gunning That Harmed Her Reputation.

While, as discussed *infra*, Defendants dispute whether the statements at issue are "provably false" or not, they cannot plausibly dispute that they published those statements and that they harmed her reputation such that they can form the basis for a libel action. Defendants admit that they are the publisher and author of the Crow's Nest website and the statements at issue in this litigation. (Memo at p. 1-2.) And, accusing Ms. Gunning of suffering from mental disease and having substance abuse problems plainly lowers her estimation in the community, as do accusations that Ms. Gunning has been threatening a boycott of local businesses and false quotations attributed to Ms. Gunning that disparage others in the community.

By way of comparison, the First Circuit, applying Maine law, held that a cable news program that falsely attributed to a plaintiff "two false and particularly ridiculous quotations" and proceeded to mock the plaintiff for being excessively politically correct "encouraged viewers to form negative conclusions about Levesque, thus tending to harm his reputation," such that they could form the basis for a defamation action. *Levesque*, 560 F.3d 89-90. Clearly, if accusing someone of making silly, overly politically correct statements is sufficiently damaging to a plaintiff's reputation to support a claim for defamation, accusing Ms. Gunning of abusing mood altering drugs and suffering from serious mental illnesses harms her reputation in a manner sufficient to support a claim for libel. *See also*, *Fuller v. Day Pub. Co.*, 2004 WL 424505, at *3 (Conn. Super. Feb. 23, 2004) ("The court finds, however, that the alleged defamatory statements would cause reasonable minds to conclude that the plaintiff suffers from a mental illness, thus potentially injuring her in her trade or profession.") Defendants do not dispute that they published the statements at issue and that those statements harmed Ms. Gunning's reputation in a manner sufficient to constitute libel. As such, if the statements made by the Defendants regarding Ms. Gunning are provably false statements of fact, she has made a prima facie case for libel sufficient to defeat Defendants' motion to quash.

2. The Crow's Nest Contains Provably False Facts That Are Not "Parodic."

Defendants' motion to quash rests principally on the notion that "no reasonable person

could understand [the statements at issue] to be anything but parody," and therefore, not provably false statements of fact. (Memo at 7.) According to Defendants, because "The Crow's Nest specifically identif[ies] itself as 'a parody look at the news'" and because "the context in which the allegedly wrongful comments were posted" establish that they were made in jest, Ms. Gunning cannot state a claim for libel based upon these statements. Defendants' assertions have no basis in fact or law.

A parody will not be actionable as defamation if it cannot "'reasonably be understood as describing actual facts about [the plaintiff] or actual events in which [she] participated.'" *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988) (citations omitted). But, a person "assaulting the reputation or business of another in a public newspaper cannot justify it upon the ground that it was a mere jest, unless it is perfectly manifest from the language employed that it could in no respect be regarded as an attack upon the reputation or business of the person to whom it related." *Powers v. Durgin-Snow Pub. Co.*, 144 A.2d 294, 297 (Me. 1958); *see also Polygram Records, Inc. v. Superior Court*, 170 Cal.App.3d 543, 555 (1985) ("'[r]esort to humor will not preclude responsibility for defamatory matter'" and "'the jocular intent of the publisher will not relieve him from liability if it is reasonable to not understand the utterance as a joke.'" (citations omitted)).

Beyond establishing what they believe is the standard for determining whether a published statement is parody or not, Defendants make no attempt to establish why the context of the defamatory statements in the Crow's Nest qualifies them as "parody" beyond noting that the publication dubs itself "a parody look at the news," and that the publication also includes "images of characters" from various movies "to parody local politicians." (Memo at 7.)

Of course, merely writing on the masthead that the Crow's Nest is "a parody look at the news" and that certain parts of the publication are parodic does not establish that the defamatory statements Ms. Gunning has identified in her complaint cannot "'reasonably be understood as describing actual facts about'" Ms. Gunning. *Hustler*, 485 U.S. at 57 (citation omitted). The Crow's Nest explicitly captions itself a news publication ("a parody take on the news"), so it is making statements that are intended to be interpreted as fact, and as explained above, its

recitations of actual fact corroborate that it is a newsletter. It is impossible for the Crow's Nest be a "parody" take on the news without actually reporting the news. *See, e.g., New York Stock Exchange, Inc. v. Gahary*, 196 F.Supp.2d 401, 406 (S.D.N.Y. 2002) ("Virtually all parody 'depends upon association with the original'—otherwise the parody would be incomprehensible." (citation omitted)); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994) (parody is the "joinder of reference and ridicule"). For example, when the popular television political satirist John Stewart reports on the recent federal government shutdown and then proceeds to lampoon Congress for failing to keep the doors of government open, it is reasonable for viewers to believe that the government shut down, but no one would take his lampooning of Congress as anything more than opinion or parody. The existence of parody does not preclude the concomitant reportage of fact—rather, it demands it.

And, the Crow's Nest cannot plausibly claim, as it does, that *nothing* published on its website or in its print edition can reasonably be interpreted as stating actual facts simply because *some* of the publication contains parody. Just because part of a publication can be deemed opinion or parody does not render everything contained therein to be opinion or parody as well. In an analogous case, a Texas court rejected a defendant's claim that a website containing defamatory comments should be considered parody and thus immune from defamation liability, noting that because the website, in addition to satiric content, "refer[red] to actual court cases and cite[d] several documents for support," "a reasonable person would find that the Predatorix website describes actual facts." *Super Future Equities, Inc. v. Wells Fargo Bank Minnesota, N.A.*, 553 F.Supp.2d 680, 689 (N.D. Tex. 2008); *see also Chapman v. Journal Concepts, Inc.*, 2008 WL 5381353, at *11 (D. Hawai'i Dec. 24, 2008) ("The use of narrative, figurative language, and inclusion of opinion in the Magazine, however, does not render all of its statements inactionable.").

Here, even though the Crow's Nest contains some examples of parody, it also contains lengthy recitations of actual facts, refers to actual legal documents, and describes actual civic events in the town. Thus, it is perfectly reasonable for readers to regard as fact material within the Crow's Nest that looks like fact. One issue was devoted entirely to publishing a letter sent to

the governor regarding an ethics complaint brought against a Freeport resident. (Gunning Decl. ¶ 5, Ex. 1.) The next issue reported on the same issue, referring to actual legal documents—even quoting the ethics complaint itself. (RJN Ex. A, Ex. 7.) Other issues of the Crow's Nest contain nothing even remotely resembling parody. The "Special Edition" of the Crow's Nest identified in the Complaint reported on an actual Town Council debate regarding the Crow's Nest's libelous content and included a link to a video of the meeting. (RJN, Ex. A, Ex. 2.) Plainly, the Crow's Nest was presenting itself as reporting actual facts. Nobody would reasonably believe that the Crow's Nest was merely joking when it stated that "[t]he population of Freeport is about 8,000 people," simply because this statement was contained in an article that labels itself "a parody take on the news." (RJN, Ex. A, Ex. 11.) Clearly, that statement was intended to be taken as fact, because it *is* a fact: Freeport's population is approximately 8,000 people. Defendants do not and cannot explain why statements such as these should reasonably be interpreted as factual, but other fact-like statements such as "Marie is suffering from a bipolar disorder with acute depression and paranoia, amplified by substance abuse" cannot be reasonably interpreted as factual.[5]

The distinction between when the Crow's Nest is parodying something and when it is purporting to state facts is abundantly clear. For example, in the issue in which the Crow's Nest accuses Ms. Gunning of substance abuse and mental illness, the article purports to state facts about Ms. Gunning's mental health and substance abuse issues and "parodies" her by comparing her to Lindsay Lohan, a celebrity known for struggling with drug addiction. (RJN, Ex. A, Ex. 16.) The import of the article is obvious: it attempts to mock Ms. Gunning for her alleged substance abuse by comparing her to Lindsay Lohan. Nobody could reasonably believe that Ms. Gunning *is* Lindsay Lohan—that part of the article is clear parody. But, the remainder of the article is reported as fact, and a reasonable reader interpreting this material according to the convention that parody is the "joinder of reference and ridicule" would *believe* the fact-like

[5] To the extent that Defendants will argue that the statement is not actionable as defamation because it purports to report on a "rumor" that Ms. Gunning abuses drugs, such an argument is inapposite. "Simply couching [defamatory] statements in terms of opinion does not" render them non-factual. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990). "As Judge Friendly aptly stated: '[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'" *Id.* (citations omitted).

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portion, and disregard the Lindsey Lohan part as "ridicule".[6] Therefore, since it is not "perfectly manifest from the language employed" that it is merely a joke, it is not protected as parody under the First Amendment and can form the basis for a claim for libel. *Powers v. Durgin-Snow Pub. Co.*, 144 A.2d at 297.

As such, the context of the Crow's Nest publication generally gives rise to an inference that no reasonable reader would construe it as merely parody; rather, a reasonable reader would take the facially factual statements contained in the Crow's Nest, such as the defamatory statements regarding Ms. Gunning's activities and comments, as stating actual facts. Because Ms. Gunning has presented evidence that the statements the operators of the Crow's Nest have published regarding her are false and would appear to a reasonable person to be stating facts about her, under the *Krinsky* test, the court should find that her interest in uncovering the identities of the Doe Defendants outweighs their interest in remaining anonymous.[7]

C. The Communications Decency Act Does Not Shield John Doe 1's Identity From Discovery

1. The CDA does not apply to conventional hard copy publications, which are also the subject of Ms. Gunning's complaint.

"Section 230 of the CDA immunizes providers of *interactive computer services* against liability arising from content created by third parties ...." *Fair Housing Coun., San Fernando v. Roommates com*, 521 F.3d 1157, 1162-63 (9th Cir. 2008) (emphasis added). However, it has *no* application to claims of libel in connection with conventional *hard copy* publications. As Ms. Gunning alleges defamation in connection with hard copy versions of the Newsletter in

[6] The defamatory quotations falsely attributed to Ms. Gunning are particularly likely to be interpreted as stating actual facts about what Ms. Gunning said. *See Weyrich v. New Republic, Inc.*, 235 F.3d 617, 626 (D.C.Cir. 2001) (holding that "quotations, some purportedly from appellant, [] further reinforce the impression that the stories are in fact true.") (citing *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 519–20 (1991) ("The orthodox use of a quotation is the 'quintessential direct account of events that speak for themselves.'" (citation omitted))).

[7] To the extent that Defendants may argue that Ms. Gunning is somehow a "public figure" and under the Supreme Court's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), must therefore show "actual malice" on the part of the Crow's Nest to recover, Defendants' claim is unavailing. The *Krinsky* court specifically held that, when considering whether a Plaintiff has made a prima facie case for defamation sufficient to overcome a Defendant's right to speak anonymously, the Plaintiff need only present evidence in her possession, and since evidence showing "actual malice" is essentially unobtainable absent knowledge of the Defendant's identity, it is not required to defeat a petition to quash. *Krinsky*, 159 Cal.App.4th at 1171 fn.12; *see also, Star Editorial, Inc. v. U.S. Dist. Court for Cent. Dist. of Calif.*, 7 F.3d 856, 861 (9th Cir. 1993) (allowing public figure to obtain identity of confidential sources to support defamation claim because "proving actual malice may be difficult without knowing the identity of the informant.")

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addition to the website, the discovery of John Doe 1's identity—insofar as it may lead to facts showing his involvement in the *hard copy* version of the Crow's Nest—clearly cannot be shielded by the CDA. (RJN, Ex. A, ¶¶ 38-70.)

2. Doe 1's assertion that his participation is limited to owning the Crow's Nest website is precisely the type of self-serving untested "controverting evidence" that the *Krinsky* test disregards at the Doe discovery stage.

Under *Krinsky*, to decide whether to grant a petition to quash Doe discovery, the relevant question is whether Ms. Gunning can set forth a *prima facie* case of libel. *Krinsky*, 159 Cal.App.4th at 1172. Plaintiff need only advance allegations that "'will support a ruling in favor of its proponent *if no controverting evidence is presented*...[Even] slight evidence which creates a reasonable inference of fact sought to be established,'" will suffice. *Id.* at fn. 14 (emphasis added, citation omitted). A plaintiff must make "a preliminary showing of only those facts accessible to the plaintiff." *Id.* at fn. 12. Doe 1, however, improperly asks the Court to rely on the untested words of his anonymous declaration—precisely the sort of controverting evidence from a Defendant that under *Krinsky* has no bearing on whether Ms. Gunning has made a *prima facie* case.

It would be improper to give weight to Doe 1's self-serving untested declaration to decide the CDA issue at this stage of proceedings, because discovery may show a deeper involvement than just providing server space for a website.

> This grant of immunity applies only if the interactive computer service provider is not also an "information content provider," which is defined as someone who is "responsible, in whole or in part, for the creation or development of the offending content. *Id.* § 230(f)(3).

Roommates.com, 521 F.3d at 1162-63. Discovery may show that Doe 1 is "responsible, in whole or in part" for creating or developing the content, such as by providing editorial input or financial backing for the content, or he may otherwise be an alter ego, joint venturer, principal or agent of John Doe 2. The fact that Doe 1 is also claiming a First Amendment protection suggests a closer connection to the alleged defamation than mere passive ownership of the Crow's Nest website. At this extremely early stage of proceedings, before Plaintiff knows Doe 1's identity and has not yet deposed him, these questions are unanswered, so the CDA immunity is inapplicable.

3. Plaintiff cites no authority supporting application of the CDA immunity on the current factual record, and certainly no authority binding on a Maine court.

Petitioners rely on *Barrett v. Rosenthal*, 40 Cal.4th 33 (2006) to support application of the CDA immunity here. That case provided a novel interpretation of the CDA, but did so with trepidation. *Id.* at 40 ("[w]e acknowledge that recognizing broad immunity or defamatory republications on the Internet has some troubling consequences."). *Barrett* recognizes an important exception to the CDA, one which the Plaintiff in that case failed to raise, but which is of relevance here. The *Barrett* Court looked to *Batzel v. Smith,* 333 F.3d 1018 (9th Cir. 2003), where the Ninth Circuit had ruled that the recipient of an email message who posted that email to an Internet-wide message board could be liable for defamation, the CDA notwithstanding. "It [was] not entirely clear from the record whether [defendant] Smith 'provided' the e-mail [to the Internet poster co-defendant claiming the CDA immunity] *for publication on the Internet ....*" *Id.* at 1035 (emphasis added). Thus, the *Batzel* Court remanded for fact-finding as to "whether the operator should reasonably have known [that the author of the defamation] *intended his e-mail to be published on the Internet.*" *Barrett*, 41 Cal.4th at 61 (emphasis added). If not, then the operator who posted the defamatory material to the Internet would not be immune under the CDA and *could* be liable. The Plaintiff in *Barrett* failed to raise this *Batzel* exception. *Id.* at n. 20 ("[Plaintiff] does not argue that Rosenthal [the defendant claiming CDA immunity] might be liable under this theory.") The *Batzel* exception may very well be applicable here, because Doe 1's exceedingly sparse declaration is conspicuously silent as to the circumstances under which the Crow's Nest was "provided" to him. (Doe 1 Decl., ¶ 3.) Doe 1 plainly does not testify that the author provided it to him for publication across the Internet (and any such self-serving testimony would, of course, ring hollow).

Even beyond *Barrett*'s obvious inapplicability on the current record, that California precedent is obviously not the law of Maine. Moreover, given that *Barrett* expresses doubt and concern about the "troubling consequences" of its own holding, it is not a foregone conclusion that a Maine court would follow *Barrett*. By failing to cite *Maine* authority, Petitioner Doe 1 has failed to negate Ms. Gunning's *prima facie* case under *Maine* law, as required by *Krinsky*.

The Court here need not speculate as to how a Maine court would interpret the CDA or its application to Doe 1 after the circumstances of the Internet-wide postings of the Crow's Nest come out in discovery. This Court should grant the discovery Ms. Gunning requests and then the Maine court can itself make the necessary factual and legal judgments on a more complete record.

IV. CONCLUSION

The Defendants' present petition is just another intimidation tactic meant to humiliate and discourage a private citizen from any participation in her town's civic life. Since she made one brief run for Town Council in 2011, Ms. Gunning has been savagely and repeatedly defamed in the Crow's Nest publication. The Crow's Nest seeks to embarrass any Freeport citizen who might even consider taking a critical position in the town's public discussions. Indeed, it is Ms. Gunning's First Amendment rights that the Crow's Nest and this Petition are designed to extinguish. What started with social reprisal and humiliation in the Crow's Nest has now escalated into a legal attack in which Petitioners wish to add "injury to insult" with statutory fee-shifting. Because petitioners are acting in obvious "bad faith," it is they who should pay Ms. Gunning's fees.

Under no version of the law—even one clothed in the most generous interpretation of the First Amendment—can Petitioners' public accusations of drug abuse, mental disorder, and anti-local business boycotts be considered "parody." Similarly, Petitioners' frivolous CDA argument fails for three independent reasons. *See* Section III.B.iii, *supra*. Ms. Gunning, a private individual without the resources to fight complex legal battles in a distant jurisdiction, should not have to foot the bill for deflecting these senseless arguments. Given the oppressive and unjustified nature of Petitioners' arguments and their obvious "bad faith" motivation, the Court should order Defendants' to pay Ms. Gunning's legal fees in opposing this petition pursuant to § 1987.2.

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