MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. CUM-15-558

MARIE GUNNING
Appellant

v.

JOHN DOE,
Appellee

On appeal from the Cumberland County Superior Court

APPELLANT'S BRIEF

March 11, 2016

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STATEMENT OF FACTS

Marie Gunning, a Freeport resident for approximately fifteen years, attended her first regular open meeting of the Freeport Town Council in 2010. (A. 118.) Spurred by her interest in the Freeport community, and with the thought she could make a valuable contribution to the Town, Ms. Gunning ran for an open seat on the Council in 2011. (A.118.) Ms. Gunning's short personally funded "campaign" ended on November 8, 2011, with Ms. Gunning losing her bid for public office. (A. 118.) She has not again sought public office. (A. 118-19.)

After the election had closed, a publication entitled "*The Crow's Nest*" was released. (A. 15, 119.) Paper copies of the *Crow's Nest* publication were anonymously placed inside Town Hall and at local businesses. (A. 15.) The Crow's Nest was also subsequently posted on the internet at www.freeportcrowsnest.com. (A.120.) The intent and motivation of those who published the *Crow's Nest* was clearly stated in the "Op-Editorial Summary" section of the publication known as Issue #62:

> For those who haven't ever seen the publication of 'A CROW'S NEST' it has been around off and on for nearly thirty years and *most everyone who enters the public forum and speaks to public issues is fair game within reason*. If you choose to speak on the public record, that is your choice to make. Speaking the truth being civil, you will be heard. That has always been the Town Council's open policy and has not changed. Anyone who chooses to do otherwise, can well be taken to task for their irresponsible statements and accusations.

(A. 124) (emphasis added). As is clearly indicated in the "Op-Editorial Summary," the intent of the publication was to publicly humiliate and intimidate certain individuals who had the temerity to speak at public Town Council meetings. (A.120.)

Ms. Gunning was no exception. She was one of a number of private individuals targeted in the *Crow's Nest*. (A. 26-69, 120.) In one edition of the *Crow's Nest*, the publication featured Ms. Gunning prominently on the front page, calling her "Miss Prozac 2003." (A. 26.) The publication falsely quoted Ms. Gunning as follows: "Asked about persisting rumors that she is abusing mind 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.'" (A. 26.) At the time the Complaint was filed, the "Election Special" edition and other editions of the *Crows Nest* were also published online. (A. 16.) Ms. Gunning, and others in the Freeport community with whom she has spoken at Council meetings, believe that the ultimate aim of the *Crow's Nest*—consistent with its above-quoted statement—was to intimidate Ms. Gunning and other residents from exercising the basic right of all private residents in the community to engage in a public forum. (A. 120.)

Ms. Gunning participated in Town Council meetings in her capacity as a private citizen, but nonetheless continued to targeted by the *Crow's Nest* for well

over a year following the "Election Special" issue. (A. 26-69.) Statements made about Ms. Gunning in the *Crow's Nest* Issue #72, were especially harmful and horrifically false, stating, among other things, that Ms. Gunning "suffers from a bipolar disorder with acute depression and paranoia" which were "amplified by substance abuse." (A. 21, 67, 119, 121.) *All* of these statements are patently and demonstrably false. (A. 121.) Moreover, that particular issue as it was published on the *Crow's Nest* website, appeared as a separate page that included no other articles from that issue or any other disclaimers of purported "parody." (A. 121.) Any person who opened that page could see only those statements and other quotes falsely attributed to Ms. Gunning, as reproduced in Ms. Gunning's affidavit. (A. 121.) Read in isolation, as it appeared on the *Crow's Nest* website, a reasonable person would understandably believe that the statements in Issue #72 were factual. (A 122.)

As stated in her complaint, the publication continued with at least sixteen separate issues making false, malicious, and damaging statements about Ms. Gunning. (A. 15-69.) Ms. Gunning is a financial and business consultant, and has national clients that include major financial institutions.[1] (A. 122.) Her reputation

[1] Although a previous filing in the trial court disclosed that Ms. Gunning was the Treasurer of two community organizations, Ms. Gunning was in fact the President of that organization and had spoken on behalf of those organizations publicly. Because this fact is not necessary for this Court's determination and does not bear directly on this appeal, the Appellant saw no reason to attempt to correct the record on this issue by motion. *See* M.R. App. P. 5(e).

and good name are integral to her ability to earn a living in her field. (A. 122.) After the publication of these issues of the *Crow's Nest* throughout the Freeport town buildings, local businesses, and online, Ms. Gunning received threatening hate mail and experienced aggressive encounters with individuals in Freeport. (A. 21.) Additionally, as a result of the *Crow's Nest* publications, Ms. Gunning has suffered serious harm to her reputation and emotional wellbeing, and it has effectively chilled her right to participate in a public forum. (A. 21, 122.)

PROCEDURAL HISTORY

Ms. Gunning filed her Complaint in August 13, 2013, alleging libel, false light invasion of privacy, and intentional infliction of emotional distress against John Doe, whom she identified as the "publishers and contributing writers of the *Crow's Nest*." (A. 8, 15.) Ms. Gunning's then-counsel issued a subpoena to Automattic, Inc., a California-based web development company and host of "Wordpress"—the online site where the *Crow's Nest* was published—requesting information about the authors of the site. (A. 8.) On December 11, 2013, Automattic, Inc., responded to the subpoena by filing a Motion to Quash in California Superior Court. (A. 110.) During the course of the California proceedings, Attorney Sigmund Schutz entered his limited appearance on behalf of John Does #1 and #2, who identified themselves as the anonymous publisher and author of the *Crow's Nest*. (R. Limited Entry of Appearance.) Ultimately the California court quashed the subpoena, concluding that the statements regarding Ms. Gunning in the *Crow's Nest* were parody. (A. 110.)[2]

[2] The only operative order of the California Superior Court is located on page 110 of the Appendix. The initial judgment was issued by a judge pro tempore or temporary judge. *See* Cal. R. Civ. P. 2.814. However, because the parties did not stipulate to the matter being heard by a judge pro tempore, the matter was referred to the trial docket and a judgment was entered on December 11, 2013. (A. 109.) However, that judgment mistook Portland, Maine for Portland, Oregon, and cited Multnomah County in the judgment. (A. 109.) A nearly identical judgment (*Goldsmith, Ernest, J.*) was entered on January 24, 2014, containing the correct caption and citation for Cumberland County, Maine. (A. 110.)

While the California proceedings were pending, Ms. Gunning had meanwhile petitioned the Maine Superior Court to permit her to serve John Does #1 and #2 by alternative means—specifically by serving their attorney of record. (R. Mot. for Service by Alt. Means.) Additionally, Ms. Gunning also moved the Court to permit depositions of three individuals, which was unopposed. (A. 9.) The Court denied the motion to effectuate service through the Does' attorney, but granted Ms. Gunning's request for depositions. (A. 9.) During the time in which Ms. Gunning conducted those depositions, the Court suspended the deadline for filing the return of service. (A. 9.)

Ms. Gunning issued a subpoena and took the deposition of Edward Campbell, a former Freeport Town Council Chairman. (A. 9.) Ms. Gunning also issued a subpoena to depose a Town of Freeport employee, Richard Simard, to determine whether he was the author of the *Crow's Nest*. (A. 102.) Initially, in lieu of the deposition, she received an affidavit of Richard Simard, denying that he had authored or knew anyone who authored the *Crow's Nest*. (A. 9, 102.) After Ms. Gunning retained new counsel, she renewed her request for the deposition of Richard Simard, and both Simard and the Does filed Motions to Quash the Subpoena, relying on the California court's ruling quashing the subpoena with respect to Automattic, Inc. as precluding the relitigation in Maine. (A. 70-114.)

Ms. Gunning filed her opposition to both motions and the court entered its judgment on the parties' briefs. (A. 9, 115-36.) On October 22, 2015, the trial court (*Warren, J.*) granted the Motions to Quash. (A. 12.)

In its judgment, the court concluded that it "would be inclined to find that there is at least a factual dispute as to whether the description of Gunning as rumored to be 'suffering from bipolar disorder with acute depression and paranoia, amplified by substance abuse' would reasonably be understood to constitute a parody." (A. 12.) However, the court noted that it was "not writing on a clean slate on that issue." (A. 12.) Rather, that issue had been raised and addressed by the California Superior Court, which held that those statements were parody. (A. 12.) Relying on the California order, the court quashed the subpoena against Richard Simard and concluded that because counsel for Ms. Gunning had no further avenues to pursue the disclosures of John Does #1 and #2, it dismissed her Complaint. (A. 14.) Ms. Gunning timely filed this appeal. (A. 6-7.)

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in concluding that Ms. Gunning was collaterally estopped from challenging the subpoena for the deposition of Richard Simard in Maine based upon the California court's judgment.

2. Whether this Court should recognize a right to anonymous speech, and if so, whether it should adopt the test, urged by the Does, in *Dendrite Int'l v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div., July 11, 2001) in order to determine whether Ms. Gunning could seek the disclosure of an anonymous speaker.

SUMMARY OF THE ARGUMENT

The trial court erred as a matter of law because, when granting the Motion to Quash a subpoena served on a Maine resident within the State of Maine, it mistakenly believed that it was constrained by an interlocutory discovery order of a California court. (A. 13.) There are three reasons that the California order does not have preclusive effect in Maine.

First, Maine law is clear that collateral estoppel principles only operate as to final judgments. Although the trial court noted that Ms. Gunning's review should have been by appeal of that California decision, pursuant to California law, the order on the motion to quash was interlocutory and not directly appealable. *See* Cal. Code Civ. P. § 904.1; *Dana Point Safe Harbor Collective v. Cal. Superior Court*, 243 P.3d 575, 577 (Cal. 2010). As a nonfinal judgment, the order also did not have preclusive effect.

Second, the California order does not have a preclusive effect on the Does' Motion to Quash in Maine. Pursuant to the Restatement (Second) of Judgments, an order does not have a preclusive effect where it inappropriately forecloses the opportunity for another court to develop its own law. Restatement (Second) of Judgments § 29(7). The Motion to Quash presented an issue of Maine law because it addresses whether a subpoena served on a Maine resident can be quashed to protect the identity of an anonymous author of defamatory material. Therefore,

applying the principles of collateral estoppel to preclude Ms. Gunning from raising those issues pursuant to *Maine* law was an error.

Finally, Ms. Gunning did not have adequate incentive to fully litigate the California proceeding because, at the time the California order on the Motion to Quash was entered, Ms. Gunning had other avenues to obtain the identity of the Does—namely, the Maine subpoena. In order for prior judgments to have preclusive effect, the party against whom preclusion is sought must have an adequate incentive and a full and fair opportunity to litigate the claim. Restatement (Second) of Judgments § 29 & cmt. b; *see also Portland Water Dist. v. Town of Standish*, 2008 ME 23, ¶¶ 7, 12-13, 940 A.2d 1097. Because Ms. Gunning lacked the incentive to fully litigate these issues, and given the California court's limited scope of ruling on the Motion to Quash the subpoena against Automattic, Inc., the trial court erred in giving preclusive effect to the California judgment.

The trial court also erred as a matter of law in this case in concluding that Ms. Gunning must meet a separate, constitutionally required test for disclosing the identity of an anonymous speaker. As set forth in a detailed review of the Supreme Court's case law below, the U.S. Supreme Court has never held that there is a "right" to speak anonymously. To the contrary, the Supreme Court has upheld laws requiring disclosure of an anonymous speaker's identity. *See Buckley v.*

American Constitutional Law Foundation, Inc., 525 U.S. 182, 199 (1999). Stated plainly, it does not violate an individual's constitutional right to free speech simply to be named.

Additionally, requiring plaintiffs in defamation cases against anonymous speakers to meet a separate test to determine the merits of their claim at the very outset of the litigation is inappropriate. First, providing evidence of certain elements, such as actual malice for public-figure-plaintiffs—without discovering the defendant's identity—is practically impossible. Further, the Does' urge this Court to adopt an analysis employed in other jurisdictions to purportedly weigh one's constitutional "right" to engage in anonymous speech against another's right of access to the courts to pursue a valid claim. However, the tests articulated in the other states' courts fail to account for constitutionally significant aspects of the speech at issue, including the content of the speech.

Moreover, the threshold test requires the judge to consider factually nuanced questions of the characterization of a statement devoid of its factual context. It is inappropriate to evaluate whether certain statements, particularly online statements, should be considered political, commercial, opinion, or satire, based on the statements alone, devoid of meaningful context. Especially with online speech, each platform, be it chatrooms, blogs, websites, private message boards, or otherwise, each contains its own unique set of circumstances and is nuanced in a

way that makes it extraordinarily difficult for a court to determine whether a statement is political, commercial, opinion, or satire simply by looking at the statement alone.

Notwithstanding the facts that this test (1) is not constitutionally mandated and (2) is inappropriate at the threshold stage, there is a third reason for this Court to reject the approaches taken in other courts: there is simply no need for this Court to create a separate level of requirements that plaintiffs in anonymous defamation must meet before bringing a defamation claim. If one's right to freedom of expression is not violated merely by being named, certainly the process of defending a defamation claim does not abridge that right. The traditional law of defamation and the existing procedural safeguards in place in all defamation cases provide extensive protection for the right of free speech.

Therefore, Ms. Gunning respectfully requests this Court to vacate the trial court's judgment and remand this case back with instructions to deny the Defendants' Motion to Quash and allow Ms. Gunning to proceed with her claim.

ARGUMENT

I. The trial court erred in concluding that Ms. Gunning was collaterally estopped from challenging the subpoena for the deposition of Richard Simard in Maine based upon the California court's judgment.

A. Standard of Review

Typically, a motion to quash is an interlocutory order that is not subject to appellate review pending a final judgment. *See In re Motion to Quash Bar Counsel Subpoena*, 2009 ME 104, ¶ 10, 982 A.2d 330. However, where the quashing of the subpoena "render[s] [it] impossible" for the Plaintiff's claim to go forward, this Court reviews that judgment pursuant to the death knell exception to the final judgment rule. *See id*. ¶¶ 10-11 ("[I]f an interlocutory order has the practical effect of permanently foreclosing relief on a claim, that order is appealable." (quotation marks omitted)); *see also Bd. of Overseers of the Bar v. Warren*, 2011 ME 124, ¶ 19, 34 A.3d 1103. Here, the effect of the trial court's judgment, granting the Defendants' motion to quash and dismissing Ms. Gunning's Complaint, foreclosed relief on her defamation claim. Therefore, it is subject to the death knell exception to the final judgment rule and is reviewable on appeal by this Court.

The standard of review is also de novo. Generally, this Court reviews the trial court's judgment on a motion to quash for an abuse of discretion. *See State v. Marroquin-Aldana*, 2014 ME 47, ¶ 33, 89 A.3d 519. However, where a judgment

on a motion to quash was based solely upon the pleadings and affidavits filed in support of those pleadings, the review is not deferential. Rather, the appropriate standard of review is more accurately characterized as de novo, like this Court's review of a trial court's judgment in an anti-SLAPP motion. *See Nader v. Me. Democratic Party* (*Nader II*), 2013 ME 51, ¶ 12 & n.9, 66 A.3d 571. "When a court reviews pleadings and affidavits, rather than live testimony, no deference is required and de novo review is appropriate." *Id.* n.9. Further, this Court "review[s] questions of law, including alleged constitutional violations de novo." *Sparks v. Sparks*, 2013 ME 41, ¶ 19, 65 A.3d 1223 (quotation marks omitted). Because the court based its judgment on the Defendants' Motion to Quash solely upon the pleadings and affidavits, and further because it involved questions of law, this Court should review the judgment de novo. *Nader II*, 2013 ME 51, ¶ 12 n.9, 66 A.3d 571.

B. The Preclusive Effect of Foreign Judgments: The Full Faith and Credit Clause and Collateral Estoppel

Ms. Gunning, like many others, was repeatedly defamed in a local publication, suspected to be authored by Freeport Town employees and members of the Town Council, after she participated in her local Town Council meetings. (A. 26-69.) Initially she sought disclosure of the author through its web-host, Automattic, Inc., in California, which was denied by the California court after it concluded that the statements were parody. Ms. Gunning also subpoenaed

individuals whom were suspected of authoring or with knowledge of who authored the *Crow's Nest*, former Freeport Town Councilor Ed Campbell and Town employee Richard Simard. The trial court quashed Ms. Gunning's subpoena, relying on the California court's order. Because the trial court's judgment erred in giving preclusive effect to an interlocutory discovery order of the California court, this Court should vacate the judgment.

The California order should not have been given preclusive effect by the trial court because it was not final. The fact that the prior order was rendered in California and thus was subject to the Full Faith and Credit Clause in the U.S. Constitution does not alter this Court's analysis with respect to collateral estoppel. Generally, to preserve the nation's interest of the uniformity of laws and finality of judgments, the U.S. Supreme Court has interpreted the Constitution to require deference to judgments rendered in other states, but this only applies to *final* judgments. When a court in another jurisdiction renders a final judgment in a given controversy, the U.S. Constitution requires that the judgment be recognized and applied in other states. U.S. Const. art. IV, § 1. "Article [IV], § 1 of the United States Constitution requires that the courts of this State to give full faith and credit to the judicial proceedings of our sister states." *O'Malley v. O'Malley*, 338 A.2d 149, 154 (Me. 1975). "A foreign 'judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that

those questions have been fully and fairly litigated . . . and finally decided in the court which rendered the original judgment.'" *Id.* (quoting *Durfee v. Duke*, 375 U.S. 106, 111 (1963)).

Within each state, however, the common law doctrines of stare decisis and collateral estoppel determine the effect of a prior judgment on later courts deciding the same issues or claims. If, as a matter of state law in the court's home state, collateral estoppel or res judicata would preclude further litigation on that issue, the Full Faith and Credit Clause barred relitigation of that issue or claim decided in a different state. *See Riley v. N.Y. Trust Co.*, 315 U.S. 343, 349 (1942). "By the Constitutional provision for full faith and credit, the local doctrines of res judicata, speaking generally, become a part of national jurisprudence." *Id.*; *see also* Stewart E. Sterk, *The Muddy Boundaries Between Res Judicata and Full Faith and Credit*, 58 Wash. & Lee L. Rev. 47, 60 (2001).

C. The Principles of Collateral Estoppel

Collateral estoppel generally bars relitigation of an issue between the parties that was actually litigated and determined by a valid and final judgment, if that issue was essential to the judgment. *See* Restatement (Second) of Judgments § 27. "Under the existing doctrine of collateral estoppel, when an essential fact or question is actually litigated on the merits and determined by a valid final judgment, the determination is conclusive between the same parties and their

privies on a different cause of action." *Hossler v. Barry*, 403 A.2d 762, 767 (Me. 1979). "The purpose of collateral estoppel is to prevent harassing and repetitious litigation, to avoid inconsistent holdings which lead to further litigation, and to give sanctity and finality to judgments." *Id.* When applying the doctrine of collateral estoppel, Maine law generally follows the approach of the Restatement (Second) of Judgments. *See Beal v. Allstate Ins. Co.*, 2010 ME 20, ¶ 13, 989 A.2d 933; *Town of North Berwick v. Jones*, 534 A.2d 667, 668 (Me. 1987); *Beegan v. Schmidt*, 451 A.2d 642, 645 (Me. 1982).

To have preclusive effect, the initial judgment must have certain characteristics. First, the issue must have been actually litigated, and the determination of that issue must be essential to the judgment. "A party asserting collateral estoppel has the burden of demonstrating that the specific issue was actually decided in the earlier proceeding." *Macomber v. MacQuinn-Tweedie*, 2003 ME 121, ¶ 25, 834 A.2d 131. For example, if the issue in the prior proceeding presents two issues, stated in the alternative, a decision on one issue would not preclude the litigation of the alternative issue—which was not actually decided. *Id.*

Second, the judgment must be valid. *Beegan*, 451 A.2d at 644. A judgment is generally valid if the court had personal jurisdiction over the parties—who

received adequate notice—and the court had jurisdiction over the subject matter involved in the suit. Restatement (Second) of Judgments § 1.

Third, the judgment must be final. *Beal*, 2010 ME 20, ¶ 12, 989 A.2d 733. This Court has held that finality for the purposes of collateral estoppel is equivalent to finality for the purposes of appellate review: "It is essential that the judgment be a final determination on the merits; *an interlocutory judgment constitutes no bar to subsequent relitigation of the issues*." *Sevigny v. City of Biddeford*, 344 A.2d 34, 38-39 (Me. 1975) (emphasis added) (citing *Buck v. Collins*, 69 Me. 445, 448-491 (1879); *N.Y. Cent. & Hudson R.R. Co. v. T. Stuart & Son Co.*, 157 N.E. 540 (1927); *Payne v. Superior Court*, 80 A.2d 159, 163 (R.I. 1951); *Miller v. Miller*, 186 A.2d 93, 95 (Vt. 1962)).

But even if the general elements of collateral estoppel are met, it is nonetheless limited by several exceptions. *See* Restatement (Second) of Judgments § 28. Relevant to this case, there is an exception to the rule of preclusion if "the party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action" relitigation of that issue is not precluded. *Id.* § 28(1). For example, if there are new developments in the law that would make application of the original determination unjust, or if the party sought to be precluded did not have adequate incentive to obtain a full and fair adjudication in the initial action, the doctrine of collateral estoppel does not apply.

See Restatement (Second) of Judgments § 28(2)-(5). Also, when *appellate* review is unavailable, this Court does not give the original judgment preclusive effect. *Id.* § 28 cmt. a; *see also Sevigny*, 344 A.2d at 38-39.

Moreover, there are some additional exceptions to the doctrine of collateral estoppel that apply when the relitigation of the issue is not between the same parties, but rather in litigation with others. *See* Restatement (Second) of Judgments § 29. These exceptions generally take into account the likelihood that the second forum may not be in the same jurisdiction or applying the same law as the first forum. For example, as is relevant to this case, if the issue is one of law and treating it as conclusively determined would inappropriately foreclose the opportunity for the second venue to consider the legal rule, it is not precluded. *Id.* § 29(7). In this case, there are several reasons why the trial court erred in giving the California order quashing the subpoena against Automattic, Inc. preclusive effect in the Maine proceeding regarding the subpoena to Richard Simard.

D. The California Order Quashing Ms. Gunning's Subpoena to Automattic, Inc. was Interlocutory and Therefore Had No Preclusive Effect

The first reason why the California court's order quashing Ms. Gunning's subpoena to Automattic, Inc., should not operate to preclude her further subpoenas to other witnesses in this matter is that the California court's order was interlocutory. As noted above, this Court treats the requirement of finality for the

purposes of res judicata as equivalent to the requirement of finality for the purposes of appellate review. *See Sevigny*, 344 A.2d at 38-39; Restatement (Second) of Judgments § 28 cmt. a. As the Restatement (Second) of Judgments elaborates, the exception to the general rule of collateral estoppel is as follows:

> when the determination of an issue is plainly essential to the judgment but the party who lost on that issue is, for some other reason, disabled as a matter of law from obtaining review by appeal or, where appeal does not lie, by injunction, extraordinary writ, or statutory review procedure. Such cases can arise, for example, because the controversy has become moot, or because the law does not allow review of the particular category of judgments.

Restatement (Second) of Judgments § 28 cmt. a.

The California order, pursuant to California law, was not final. The California Supreme Court follows the same approach as this Court with respect to the finality of discovery orders. An order quashing a subpoena is only final in California, as in Maine, when it has the effect of "terminat[ing] the litigation between the parties." *Dana Point Safe Harbor Collective v. Superior Court*, 243 P.3d 575, 577 (Cal. 2010); *accord. In re Motion to Quash Bar Counsel Subpoena*, 2009 ME 104, ¶ 10, 982 A.2d 330. Where a discovery order does not terminate the litigation, it is interlocutory and therefore not appealable. *Id.*; *see also* Cal. Code Civ. P. 904.1.

In this case, the trial court noted that as it was relying on the California Superior Court's determination.[3] Indeed the court noted that it was doing so precisely because it viewed the order as appealable.

> The decision of the California Superior Court constituted a final decision on Gunning's application for interstate discovery. *Gunning could have sought review of that decision by filing a petition to the California Court of Appeal for an extraordinary writ.* California Code of Civil Procedure § 2019.650.[4] While there is an exception to collateral estoppel when the party sought to be precluded could not have obtained appellate review, the availability of discretionary review is sufficient to permit the application of collateral estoppel. No appeal was sought. Accordingly, the California decision is entitled to collateral estoppel effect and precludes Gunning from relitigating the same issue here in Maine.

(A. 13).

However, the trial court erred in concluding that an extraordinary review of discovery orders in California procedure is equivalent to discretionary appellate review. Rather, the "extraordinary review" by appellate courts of discovery orders occurs "when a ruling threatens immediate harm, such as loss of a privilege against disclosure, for which there is no other adequate remedy." *Zurich Am. Ins. Co. v. Cal. Superior Court*, 66 Cal. Rptr. 3d 833, 837 (Cal. Ct. App. 2007); *Kleitman v.*

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[3] The trial court also erred in relying on all three judgments by the California court. As noted above in footnote 1, the only operative decision of the California Court is the third order signed by Judge Ernest Goldsmith. (A. 110.)

[4] The trial court cited to the California Code of Civil Procedure § 2019.650. Appellant's counsel could not locate a provision in the California Code of Civil Procedure with this citation.

Cal. Superior Court, 87 Cal. Rptr. 2d 813, 818 (Cal. Ct. App. 1999), *as modified* (Sept. 9, 1999). Ms. Gunning did not have a claim for loss of a privilege and was not otherwise threatened with immediate harm by the quashing of the subpoena against Automattic, Inc. As such, she was not entitled to "extraordinary review." Moreover, the California order quashing the subpoena as to Automattic, Inc., did not have the effect of terminating the litigation because Ms. Gunning still had other discovery sources in Maine. Therefore, the trial court erred in giving the California order preclusive effect because that order was not final.

E. Because Ms. Gunning Did Not have Adequate Incentive to Obtain a Full and Fair Adjudication of the Initial Action, Relitigation in Maine Should Not Be Precluded

The California Order should also not be given preclusive effect in the proceeding between Ms. Gunning and the Does (as opposed to Automattic, Inc.) because Ms. Gunning did not have a full and fair incentive to litigate the issue in the California court. *See Beal v. Allstate Ins.* Co., 2010 ME 20, ¶ 17, 989 A.2d 733. Without an adequate incentive and a full and fair opportunity to litigate the claim, the party against whom preclusion is sought is denied due process of law. Restatement (Second) of Judgments § 29 cmt. b. This Court has recognized several factors to consider whether a party has had a full and fair opportunity to litigate the claim, including:

> "the size of the claim, the forum of the prior litigation, whether the issue was a factual or a legal one, the foreseeability of future suits, the

> extent of the previous litigation, the availability of new evidence, the experience of counsel, indications of a compromise verdict, [and] procedural opportunities available in the second suit that were unavailable in the first."

Id. (quoting *Hossler v. Barry*, 403 A.2d 762, 769 (Me.1979)); *see also* Restatement (Second) of Judgments § 29. The ultimate issue of preclusion centers on "a balancing of important interests: on the one hand, a desire not to deprive a litigant of an adequate day in court; on the other hand, a desire to prevent repetitious litigation of what is essentially the same dispute." Restatement (Second) of Judgments § 27 cmt. c; see also *Portland Water Dist. v. Town of Standish*, 2008 ME 23, ¶¶ 7, 12-13, 940 A.2d 1097.

Here, Ms. Gunning lacked the adequate incentive to litigate the Motion to Quash the subpoena against Automattic, Inc., because at the time of the California proceedings, she had another avenue available to her from which to seek disclosure of the *Crow's Nest* authors: the depositions that were being sought in Maine. (A. 3.) Whereas the California proceeding dealt only with an ancillary legal issue of whether disclosure could be sought *from that particular source* (a limited claim), the Maine trial court's judgment acknowledged that Ms. Gunning had no other avenues from which she could legally compel disclosure. (A. 14.) In other words, the California litigation was limited, both in scope and in Ms. Gunning's incentive to litigate because she still had the opportunity to discover the identity of the *Crow's Nest* authors given the availability of other sources. *See Beal*, 2010

ME 20, ¶ 17, 989 A.2d 733. As a result of the limited scope and limited incentive of Ms. Gunning in the California proceeding, the trial court erred in giving the order preclusive effect.

F. The California Order Involved a Determination of Law and Thus It Should Not Be Given Preclusive Effect in Another Jurisdiction

Finally, because the California decision addressed solely issues of California law, concluding that it was subject to issue preclusion foreclosed the Maine court's ability to address legal issues independently, interpreting to Maine law. Restatement (Second) of Judgments § 29(7) provides that in subsequent litigation with others, an issue may not be given preclusive effect, even if it was fully and fairly litigated, if: "The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based." Specifically, the comments to this section make clear that where a "court is foreclosed from an opportunity to reconsider the applicable rule, and thus to perform its function of developing the law [preclusion is inappropriate.] This consideration is especially pertinent when there is a difference in the forums in which the two actions are to be determined." *Id.* § 29 cmt. *i*. Rather, the appropriate rule, according to the Restatement approach, is not the rule of preclusion but rather "the less limiting principle of stare decisis." *Id.*

Here, the California court was statutorily bound to apply California law. California has adopted the Uniform Interstate Depositions and Discovery Act, which provides that in discovery disputes in a case originating from another state—including motions to quash a subpoena—the California courts apply *California law* to witnesses or parties being subpoenaed in California. Cal. Code of Civ. P. § 2029.600. However, the trial court, addressing the underlying action that squarely falls in the jurisdiction of this state, should have applied Maine law.

Indeed, as noted in the trial court's judgment, it was inclined to disagree with the California court's conclusion that the statements were considered parody. (A. 12.) Rather, the Court would have held that there was at least a triable issue of fact with respect to whether the statements that Ms. Gunning was rumored to be "suffering from bipolar disorder with acute depression and paranoia, amplified by substance abuse" were parody. (A. 12.) Notwithstanding its own analysis, the Court viewed itself as collaterally estopped by the California courts ruling on this issue. (A. 12-13.)

This approach is incorrect where the issue is a distinctly legal one, and where the courts are located in separate jurisdictions that may determine the law to apply differently in their own respective forums. Restatement (Second) of Judgments § 29 cmt. *i*. Because the stability of decisions is adequately covered by the rule of stare decisis, the court should not have concluded that it was "foreclosed

from an opportunity to reconsider the applicable [legal issue]." *Id.* Therefore, the trial court erred in concluding that the legal determination by the California court was preclusive and did not permit it to determine the legal issue independently.

II. Requiring a Separate Threshold Analysis for Identifying Anonymous Speakers Is Not Constitutionally Required, Is Inappropriate at the Threshold Stage, and Is Unnecessary

Additionally, the trial court erred in creating a separate, constitutionally required test before obtaining the identity of John Doe #2. The U.S. Supreme Court has never held that there is a generalized "right" to speak anonymously, and it does not violate an individual's constitutional right to free speech simply to be named.

A few courts have required plaintiffs in defamation cases against anonymous speakers to meet a threshold test before obtaining court-ordered disclosure of their identity. For example in *Dendrite Int'l Inc. v. Doe No. 3*, 775 A.2d 756, 760-61 (N.J. Super. Ct. 2001), the court required that plaintiffs (1) provide sufficient notice to the putative defendants to provide them with an opportunity to respond; (2) identify the exact statements claimed to be actionable; (3) set forth prima facie evidence of each element of their cause of action against the anonymous defendants; and (4) demonstrate that their action is sufficiently strong and outweighs a defendant's right of anonymous speech. *See also id.* at 766 ("Precedent, text, structure, and history all compel the conclusion that the New

Jersey Constitution's right of free speech is broader than the right against governmental abridgement of speech found in the First Amendment [of the U.S. Constitution]."). In other states, courts have modified this approach. For example, in *Doe v. Cahill*, 884 A.2d 451, 463 (Del. 2005), the court held that "the defamation plaintiff, as the party bearing the burden of proof at trial, must introduce evidence creating a genuine issue of material fact [under the summary judgment standard] for all elements of a defamation claim within the plaintiff's control," before obtaining the identity of the speaker. *See also Krinsky v. Doe 6*, 72 Cal. Rprtr. 3d 231, 244-45 (Cal. Ct. App. 2008) (holding that the plaintiff must demonstrate prima facie evidence, although avoiding the procedural label of summary judgment or motion to dismiss). Other courts have avoided the *Dendrite* requirements altogether, simply holding that if a subpoena is filed with a good faith basis to claim that the statements were actionable, it is sufficient. *In re Subpoena to America Online, Inc.*, 2000 WL 1210372, at *8 (Va. Cir. Ct. Jan. 31, 2000).

While the trial court did not settle on a particular test, but applied only some aspects of the *Dendrite* analysis. (A.10.) In doing so, the trial court erred as a matter of law. The use of these threshold tests are both impracticable and unnecessary and should not be adopted as part of Maine constitutional law.

A. The Supreme Court Has Never Recognized a Generalized "Right" To Anonymous Speech

In order to determine the scope of Ms. Gunning's purported obligation before seeking the disclosure of an anonymous author to pursue a defamation claim, this Court must examine the precise nature of the "right" to which the Does claim would be infringed. There are four U.S. Supreme Court cases that are typically cited in discussing the "right" to anonymity in speech. None of these cases stand for the proposition that there is a right to anonymous speech. At most, these cases establish only that a speaker cannot be required to identify himself at the time the speech is made because the state sought to control the content of the speech. None of these cases address disclosure of a speaker's identify after the speech has occurred.

The first case, *Talley v. California*, 362 U.S. 60 (1960), addressed a Los Angeles ordinance which prohibited the dissemination of leaflets or handbills without the name and address of the author identified on it. *Id.* at 60-61. The Supreme Court concluded that the ordinance was void because it "bars all handbills under all circumstances anywhere that do not have the names and addresses printed on them in the place the ordinance requires." *Id.* at 64. The Court reasoned that there were many ways to accomplish the legitimate aims of preventing frauds, disorder, or littering, without prohibiting the dissemination of "*all* handbills in *all* circumstances." *Id.* at 63-65.

In the second, *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), the Court another statute pertaining to leaflets—although it was not identical to ordinance at issue in *Talley*. *McIntyre*, 514 U.S. at 344. The Ohio law, unlike the *Talley* ordinance, did not provide that all unsigned leaflets would be prohibited, but rather the law only applied to unsigned documents designed to influence voters in an election. *Id.* Because the law was limited to leaflets designed to influence voters in ordinary elections, and because the law affected the content of the speech by requiring the author's name, business address and other information to be included, the Court concluded that it affected political expression, which was subject to "exacting scrutiny." *Id.* at 346.

Critically, the Court's First Amendment focus was not on the protection of the anonymous speaker's identity, but rather on the fact that the law *compelled* disclosure: "*we think the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude*." *Id.* at 348 (emphasis added). In contrast to the majority opinion, Justice Thomas in a concurring opinion would have expressly recognized a right to speak anonymously. *Id.* at 359-60 (*Thomas, J.*, concurring).

The late Justice Scalia clarified the state of the Supreme Court's jurisprudence on anonymity, concluding that the Constitution in fact contained *no* "right" to speak anonymously. Rather, Scalia reasoned, the Court's jurisprudence

supported only the proposition that "*in peculiar circumstances* the compelled disclosure of a person's identity would unconstitutionally deter the exercise of First Amendment constitutional rights." *Id.* at 379 (*Scalia, J.*, dissenting).

> But those cases did not acknowledge any general right to anonymity, or even any right on the part of *all* citizens to ignore the particular laws under challenge. Rather, they recognized a right to an *exemption* from otherwise valid disclosure requirements on the part of someone who could show a "reasonable probability" that the compelled disclosure would result in "threats, harassment, or reprisals from either Government officials or private parties."

Id. (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (per curiam)). Rather, Scalia noted, the Court had expressly *rejected* the generalized right of anonymity in *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913). *Id.* at 380. To recognize a "generalized right to anonymous speech" would lead to dramatic legal changes—including changes to existing and widely recognized legitimate laws that compel identification in a broad array of circumstances. *Id.* at 383-84. For example,

> Must a parade permit . . . be issued to a group that refuses to provide its identity, or that agrees to do so only under assurance that the identity will not be made public? Must a municipally owned theater that is leased for private productions book anonymously sponsored presentations? Must a government periodical that has a "letters to the editor" column disavow the policy that most newspapers have against the publication of anonymous letters? Must a public university that makes its facilities available for a speech by Louis Farrakhan or David Duke refuse to disclose the on-campus or off-campus group that has sponsored or paid for the speech? Must a municipal "public-access" cable channel permit anonymous (and masked) performers? *The silliness that follows upon a generalized right to anonymous speech has no end*.

Id. at 380-81 (emphasis added).

The third case, *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), involved a law governing the process of so-called ballot initiatives. *Id.* at 186. In Colorado, where this case originated, citizens were permitted to create laws through initiatives placed directly on election ballots. *Id.* Among the challenged aspect to the initiative procedures were requirements that the initiative petition circulators wear identification badges and report the names of all circulators with the amounts paid to each circulator. *Id.* Again, like the leaflets designed to influence elections that were targeted in *McIntyre*, the Court concluded that the ballot initiatives were "'core political speech[]' because [they] involve[] 'interactive communication concerning political change.'" *Id.* at 186-87 (quoting *Meyer v. Grant*, 486 U.S. 414, 422 (1988)).

The Court invalidated the name-badge requirement, concluding that there was a less restrictive means[5] for securing the public interest of discouraging misconduct by the circulators. *Id.* at 196. Specifically, the law required that each circulator submit an affidavit with the petition identifying the circulator by name

[5] In 2010, the Supreme Court restated the "exacting scrutiny" test that applies to "core political speech" as requiring only "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest,'" rather than making it identical to strict scrutiny. *Doe v. Reed*, 561 U.S. 186, 196 (2010) (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 358-59 (2010)).

and address, together with a statement that they know and understand the laws pertaining to these petitions. *Id.* at 198-99. In upholding the affidavit requirement of the law, the Court distinguished it from the name-badge requirement because "the affidavit is separated from the moment the circulator speaks." *Id.* at 199. In other words, the name badge identifies the speaker "at the precise moment when the circulator's interest in anonymity is greatest," whereas "[t]he affidavit, in contrast, does not expose the circulator to the risk of 'heat of the moment' harassment." *Id.* Thus, there was no absolute right to "anonymity" because the identity of the circulator was required to be disclosed (through the affidavit requirement upheld by the Court). Rather, the Court the aspect of the law that required disclosure at the time of speech, where it was not sufficiently justified by the state's interest in preventing fraud or misconduct. *Id.*

Similarly, the fourth case typically referred to when discussing the Supreme Court's recognition of a "right" to anonymous speech, *Watchtower Bible & Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002), addressed an ordinance related to canvassing. Unlike *Buckley*, the *Watchtower Bible* Court addressed an ordinance that made it a misdemeanor to engage in door-to-door advocacy without first registering with the mayor and receiving a permit. *Id.* at 153. The Watchtower Bible and Tract Society, known to most as Jehovah's Witnesses, coordinated the preaching activity of its congregations' members in

Ohio where the Village of Stratton is located. *Id.* The Court invalidated the ordinance, concluding, "a law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition." *Id.* at 166. Specifically, the Court concluded that it violated the rights of both speech and assembly because swept much more broadly than the affidavit requirement in *Buckley*. *Id.* at 167. By requiring a permit before canvassing, the ordinance it restricted "a significant amount of spontaneous speech," and imposed "an objective burden on some speech" where "a significant number of persons whose religious scruples will prevent them from applying for such a license." *Id.* at 167-68.

Looking at these four decisions together, none of them addressed anything remotely resembling to the factual circumstances through which this case arose: a private defamation claim against an anonymous speaker. Most importantly, each of the Supreme Court cases addressed a blanket legal requirement for requiring identification of a speaker *before the speech ever took place*. Additionally, in three of the four cases, the laws were directly aimed at speech that was designed to influence voters in elections or canvassing for ballot issues in a given election. As such, the First Amendment protection came not from the speaker's own interest in anonymity, but rather the fact that the law was directed solely at "core political speech," and whether the destruction of anonymity affected the speech. For that

reason, the Court concluded that anonymity was not appropriate in *Buckley*, but simply the requirement of name-badges was invalidated given the sufficiency of the affidavit process to protect the concerns of the state of Colorado. *Buckley* 525 U.S. at 199. Alternatively, even where core political speech was not involved, the concern was generally for those for whom speech is foreclosed because the permits to engage in that speech would not be available, due to religious beliefs for example. *Watchtower Bible & Tract Society of N.Y., Inc.*, 536 U.S. at 167-68.

In sum, the Supreme Court has not recognized the sanctity of anonymity or a generalized "right" of anonymous speech. *see also* Marian K. Riedy & Kim Sperduto, *Revisiting the "Anonymous Speaker Privilege*," 14 N.C. J. L. & Tech. 249, 273-82 (Fall 2012); Michael Baumrind, *Protecting Online Anonymity and Preserving Reputation Through Due Process*, 27 Ga. State U. L.R. 757, 771-80 (2011) (describing *Talley* and its progeny as not espousing a generalized right of anonymity); Caroline E. Strickland, *Applying* McIntyre v. Ohio Elections Comm'n *to Anonymous Speech on the Internet & Discovery of John Doe's Identity*, 58 Wash. & Lee L. Rev 1537, 1558-1563 (2001) ("[Although] [j]udges, attorneys, and free speech advocates cite *McIntyre* as a basis for protection of anonymous Internet speech [a] thorough examination of both *McIntyre*'s facts and the Court's analysis indicates that the assumption that the case extends to all anonymous Internet speech is conclusory and may be incorrect."). To the contrary, anonymity,

according to the late Honorable Justice Antonin Scalia, "facilitates wrong by avoiding accountability, which is ordinarily the very purpose of anonymity." *McIntyre*, 514 U.S. at 385 (*Scalia, J.*, dissenting). Rather, what each of the above-cited cases have in common is one factor: the requirement of disclosure of the speaker's identity took place before the speech occurred—thus implicating a prior restraint on certain types of speech.

The Does and the trial court treat the adoption a *Dendrite*-type analysis as a foregone conclusion. However, based upon a thorough review of the Supreme Court's jurisprudence on this issue, this Court should not adopt a blanket or generalized "right" to speak anonymously. Defamation cases against anonymous speakers are markedly different than the above Supreme-Court cases because in the defamation cases, the speech has already occurred and therefore there is no concern of prior restraint. Moreover, plaintiffs seek the identity of the speaker only after the speech that has occurred was alleged to be defamatory or otherwise harmful. Requiring disclosure of the speaker's identity is not itself a violation of the right of free speech and existing defamation law already accounts for First Amendment concerns. *See generally N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

Rather, if the *Talley* case and its progeny is instructive of anything it is this: *A speaker's right to engage in constitutionally protected speech is not violated merely by learning his or her name. See Buckley*, 525 U.S. at 198 (upholding the

mandatory disclosure of the speaker's identity through affidavits); *McIntyre*, 514 U.S. at 348 ("[W]e think the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude.").

B. Adopting a One-Size-Fits-All Threshold Test for Disclosing the Identity of a Speaker in Any Defamation Case is Inappropriate

Additionally, the specific First Amendment concerns and factors relevant to whether the defamation case is valid will vary with the each case. Specifically, it matters what the content of the speech is—i.e., whether it is core political speech or commercial speech, for example. The *Dendrite*, *Krinsky*, *Cahill*, or *America Online, Inc.* analyses fail to differentiate between the different types of speech and the intermediate scrutiny that applies to some types of speech over others.

Additionally, determining whether the speech was parody, opinion, or truth is not only inappropriate as a threshold matter, it is also unnecessary. First, it is inappropriate to determine whether a given statement is parody, opinion, or truth in isolation based solely on the pleadings and affidavits because the Court has no context. "Speech on the Internet does not occur in one vast, undifferentiated expanse. Rather, Internet speech occurs within a variety of online contexts, each one of which facilitates distinctive kinds of expression, interaction, and activity among users." Musetta Durkee, *The Truth Can Catch the Lie: The Flawed Understanding of Online Speech in* In re Anonymous Online Speakers, 26

Berkeley Tech. L.J. 773, 777 (2011). Some courts have attempted to address the inappropriateness of this threshold determination by requiring plaintiffs to provide prima facie evidence of only those elements that are "within the plaintiff's control." *Cahill*, 884 A.2d at 464 ("[A] public figure defamation plaintiff must only plead and prove facts with regard to elements of the claim that are within his control[—not including actual malice]."). However, that approach does not fully take account of all of the facts and circumstances the court must consider.

"[C]ourts risk misunderstanding the meaning and effect of the speech—that is, whether the speech is fact or opinion, commercial or political[,] [serious or satire]—by failing to recognize that, for example, some blogs host factual information while others host opinions intermixed with facts." *Id.* at 789. Speech that occurs online is as varied as its speakers.

> Online spaces are developing rapidly and different examples of similar online platforms may have different opportunities for verifying and correcting speech: consider different blogs, which may have different technological opportunities for correction—metacritics, flagging comments, etc.—as well as different governing norms from the users' expectations, societal or otherwise. For example, these characteristics of a blog embedded in a well-established site could differ greatly from those of an independent blog. . . . Failure to understand context on a case-by-case basis can lead to a mistaken impression of the characteristics of speech in a given online space.

Id. at 789, 793. It is inappropriate to require a court to attempt to account for these nuances as part of a threshold determination at the outset before the plaintiff has had the benefit of discovery or isolation of the issues through responsive pleadings.

Additionally, by labeling these statements as either political or commercial, fact or opinion, true or false, serious or satire, is wholly inappropriate in the abstract and at the threshold stage.

C. Litigants Already Enjoy Considerable Substantive and Procedural Protection under Traditional Defamation Law

Moreover, this additional threshold determination is unnecessary. In each case, a defamation defendant has the opportunity to either dismiss the case as a matter of law, or to respond to the case on the merits by articulating how the defamation claim affects his or her constitutional rights. This Court does not need to create a wholly separate *threshold* test. Stated differently, *one's constitutional rights to free speech are not violated simply by going through the process of litigating the issue of whether the defendant has engaged in defamation*. If the case is indeed meritless, the Defendant has the opportunity to dispose of the case through a motion to dismiss or for summary judgment.

In *Cohen v. Google, Inc.*, 887 N.Y.S.2d 424, 427 & n.5 (N.Y. Sup. Ct. Aug. 17, 2009), the New York Supreme Court rejected the approach used in the New Jersey appellate court in *Dendrite Int'l, Inc.*, 775 A.2d 756, because the court recognized the adequacy of existing procedures. The *Cohen* Court concluded that no additional analysis was required because the New York rule governing preaction discovery was adequate to address whether the claim was viable and to give the potential defendant the opportunity to contest the disclosure. *Cohen*, 887

N.Y.S.2d at 427 n.5. Similarly here, the Does were notified and have entered their appearance and have vigorously defended themselves. Thus, there are no notice or procedural due process issues raised. Further, with respect to whether it may violate the speaker's constitutional rights, traditional defamation law already accounts for the rights to engage in free speech. *See N.Y. Times*, 376 U.S. 254. Thus, the creation of a separate threshold test against anonymous defendants is unnecessary.

CONCLUSION

The trial court erred by concluding that it was precluded as a matter of collateral estoppel from considering whether Ms. Gunning could pursue a subpoena to disclose the identity of an anonymous speaker. The California judgment was not filed and addressed solely an issue of law. Thus, it should not have been considered preclusive for collateral estoppel purposes. Additionally, neither the federal nor the Maine constitutions provide for a generalized right of anonymous speech, and the Supreme Court has never held that one's right to free expression is violated by being named. Thus, this Court need not and should not create a separate test for determining whether a plaintiff in a defamation action can secure the identity of speaker. Such tests are ill-suited for a threshold determination and present a myriad of unnecessary problems in determining whether a plaintiff has met a minimal threshold showing.

Respectfully Submitted by,

Dated: March 11, 2016

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I, Tara A. Rich, do hereby certify that on March 11, 2016, I caused to be served upon the following two conformed copies of the Appellant's Brief by regular U.S. Mail and electronic mail:

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