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10 JOHN DOE 1 and JOHN DOE 2

11 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 IN AND FOR THE COUNTY OF SAN FRANCISCO
13 UNLIMITED JURISDICTION

14 JOHN DOE 1, an individual, and
15 JOHN DOE 2, an individual,
16 Petitioners,
17 vs.
18 MARIE GUNNING, an individual,
19 Respondent.

20 California Case No. CPF-13-513271
21 REPLY MEMORANDUM OF POINTS AND
22 AUTHORITIES IN SUPPORT OF PETITION
23 TO QUASH SUBPOENA (C.C.P. §§ 1987.1,
24 1987.2, 2029.600)
25 Date: November 22, 2013
26 Time: 9:00 a.m.
27 Department: 302 - DISCOVERY
28 Judge: Hon. Marla J. Miller

29 IN THE CIRCUIT COURT OF THE STATE OF MAINE
30 FOR THE COUNTY OF CUMBERLAND

31 MARIE GUNNING, an individual,
32 Plaintiff,
33 vs.
34 JOHN DOE,
35 Defendant.

36 Maine Case No. CV-13-359

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1 **INTRODUCTION.**

2 In their moving papers, petitioners established that the subpoena served on Automattic,
3 Inc. (Automattic) by Maine plaintiff Marie Gunning (respondent) seeks to intrude on their free
4 speech activities. Respondent argues that she has legitimate claims and should be provided with
5 the information sought from Automattic regarding petitioners. However, contrary to
6 respondent's primary argument, the First Amendment protects not only media stars like Jon
7 Stewart, but also the author and Internet publisher of the Crow's Nest. The analysis required
8 here is of the statements in context, and not of the isolated, selective quotes put forth by
9 respondent, nor is the quality of the parodies at issue. The authority cited by respondent in her
10 opposition actually supports petitioners' argument that the subject political commentary is not
11 actionable and is protected under the First Amendment. When read in context, no reasonable
12 reader would take the content of the Crow's Nest as serious news reporting, nor would they see
13 the subject political commentary as anything but the parody that it is. To a reasonable reader, the
14 Crow's Nest, complete with its contorted grammar, seemingly random punctuation, and crude
15 production values, is clearly not the New York Times, the San Francisco Chronicle, or the
16 Portland Press Herald.

17 However, respondent apparently believes that the people of Freeport in particular are not
18 intelligent or sophisticated enough to distinguish serious news reporting from parody. She
19 argues that because traces of actual facts are scattered throughout various editions of the Crow's
20 Nest (which she concedes is an essential part of all parodies), reasonable readers would take the
21 comments about her to be actual facts as well. However, just as with Jon Stewart, "no one
22 would take [the Crow's Nest's] lampooning of [Gunning] as anything more than opinion or
23 parody." In fact, no reasonable person would read the comments about her in the Crow's Nest
24 and believe that they are actual facts. The context clearly shows that they are commentary on her
25 involvement in local politics, lampoons of her political positions and antics. If anything, the
26 Crow's Nest consists of parodies, humor and whimsy, interwoven with an occasional statement
27 of actual fact, not vice versa as respondent argues. Respondent surmises that reasonable readers
28 would not take humorous comments about other town characters as actual factual statements, but

1 that they would take such statements about her seriously and accept them as actual factual
2 statements.

3 The commentary in the Crow's Nest regarding respondent is non-actionable under the
4 First Amendment of the United States. Respondent has not shown that she has legitimate claims.
5 This petition should be granted and petitioners should be awarded the attorneys' fees and costs
6 incurred in making this petition.

7
8 **I. THIS COURT SHOULD QUASH THE SUBPOENA TO AUTOMATTIC**
9 **BECAUSE IT INTRUDES ON THE CONSTITUTIONAL RIGHT TO SPEAK**
10 **ANONYMOUSLY.**

11 Respondent does not appear to disagree with petitioners that this court has the authority to
12 quash or modify the subject subpoena and that they have standing to bring this petition. (See
13 petitioners' Memorandum of Points and Authorities (Memo) 3:3-4:5.) Further the parties appear
14 to agree that the First Amendment applies to statements and conduct on the Internet. (See Memo
15 4:6-22; see also Opp. 5:13-21.) They also generally agree that this Court must determine
16 whether Respondent has, in fact, any legitimate claims.¹ (See Memo 4:24-6:17; see also Opp.
17 5:22-7:1.) The result of such analysis is where they disagree.

18 **A. The Allegedly Wrongful Statements Are Nonactionable Parody.**

19 The masthead of the Crow's Nest prominently warns readers that it is "a parody look at
20 the news," which is also abundantly clear from its content. Nonetheless, respondent argues that
21 a reasonable reader would take the allegedly wrongful statements about her to be statements of
22 actual facts in a publication that² (RJN, Exhibit A, Exhibit 1 thereto [typos and grammar

23 ¹ Respondent asserts that petitioners argue that she must show that she has a claim under
24 California law. In fact, petitioners argument is based on the United States Constitution and well-
25 settled case law interpreting same. It does not matter what state law is applied to the underlying
26 claim. (See Opp. 7:22-12; Memo 7:10-8:20.) Here, Respondent acknowledges that the subject
statements are not actionable if they cannot "reasonably understood as describing actual facts
about [the plaintiff] . . ." (Opp. 9:7-9, citing *Hustler Magazine, Inc. v. Falwell* (1988) 485 U.S.
46, 57.) No reasonable person could read the Crow's Nest as such a publication.

27 ² Space does not allow for a line by line analysis of the context in which all of the
28 allegedly wrongful statements were made. However, following is a representative analysis. The
Court will readily see that this analysis is applicable to the Crow's Nest content at issue here

1 original]):

- 2 ● recaps a recent election identifying a candidate as “The Screaming Skull” and the
3 “Grand Wizard,” illustrated with a photograph of a character from a science fiction
4 movie;
- 5 ● identifies another candidate as “Joe ‘The Greaser’ Migliacio,” whose political
6 slogans were purportedly “If I only had a brain” (illustrated with a picture of the
7 Scarecrow from the Wizard of Oz), “Who’s on first? Yes!” and “Let’s light up a
8 Fat boy’!”;
- 9 ● refers to the Fire Chief and his assistant as “TWEEDLE-DEE” and “TWEEDLE-
10 DUM,” including a graphic depiction of those fictional characters. The Crow’s
11 Nest further “reported” that the deputy fire chief said ““Sir, I am ready and eager to
12 do what I can for the Brave people of Freeport, no matter how Dangerous’!” along
13 with a photograph of the fictional character Batman;
- 14 ● states that one of the candidates was “Eric ‘Paranoia’ Pandora”;
- 15 ● states that “The cable TV Director should be ‘Suspended’ After a short trial he
16 should be hanged outside, Freeport’s Community Center for all to see by order of:
17 The Grand Wizard.”

18 In that edition, the Crow’s Nest also “reports” on respondent’s failure to win election to the
19 Town Council, illustrated with a picture of the Wicked Witch of the West from the Wizard of
20 OZ, whose nicknames are “Gunner Gunning” and “Miss Prozac 2003,” and whose purported
21 political slogan was “shoot‘em all let God sought‘em out’!”. Following are the “quotes”
22 attributed to respondent in this story:

23 “I know why I lost the Election” said Marie, It was a conspiracy”! “The Votes and Town
24 Councilors all ganged up on me at the Poles and Voted against me, secretly”!

25 “Ken Mann warned me about them and he was right”!

26 “They won’t get away with it, not with me”! “I’ll be at every Council meeting and I’ll
27 harass every move they make”!

28 _____
generally.

1 "I'm going to the Attorney General's Office and the Secretary of State's Office. I'll
2 challenge the whole Election process"!

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

6 (RJN, Exhibit A, Exhibit 1 thereto.) In context, the statements therein of which respondent
7 complains are clearly parody political commentary. No reasonable reader would consider such
8 absurd statements to be actual statements by respondent given their context. Indeed, some may
9 find the comments in poor taste or offensive, but they are legitimate commentary on
10 Respondent's political activities, e.g., that some people believe her political positions and antics
11 can only be explained as being the result of substance abuse.

12 Respondent also asserts that an edition of the Crow's Nest contains a link to video of an
13 actual Town Council meeting, which is evidence that it would be seen by a reasonable reader as
14 a serious source of news and actual facts. (Opp. 2:24-28.) What respondent fails to state is that
15 the "Special Edition" of the Crow's Nest was emblazoned with stenciled "EYES ONLY," "TOP
16 SECRET" and "CLASSIFIED" on the front page and "reports" that at the meeting, the Town
17 Council considered a resolution stating "and where as Ed Campbell does have the Constitutional
18 Right to 'free speech' be it ordered that these writings in this parody news letter are,
19 inappropriate, hurtful, harmful, not fit for viewing, and not funny, be it further ordered that the
20 Freeport Town Council fire the Town Manage because he is a friend of Ed Campbell's." (RJN,
21 Exhibit A, Exhibit 2 thereto.) In this same article, respondent is "reported" to be part of a group
22 that "implemented" a town wide boycott of businesses that allowed the Crow's Nest to be
23 circulated from their property, which group visited local businesses warning about the boycott,
24 confiscating all copies of the Crow's Nest. (*Ibid.*) In this same edition, the Town Council
25 meetings are referred to as "Dinner Theater" and "whimsical flight[s] of fancy" wherein one can:

26 See puppet master Ken Mann orchestrate the evenings follies, you'll laugh' you'll cry,
27 you'll cringe but you will be entertained.

28 Watch Marie Gunning, stump her GO GUNNING run for 2012 council seat. Gasp as she
slices and dices with her rapier wit, while building the BIG MO.

Peek at Eric Pandora as he chases people who are trying to get him.

1 Share Stephanie Helms heart wrenching story of shame and sorrow, share, with her, a
2 group hug.

3 Listen as Sandy Thompson as parades her shocking picture, blow ups, with us all.

4 Hear Peter Thompson preach hell fire as he attacks the Chairman and demands the
5 managers head on a plate.

6 (RJN, Exhibit A, Exhibit 2 thereto.) This article is illustrated with pictures such as the “Puppet
7 master” movie character, former child star Lindsay Lohan, Corporal Max Klinger from the
8 M*A*S*H television series, and other similar characters. (*Ibid.*) Clearly, no reasonable reader
9 would take this to be actual news reporting of actual facts.

10 Another edition of the Crow’s Nest of which respondent complains, and apparently thinks
11 reasonable readers would take as a serious news publication, features a story about how the
12 Town Council purportedly asked if there were any volunteers to look “into public charges of
13 malfeasance of office and crimes against humanity” and “Four hands shot into the air! ‘Me, me,
14 oh, Pick ME’!, chorused the volunteers”, which is illustrated with humorous photos of two
15 children raising their hands and identified as respondent and Mr. Pandora, The same issue
16 includes a “report” about a Mr. Simard, who was purportedly “accosted by an angry mob of
17 vigilantes” who “trussed [him] up and made sport [of him], sustaining what could have been a
18 fatal injury.” The same edition contains another “story” about an upcoming “Dinner Theater”
19 performance of Street Car Named Desire wherein respondent would play the part of Stella
20 (pictured as a young girl), with the word “paranoia” scattered about, along with a picture of
21 Richard Nixon. (RJN, Exhibit A, Exhibit 4 thereto.) No reasonable reader could possibly take
22 the Crow’s Nest to be anything but what it is, a parody of the news.

23 Another Crow’s Nest of which respondent complains contains another installment of the
24 Dinner Theater motif, announcing the production of “Mann of LaMoncha” with respondent
25 playing the part of “*Cruela, a scheming one eyed scullery maid with an eye for pictures.*” (RJN,
26 Exhibit A, Exhibit 5 thereto.) Another edition of the Crow’s Nest of which respondent
27 complains has the front page “news” that police have acted on tips about who is the author of the
28 Crow’s Nest stating that “Acting on tips from civilians, police have compiled several police
photos of varying shapes of the suspected Crow’s Nest author. The suspect is between 4’8” and

1 6'3", light brown hair, gender unknown.' [] Police ask the public, if you see this individual, call
2 the police at once. [] Do not attempt to apprehend, suspect is known to have scared children and
3 old people." The story is illustrated with photos of such people as Buster Keaton, Pee Wee
4 Herman, Charlie Brown, Zorro, Charlie Chaplin, and Gilligan. (RJN, Exhibit A, Exhibit 8
5 thereto.) The edition contains another installment of "Dinner Theater" presenting Shakespeare's
6 "The Taming of the Shrew" "[s]tarring that lovable, Marie Gunning. [] Marie studied drama
7 while attending Yale's school of Drama." (*Ibid.*)

8 Respondent also complains about an issue of the Crow's Nest wherein she is compared to
9 Lindsay Lohan. (Opp. 4:11-23.) Again, the context makes clear that the allegedly wrongful
10 statements are parody:

11 The last lost election has not slowed Marie Gunning down one bit. With the iron will and
12 force of a bulldozer, she's back and more determined than ever.

13 "I drove that crooked dirt bag manager out of town and that Council is next, said, a very
14 mad Gunning!

14 "I'll make them sorry they didn't elect me"!

15 Rumors continue that, Marie is suffering from a bipolar disorder with acute depression
16 and paranoia, amplified by substance abuse.

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

18 Recently Gunning charged that there is an inherent conflict of interest when town
19 employees approve anything that the Town Council wants. "They're interested parties,
20 they work for the town" Gunning snarled, "and that is a conflict of interest"! "They're
21 being paid with thousands of tax payer's dollars and no one wants to talk about it"!

21 Gunning claims to have documents from inside sources, supporting her allegations.
22 (RJN, Exhibit A, Exhibit 16 thereto.) No reasonable reader would mistake the Crow's Nest to
23 be publishing actual facts about Gunning's physical condition in this regard.

24 In fact, the Office of the Attorney General for the State of Maine reviewed selected
25 portions of the Crow's Nest and concluded that "Despite its offensive nature the author of the
26 newsletter is doing nothing more than engaging in First Amendment speech." (Clifford
27 Supp.Decl., ¶ 2, Exhibit C, p. 1.) The Assistant Attorney General concluded that "The
28 newsletter may be offensive, but it is an offensive exercise of the author's First Amendment

1 right.” (Clifford Supp.Decl., ¶ 2, Exhibit C, p. 2.)

2 The cases cited by respondent are of little help to her. First, it appears that respondent is
3 actually arguing petitioners’ case here, that the mere inclusion of actual factual statements does
4 not mean something is not a parody, or, in respondent’s words “The existence of parody does not
5 preclude the concomitant reportage of fact -- rather, it demands it.” (Opp. 10:10-11.)

6 Apparently, in respondent’s mind, it is perfectly acceptable for Jon Stewart to state an occasional
7 actual fact when performing his parodies, but it is not acceptable for the Crow’s Nest to do the
8 same. (See, e.g., Opp. 10:6-11.) For example, respondent’s reliance on *New York Stock*
9 *Exchange, Inc. v. Gahary* (2002) 196 F.Supp.2d 401 is misplaced. (Opp. 9:26-10:6.) In the *New*
10 *York Stock Exchange* case, the court stated, after the quote selectively cited by respondent:

11 To presume bad faith on the part of every parodist would be both unfair and inefficient.
12 The critical question, in this context, is whether the parody, in addition to referencing the
13 original, simultaneously conveys the contradictory message ‘that it is not the original.’
14 And here, both the sheer outrageousness of Gahary’s messages, as well as the particular
15 place he chose to post them, paradoxically bolster defendants’ claim that Gahary’s
16 intention could not have been to impersonate Grasso.

17 (*New York Stock Exchange, Inc. v. Gahary, supra*, 196 F.Supp.2d at p. 406 [citations omitted].)

18 Here, it should be clear to any reasonable reader that the Crow’s Nest is parody. Indeed, the vast
19 majority of what is contained in the Crow’s Nest is not the reporting of serious, actual facts,
20 apparently even by respondent’s standards. (See Opp. 3:17-22.)

21 Also, the Texas case of *Super Future Equities, Inc. v. Wells Fargo Bank Minnesota, N.A.*
22 (2008) 553 F.Supp.2d 680, involves statements made in a context very much different than that
23 here. The subject statements therein were published on a website that claimed to be a serious,
24 factual website that gathers information to document the alleged wrongdoings in that the author
25 “claims to verify the accuracy of the information he posts.” The court found that the disclaimer
26 that the statements were merely opinions was counter-balanced by the statements that the site
27 reported verified facts. (*Id.* at p. 689.)

28 Respondent also cites *Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d
543, 555. As relevant here, *Polygram* merely stands for the proposition that simply calling
something a joke does not mean that it is understood to be a joke. The court essentially found

1 that the context of the purported joke must be examined to determine whether a reasonable
2 reader would take the subject statements as being of an actual fact.

3 *Powers v. Durgin-Snow Publishing Company, Inc.* (1958) 154 Me. 108, was decided well
4 before most of the First Amendment cases cited by petitioners, particularly the *Falwell* case, and
5 contains no constitutional analysis. Its conclusion that statement is actionable is questionable at
6 best under modern jurisprudence:

7 The reader is given the impression that the plaintiff is at best an odd or unusual character
8 acting in a manner far removed from the ordinary standards of the day. The man who
9 builds his own coffin and is planning to dig his own grave is described as a ‘thrifty, if
10 slightly ghoulish gent.’ The reader may well laugh with the writer at the victim with a
laughter mixed with contempt. [] The defendant does not escape liability on the ground
the article was written in jest, if such was the fact. The joke that goes too far and causes
harm, not laughter, is within our common experience.

11 The case was apparently decided under an antiquated law that allowed recovery for defamation
12 if the plaintiff was subjected to ridicule, whether or not the statements were true. Further, the
13 case does not involve political speech about a public figure, but appears to be regarding
14 statements about a private individual. As the Maine U.S. District Court has recognized, “[t]he
15 Supreme Court has also imposed constitutional limits on the type of speech which is actionable,
16 carving out exceptions for statements which are not provable as false such as rhetorical
17 hyperbole, imaginative expression, *and parody*.” (*Pan Am Sys. v. Hardenbergh* (D. Me. 2012)
18 871 F.Supp.2d 6, 12 [emphasis added].)

19 It is clear that the Crow’s Nest is parody. No reasonable reader could possibly look to it
20 as a source of serious, factual news reporting. Politics is often a hard, cruel world. Respondent
21 voluntarily entered that world. Political parody is a tradition in this country, sometimes artful,
22 sometimes not, and oftentimes offensive. Whether the Crow’s Nest is on the level of Jon
23 Stewart’s humor is not the standard. Parody, good and bad, is protected under the First
24 Amendment.

25 **B. John Doe 1 Is Immune Under CDA §230.**

26 Petitioners have established that Doe 1 is simply the owner of the Crow’s Nest website
27 and did not write any of the allegedly wrongful subject statements. (See Doe 1 Decl., filed
28 10/18/13; see also Doe 2 Decl., filed 10/18/13; see also Doe 1 Supplemental Declaration, ¶ 2.)

1 Respondent asserts that she should be allowed to intrude on Doe 1's First Amendment rights to
2 conduct her fishing expedition because Doe 1 may have information regarding who published
3 the hard copy editions. (Opp. 12:13-15:4.) The only evidence before this Court in this regard is
4 that Doe 1 had nothing to do with creation of the content. Respondent argues that because
5 discovery *may* reveal that Doe 1 had a more active role than simply owning the URL and
6 operating the Crow's Nest website, Doe 1's personally identifying information should be
7 revealed by Automattic. (Opp. 12:19-13:3, 13:22-26.) Her argument flies in the face of well-
8 settled First Amendment case law. As petitioners pointed out in their moving papers, "[t]he loss
9 of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes [an]
10 irreparable injury." (*Elrod v. Burns* (1976) 427 U.S. 347, 373.) "Anonymity, once lost, cannot
11 be regained." (*Rancho Publications, supra*, 68 Cal.App.4th at p. 1541.)

12 Respondent further argues that Doe 1 cannot claim protection under CDA 230 because it
13 is not clear that Doe 1 obtained the content published on the website from someone who
14 intended that it be published on the Internet. (See Opp. 14:1-23.) In fact, the content posted to
15 the Crow's Nest website was specifically provided to Doe 1 so that it could be posted to the
16 Internet. (Doe 1 Supp.Decl., ¶ 2.) Doe 1 had nothing to do with publication of the hard copy
17 editions. (*Ibid.*)

18 Most importantly, even if Doe 1 had a more active role as respondent fantasizes,
19 respondent does not have legitimate claims against anyone based on the allegedly wrongful
20 statements in the Crow's Nest, as discussed above.

21 22 **II. RESPONDENT SHOULD BE ORDERED TO PAY PETITIONERS' FEES AND** 23 **EXPENSES IN MAKING THIS PETITION.**

24 Here, the subject subpoena requests personally identifying information from an Internet
25 service provider or a provider of an interactive computer service, for use in an action pending in
26 another state, which action arises from petitioners' exercise of free speech rights on the Internet.
27 Respondent has not satisfied her burden of showing that she has legitimate claims, such that
28 petitioners' First Amendment rights should be intruded upon. Therefore, this petition should be

1 granted and petitioners should be found to be entitled to an award of their attorneys' fees and
2 costs pursuant Section 1987.2, in an amount to be determined.


3
4 **CONCLUSION.**

5 The Crow's Nest has been entertaining some, and no doubt irritating some, of the people
6 of Freeport for some 25 years. Clearly, it is not and cannot be read as a serious news organ. The
7 First Amendment was crafted to protect speech such as parodies of such politics which are
8 common to every locality in this country. For our founders, protection of criticism of the
9 government was vital. Just as the First Amendment would have protected criticism of King
10 George, it protects criticism of politicians not just of the stature of President Obama, but of local
11 politicians as well. Respondent chose to become actively involved in the politics of Freeport and
12 cannot complain that her activities have become the subject of criticism by her fellow citizens.

13 Protection of political commentary, even if it is offensive to some, or considered to be in
14 poor taste by some, is the core of our First Amendment freedoms. Free and open discussion is
15 crucial to our democracy. Respondent must accept that her political views are not universal and
16 are not immune from criticism. This Court should not support her fishing expedition to out her
17 critics.

18 This petition should be granted and the subpoena should be quashed. Petitioners should
19 also be found to be entitled to an award of attorneys' fees and costs related to this motion, in an
20 amount to be proven.

21
22 DATED: November 15, 2013


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26 JOHN DOE 1 and JOHN DOE 2