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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

GREGG SCHUMACHER and LINDA SCHUMACHER, individually and as husband and wife, and GREGG SCHUMACHER FURS LLC dba SCHUMACHER FURS & OUTERWEAR,	No. CV-07-601-HU
v.	RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION ON BEHALF OF IN DEFENSE OF ANIMALS, MATT ROSSELL, CONNIE DURKEE and KEVIN MEIRAS
CITY OF PORTLAND, a municipal corporation; IN DEFENSE OF ANIMALS, a foreign nonprofit corporation; ANIMAL LIBERATION FRONT, an unincorporated	ORAL ARGUMENT REQUESTED

association; PEOPLE FOR THE ETHICAL)
TREATMENT OF ANIMALS, INC., a)
foreign nonprofit corporation; MATT)
ROSSELL; KEVIN MEIRAS aka "Bluejay";)
CONNIE DURKEE; ALEX LILLI; JOHN)
DOES 1-10; and JANE DOES 1-10)
)
Defendants.)

INTRODUCTION

In Defense of Animals, Matt Rossell, Connie Durkee, and Kevin Meiras ("IDA, Rossell, Durkee, and Meiras") respond to Plaintiffs' Motion for Preliminary Injunction as follows:

Plaintiffs' motion for a preliminary injunction requesting various restrictions on defendants protest activities relating to Schumacher Furs & Outerwear should be denied for numerous reasons, but most importantly, it is fundamentally flawed in its own right. Plaintiffs have done business at the same location for approximately 19 years. Plaintiffs admit in their Complaint that there have been protests and demonstrations in and around plaintiffs' store location from November 12, 2005 to the present. Complaint, p. 4. It is too late for a preliminary injunction to have any effect considering that plaintiffs have already determined that they are closing their business as of May 31, 2007 (two weeks after the hearing date on the preliminary injunction). Further, while plaintiffs have made numerous allegations against "mobs," the affidavits of Connie Durkee, Matt Rossell, and Kevin Mieras all indicate that they have engaged in lawful First Amendment activity that is not subject to injunctive relief.

Plaintiffs' request comes too late and with too little justification. The delay of almost two years since the activity they seek to restrict implies a lack of urgency, and undermines plaintiffs'

claim that they will suffer irreparable harm. *Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985). Further, plaintiffs' request is for time, place and manner restrictions. Requiring the court to craft restrictions for a location-specific situation that will only last a few weeks is a waste of judicial time and resources.

ARGUMENT

A. Preliminary injunction standards.

A preliminary injunction is an "extraordinary and drastic remedy, one that should not be granted unless the movant, but a clear showing, carries the burden of persuasion. *Delex, LLC v. Delivery Express, Inc.*, 2002 WL 31466586 (D.Or., 2002), citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

A preliminary injunction is only appropriate if plaintiffs demonstrate "the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law." *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir., 1990), citing *LaDuke v. Nelson*, 762 F.2d 1318, 1330 (9th Cir. 1985) (quoting *O'Shea v. Littleton*, 414 U.S. 488 (1974). "To satisfy this standard, plaintiffs must establish actual success on the merits…". *Id.* "That is, the plaintiff seeking an injunction must prove the plaintiff's own case and adduce the requisite proof, by a preponderance of the evidence, of the conditions and circumstances upon which the plaintiff bases the right to and necessity for injunctive relief." (citing *Citizens Concerned for Separation of Church & State v. Denver*, 628 F.2d 1289, 1299 (10th Cir. 1980), cert. denied, 452 U.S. 963 (1981).

As plaintiffs point out in their Memorandum, the Ninth Circuit has used two different tests to determine whether an injunction is warranted. The traditional test is a four prong test where the plaintiffs would need to show that:

1. a strong probability of success on the merits;
2. a threat of irreparable injury if the preliminary injunction is not granted;
3. that the balance of hardships favors the movant; and
4. that granting preliminary relief to the movant is in the public's interest.

Miller v. California Pacific Medical Center, 19 F.3d 449 (9th Cir. 1994) (en banc).

Another test for determining whether an injunction is appropriate is what is known as the "alternative test." "The standard for granting a preliminary injunction balances the plaintiff's likelihood of success against the relative hardship to the parties." *Clear Channel Outdoor Inc., a Delaware Corp. v. City of Los Angeles*, 340 F.3d 810 (9th Cir. 2003). In order for the plaintiffs to get a preliminary injunction they must show either:

1. a likelihood of success on the merits and the possibility of irreparable injury; or
2. that serious questions going to the merits were raised and the balance of hardships tips sharply in its favor" *Id.*

Plaintiffs cannot prevail under either of the above tests, even under the less stringent "alternative test". Plaintiffs' unexplained long delay in bringing this case should in itself, cause their request to be denied. It is difficult to believe that an injunction at this point in time will prevent irreparable injury when the alleged activities have been occurring for almost two years. Further, the hardship falls on the defendants who are exercising their protected First Amendment

Rights, not on the plaintiffs who in approximately two weeks will no longer do business at the location in question.

The likelihood of anyone suffering the injuries Plaintiffs predict is remote. Plaintiff has not shown irreparable harm. Further, as noted in a 2001 Sixth Circuit case involving a preliminary injunction seeking various restrictions on protesters of certain reproductive health care clinics, the New York Court of Appeals cautioned that when examining injunctions affecting First Amendment activity, the District Court should "conduct an independent examination of the record as a whole", as these types of injunctions are not to be taken lightly. *New York ex rel. Spitzer v. Operation Rescue National*, 273 F.3d 184 (N.Y. 2001). The Court of Appeals reversed some of the injunctions the district court had awarded the plaintiffs, noting that "...the evidence adduced at the preliminary injunction hearing was less overwhelming than the District Court suggested" and that "the District Court failed to differentiate illegal protestor activity from protected and typical, albeit abusive behavior..." *Id.* at 195.

Here, the court will most certainly not be able to differentiate between illegal protestor activity and protected activity, as plaintiffs have failed to allege with specificity which defendants were responsible for the various acts alleged in their Motion (the individuals who allegedly committed illegal acts are collectively referred to as "the mobs" in the Declaration of Gregg Schumacher in Support of Plaintiffs' Motion for a Preliminary Injunction).

The underlying rationale for an injunction is lost when the person or thing the injunction is meant to protect no longer exists. *Tory v. Cochran*, 544 U.S. 734 (2005). In *Tory*, the appealed injunctive relief was held moot because Mr. Cochran was deceased by the time the court heard the case. The court here found that it was "unnecessary, indeed unwarranted, for us

to explore the petitioner's basic claims, namely, (1) that the First Amendment forbids the issuance of a permanent injunction in a defamation case…,and (2) that the injunction (considered prior to Cochran's death) was not properly tailored and consequently violated the First Amendment." *Id.*, at 737,738. Here, even if the plaintiffs could show a compelling justification for injunctive relief for protests at their store, the issue is virtually moot because the business will close in just a couple of weeks.

Plaintiffs also allege in their motion that defendants, although unable to specifically state which defendants, often engaged in criminal conduct. Even if this were the case, which it is not, plaintiffs would still not be entitled to an injunction. The general rule is that courts have no power to enjoin the commission of a crime, with three exceptions:

> "Underlying our examination of the injunctive-relief issue is the doctrine that courts have no power to enjoin the commission of a crime. See 5 J. Moore, Federal Practice P38.24 (3), at 192 (2d ed. 1968). Historically this doctrine has been subject to exception in only three general situations: **National emergencies, widespread public nuisances, and where a specific statutory grant of power exists**." (emphasis added)

U.S. v. Jalas, 409 F.2d 358 (1969).

Clearly in the case at hand there is no national emergency, and of the codes and statutes included with Plaintiff's Memorandum, none include specific grants of power for injunctive relief. "Widespread public nuisances" are inapplicable here as well. Examples provided by the courts of "widespread public nuisances" have included obstructions of highways, navigable waterways, and railways (*i.e.*, where interstate commerce and public transport are adversely affected). See *In re Debs*, 158 U.S. 564 (1895). Yet another reason plaintiffs' motion should be denied.

Plaintiffs, through their motion for preliminary injunction, also seek to enjoin defendants' alleged commission of common law torts. Courts balance the following factors to determine the appropriateness of injunctive relief for committed or threatened torts:

(1) The appropriateness of the remedy of injunction against a tort depends upon a comparative appraisal of all of the factors in the case, including the following primary factors:

(a) the nature of the interest to be protected,

(b) the relative adequacy to the plaintiff of injunction and of other remedies,

(c) any unreasonable delay by the plaintiff in bringing suit,

(d) any related misconduct on the part of the plaintiff,

(e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied,

(f) the interests of third persons and of the public, and

(g) the practicability of framing and enforcing the order or judgment.

Restatement (Second) of Torts § 936.

Here, in light of the store's imminent closure, the fact that the suit was brought long after the protests began, the strong interest in protecting free speech, and the difficulty in enforcing such an injunction, plaintiffs' motion should be denied.

RESPECTFULLY SUBMITTED this 11th day of May, 2007.

Jami Pannell, OSB #06429	Gregory Kafoury, OSB #74[illegible]6
(admission pending)	Mark G. McDougal, OSB #89086
Shauna Curphey, OSB #06306	Natalie McDougal, OSB #04250 (admission pending)
Of Attorneys for Defendant Meiras	Of Attorneys for Defendants IDA, Rossell and Durkee

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing Affidavit of Matt Rossell on the following person(s) on the date indicated below, by the following method:

[X] by electronically mailed notice from the court on the date set forth below;

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