

STATE OF MAINE
CUMBERLAND, ss

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

MARIE GUNNING,)
)
 Plaintiff,)
)
 v.)
)
 JOHN DOE)
)
 Defendants.)
 _____)

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

Defendants object to service by alternative means, but do not object to Plaintiff’s motion pursuant to Me. R. Civ. P. 30(a) for leave to take up to three depositions prior to personal service of the Summons and Complaint. Accordingly Plaintiff’s motion to take up to three depositions should be granted. Moreover, Defendants’ objections to Plaintiff’s motion for alternative service should fail, and Plaintiffs motion should be granted for at least three reasons: 1) Defendants’ objection rests primarily on technical grounds, incorrectly asserting that the factual record does not support a finding that Plaintiff has exhausted all reasonable attempts to make service by other means, and any technical defect in the factual record is corrected by the attached affidavit; 2) Defendant confuses the issue of effecting service of the Defendant through Defendant’s counsel, and the issue of attempting to compel Defendant’s counsel to disclose privileged information; and 3) Defendant argues incorrectly that the California decision to quash a subpoena should be dispositive of Plaintiffs ability to have her Maine-law defamation claim heard and decided by a Maine court.

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

Defendant does not object to Plaintiffs motion pursuant to M.R. Civ. P. 30(a) to take up to three depositions prior to personal service of the Summons and Complaint. Accordingly, for the reasons stated in Plaintiff's original motion, that motion should be granted. Plaintiff can thereby conduct discovery and, if necessary, the court can provide a mechanism where Defendant's name remains confidential until the legal sufficiency of the Complaint is tested. *Thomas M. Cooley Law Sch. v. Doe I*, 300 Mich. App. 245, 265-269, 833 N.W.2d 331, 345 (2013); accord *Deer Consumer Products, Inc. v. Little*, 35 Misc. 3d 374, 393, 938 N.Y.S.2d 767, 783 (Sup. Ct. 2012); *see also Maxon v. Ottawa Pub. Co.*, 402 Ill. App. 3d 704, 715, 929 N.E.2d 666, 676 (2010). This approach allows Plaintiff her day in court before a Maine Court deciding issues of Maine Law, and it protects Defendant's ability to assert any and all constitutional claims to anonymity or protected speech.

2. Plaintiffs Claim of Defamation is a Claim Under Maine Law that Should Be Decided By A Maine Court and Alternative Service is Therefore Not Futile

Defendant argues that alternative service of the Summons and Complaint would be futile because (1) a California Court has quashed a subpoena seeking discovery of the Defendant's identity and (2) Defendant's attorney cannot be compelled to identify the Defendant due to the attorney-client privilege, neither of which makes Plaintiff's attempt to serve the Complaint futile.

With regard to the first argument, the California court was wrong on the law. Defendants attach an Amended Order Quashing the Subpoena dated January 24, 2014, but the original order dated December 11, 2013 and attached hereto as Exhibit 1¹, shows that the judge quashing the subpoena, in determining that the statements were parody, struck the statement that the

¹ Defendant argues and Plaintiff agrees that the Court can take judicial notice of these pleadings

publications were “not likely to be taken as true by a reasonable person.” See Exhibit A.

However, this statement (struck by the California Judge) is the very test of whether something is parody and therefore not actionable under the First Amendment. See *Hustle Magazine, Inc. v. Falwell* 485 U.S. 46, 50 (1988) (speech is not actionable as parody if it cannot “reasonably be understood as describing actual facts”); see also *Marston v. Newavom*, 629 A.2d 587, 591-92 (Me. 1993) (“defamatory language must be ‘construed in the light of what might reasonably have been understood therefrom by the persons who [heard] it. In interpreting the language, it is ... a question of ... the understanding of those to whom the words are addressed ...’”). Moreover, there is no question that unlike in the *Hustler* case, Marie Gunning is in no way a public figure, and the Crow’s Nest publication reports on factual events in the Town of Freeport and individuals other than Ms. Gunning. As the Supreme Court has noted:

"The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty.

.....

"The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. 23*23 Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored." *Id.*, at 92-93 (concurring opinion).

Milkovitch v. Lorain Journal Co, 497 U.S. 1, 22-23 (1990). There is nothing about the Crow’s Nest publication that is parodying another piece of artwork or journalism. Nor is there any actual journalism about the private life of Ms. Gunning that *could* be parodied. Instead, Ms. Gunning has been viciously and falsely attacked in the community in which she lives, and the law of defamation in Maine entitles her to judicial recourse for that attack. The California Court’s decision was not a decision on the merits (which can only be decided by a Maine Court,

it was the quashing of a subpoena based on the California Court's prediction of Maine law). Instead, the California court was predicting Maine law to determine whether Plaintiff had made out a *prima facie* case of defamation under Maine law.

With regard to the second argument, as Plaintiff has described in its original motion and in its request to take up to three depositions, service of the Summons and Complaint by alternative means (or the ability to take depositions prior to personal service) will allow the Plaintiff to discover the identity of the Defendant without the need for such disclosure to be compelled from the Defendant's attorney. The attorney-client privilege is therefore not implicated by Plaintiff's motion for alternative service.

Plaintiff has been the target of vicious and false attacks by the Defendant, circulated in print in the Town of Freeport, which have damaged Plaintiff and chilled her participation as a citizen in Freeport's political process. They will and are having a similar chilling effect on others. Plaintiff deserves her day in Court in Maine.

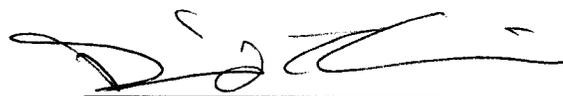
3. Plaintiff Has Made an Adequate Factual Showing of Due Diligence in Attempting to Obtain Personal Service

Finally, Defendant makes a primarily technical argument that the facts establishing that the publication was anonymous and that personal service could not otherwise be achieved were not adequately established by affidavit. This contention is incorrect, as the affidavit originally filed made clear that the publication was anonymous and that diligent attempts were made to uncover Defendants affidavit by subpoena. *See Kallin Affidavit*, ¶ 4. Moreover, any technical defect is further corrected by the attached affidavit of Melissa Hewey, Esq. which makes clear that that such due diligence also included contacting the Irving station in Freeport where the

defamatory pamphlets were distributed; requesting that Geoffrey Hole, Esq., counsel for the Town of Freeport inquire of his client if anyone at the Town knew who was responsible for writing, publishing or distributing the Crow's Nest; requesting copies of the video surveillance recordings for the Town office on the date that a defamatory publication complained of in the complaint was believed to have been distributed in the Town office; and filing a subpoena on the host of the online publication. *See* Hewey Affidavit, ¶¶3-7. Defendant does not attempt to distinguish the two Maine cases, where serving the Defendant's Attorney was considered adequate alternative service. *See Chalmers v. Hack*, 19 Me 124 (1841); *Nelson v. Omaley*, 6 Me. 218 (1829). The Plaintiff has attempted with due diligence to uncover the identity of the Defendant and effectuate personal service. Plaintiff should be permitted to effectuate alternative service of the Defendant through his attorney.

WHEREFORE, for the reasons state above and in her original motion, Plaintiff Marie Gunning respectfully requests leave to serve Defendants by delivering a copy of the Summons and Complaint on Defendants' attorney in this matter, Sigmund D. Schutz. Alternatively, pursuant to Me. R. Civ. P 30(a), and with no objection form the Defendant, Plaintiff respectfully requests leave to take up to three depositions upon oral examination prior to the expiration of 30 days after service of the summons and complaint upon the Defendant, or such other relief this Court deems just and proper.

DATED: February 12, 2014



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9 Attorneys for Petitioners
10 JOHN DOE 1 and JOHN DOE 2

ENDORSED
FILED
San Francisco County Superior Court

Dec 11 2013

CLERK OF THE COURT
BY: LESLEY FISCELLA
Deputy Clerk

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.

California Case No. CPF-13-513271
(PROPOSED) ORDER GRANTING JOHN DOE
I AND JOHN DOE 2'S PETITION TO QUASH
SUBPOENA
Date: December 11, 2013
Time: 9:00 a.m.
Department: 302 - DISCOVERY
Judge: Judge Marla J. Miller

20 IN THE CIRCUIT COURT OF THE STATE OF OREGON
21 FOR THE COUNTY OF MULTNOMAH

22 MARIE GUNNING, an individual,
23 Plaintiff,
24 vs.
25 JOHN DOE,
26 Defendant.

Maine Case No. CV-13-359

1 **(PROPOSED) ORDER GRANTING JOHN DOE 1 AND JOHN DOE 2'S PETITION TO**
2 **QUASH SUBPOENA**

3 On December 11, 2013, the petition to quash subpoena filed by JOHN DOE I and JOHN
4 DOE II came before this Court. Having considered the papers and arguments submitted in this
5 matter, and good cause appearing therefor, PETITIONERS JOHN DOE I'S and JOHN DOE II'S
6 Petition To Quash Subpoena [C.C.P. §§ 2029.600, 1987.1, 1987.2) is Granted. Petitioners'
7 request for judicial notice is granted.

8 On August 20, 2013, Respondent obtained a witness subpoena directed to Automattic,
9 Inc. requiring: (1) all names you have associated with <http://freeportcrownsnest.com>; (2) all email
10 address associated with anyone covered above; (3) IP addresses from which the
11 <http://freeportcrownsnest.com> was posted; and (4) IP addresses and user-agent for the specific
12 posts to sixteen separate editions of the Crow's Nest. In order to overcome Petitioners' motion
13 to quash, Respondent must make a prima facie showing of libel. (*Krinsky v. Doe 6* (2008) 159
14 Cal.App.4th 1154, 1172.) Respondent failed to make this prima facie showing. The Court finds
15 that while the content of the Crow's Nest could be seen as rude and distasteful, taking into
16 consideration the context and contents of the statements at issue, it is parody, ~~and not likely to be~~
17 ~~taken as true by a reasonable person.~~ The speech at issue in the Crow's Nest is protected under
18 the First Amendment of the U.S. Constitution. The statements are not actionable speech such
19 that the identities of the website owner and persons who comment or otherwise publish material
20 printed in or posted online at the Crow's Nest must be revealed pursuant to the subpoena. (See
21 *Hustler Magazine, Inc. v. Falwell* (1988) 485 U.S. 46, 57 [parody is not actionable as
22 defamation if it cannot "reasonably be understood as describing actual fact about [the plaintiff]
23 or actual events in which [she] participated".]) Pursuant to C.C.P. § 1987.2(c), Petitioners may
24 make a motion for reasonable expenses incurred in making the motion, including reasonable
25 attorney's fees.

26 IT IS SO ORDERED.

27 DATED: December 11, 2013

28 *Marla J Miller*

Marla J. Miller
Judge of the Superior Court

STATE OF MAINE
CUMBERLAND, ss

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

MARIE GUNNING,)
)
 Plaintiff,)
)
 v.)
)
 JOHN DOE)
)
 Defendants.)
_____)

**AFFIDAVIT OF
MELISSA A. HEWEY**

I, Melissa A. Hewey, depose and state as follows:

1. I am an attorney at law licensed to practice in the State of Maine and I represent Plaintiff Marie Gunning in the above-captioned action.

2. Because the defamatory statements that form the basis of this action were published anonymously, neither I nor my client know the identity and physical location of the Defendants.

3. I attempted with due diligence to obtain the Defendants' identities in order to effectuate personal service but have been unsuccessful.

4. Prior to filing the Complaint in this action, I made the following efforts to discover the identity of the Defendants:

- I contact the Irving station in Freeport where I understood the Crows Nest had been distributed and asked for any information they might have as to the identity of the person who delivered copies of the publication to that store. They did not provide me with any information.

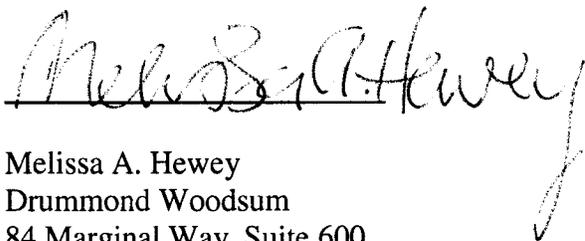
- I spoke with Geoffrey Hole, Esq., counsel for the Town of Freeport and asked him to inquire of his client if anyone at the Town knew who was responsible for writing, publishing or distributing the Crows Nest. He was unable to provide me with any information in that regard.
- I also requested that he provide me with copies of the video surveillance recordings for the Town office on the date that a defamatory publication complained of in the complaint was believed to have been distributed in the Town office, but was informed by him that the that the recordings were no longer in existence.

5. After the Complaint in this action was filed, we attempted to discover the identity of the declarant by serving a subpoena on Automattic, Inc. That subpoena was quashed by a court in the State of California on September 6, 2013.

6. Because the declarant's identity remained anonymous, a search of public and private databases for the declarant's location would be futile.

7. Service upon the Defendants Attorney is reasonably calculated to provide actual notice to the Defendant.

Dated: February 12, 2014



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STATE OF MAINE
CUMBERLAND, ss.

Dated: 2/12/14

PERSONALLY APPEARED before me the above-named Melissa A. Hewey, and made oath that the statements contained in this Affidavit are true to the best of her personal knowledge, information, and belief.

Before me,

Susan A. Bagley
Notary Public:

SUSAN A. BAGLEY
NOTARY PUBLIC, MAINE
MY COMMISSION EXPIRES FEBRUARY 2, 2017

