Herbert G. Grey, OSB #81025
Jill Odell, OSB # 973581
4800 SW Griffith Drive, Suite 320
Beaverton, OR 97005-8716
Telephone: 503.641.4908
Facsimile : 503.641.8757
Email : hgrey.law1@verizon.net
Email : jillodell@verizon.net

Jonathan A. Clark, OSB # 02274
960 Liberty Street SE, Suite 250
Salem, OR 97302
Telephone: 503.581.1229
Facsimile : 503.365.0374
Email : jonathan@jaclawoffice.com

Of Attorneys for Plaintiffs

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, Plaintiffs v. CITY OF PORTLAND, a municipal corporation; IN DEFENSE OF ANIMALS, a foreign nonprofit corporation; ANIMAL LIBERATION FRONT, an unincorporated 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.	No. CV 07-601-HU PLAINTIFFS' MEMORANDUM IN OPPOSITION TO IDA MOTIONS Special Motion to Strike Motion to Dismiss Motion to Make More Definite & Certain Motion to Strike Portions of Declarations Oral Argument Requested

Plaintiffs oppose each of the motions filed by defendants IN DEFENSE OF ANIMALS, MATT ROSSELL, CONNIE DURKEE and KEVIN MIERAS. Plaintiffs argue all of the motions lack legal merit and address each one in turn. Plaintiffs take no position on these defendants' Motion to Consolidate the hearing of the Special Motion to Strike with the May 17, 2007 preliminary injunction hearing and will be prepared to proceed at that time if the court so directs. However, plaintiffs would like the opportunity to supplement this briefing when they have the full allotted time for responding to these motions. This consolidated brief is submitted now to the extent the issues may bear on the court's determination of plaintiffs' motion for preliminary injunction.

SPECIAL MOTION TO STRIKE (ORS 31.150)

Oregon law prohibits the use of litigation to stifle free speech, providing a mechanism to strike those claims brought primarily to quell protected speech. ORS 31.150. That is not this case, where plaintiffs have expressly challenged only speech and conduct that exceeds the boundaries of protected speech. Defendants impermissibly argue the statute protects *all* conduct where the claim arises out of free speech activity. IDA Defendants' Memorandum in Support of Special Motion to Strike, p. 4. The law does not extend as far as these defendants claim, and they cite no authority extending the scope of the anti-SLAPP law as far as they seek.

Oregon's Anti-SLAPP statute, ORS 31.150 to 31.155, was adopted in 2001. Or. Laws 2001, ch. 616. "SLAPP" stands for Strategic Lawsuit Against Public Participation. *Jarrow Formulas Inc. v. LaMarche*, 74 P3d 737, 739 (Cal. 2003). The Oregon legislature looked to California's Anti-SLAPP statute as the basis for its own. Testimony of Dave Hendricks, Legislative Counsel, to House Committee on Judiciary Subcommittee on

Civil Law, March 19, 2001. The purpose of the statute in California was to provide for early dismissal of "*non-meritorious litigation* meant to chill the *valid* exercise of the constitutional rights of freedom of speech and petition in connection with a public issue." *Sipple v. Foundation for Nat. Progress*, 83 Cal. Rptr. 2d 677, 682 (Cal. App. 1999)(emphasis added). The Schumachers herein seek only to chill the *non-protected* exercise of free speech. *See* prayer at Complaint, pp. 14-15; Motion for Preliminary Injunction, pp. 2-4; Memorandum in Support of Motion for Preliminary Injunction, pp. 9-11.

Oregon's statute provides:

> **31.150 Special motion to strike; when available; burden of proof.** (1) A defendant may make a special motion to strike against a claim in a civil action described in subsection (2) of this section. The court shall grant the motion unless the plaintiff establishes in the manner provided by subsection (3) of this section that there is a probability that the plaintiff will prevail on the claim. The special motion to strike shall be treated as a motion to dismiss under ORCP 21 A but shall not be subject to ORCP 21 F. Upon granting the special motion to strike, the court shall enter a judgment of dismissal without prejudice.
>
> (2) A special motion to strike may be made under this section against any claim in a civil action that arises out of:
>
> (a) Any oral statement made, or written statement or other document submitted, in a legislative, executive or judicial proceeding or other proceeding authorized by law;
>
> (b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive or judicial body or other proceeding authorized by law;
>
> *(c) Any oral statement made, or written statement or other document presented, in a place open to the public or a public forum in connection with an issue of public interest; or*
>
> *(d) Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.*
>
> (3) *A defendant making a special motion to strike under the provisions of this section has the initial burden of making a prima facie showing that the claim against which the motion is made arises out of a statement, document or conduct described in subsection (2) of this section.* If the defendant meets this burden, the burden shifts to the plaintiff in the action to establish that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to

support a prima facie case. If the plaintiff meets this burden, the court shall deny the motion.

(4) In making a determination under subsection (1) of this section, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(5) If the court determines that the plaintiff has established a probability that the plaintiff will prevail on the claim:

(a) The fact that the determination has been made and the substance of the determination may not be admitted in evidence at any later stage of the case; and

(b) The determination does not affect the burden of proof or standard of proof that is applied in the proceeding. (emphasis added)

Under ORS 31.150, defendants must first make a showing that the *oral statements* allegedly wrongful were conducted either in a public forum or in furtherance of the exercise of the constitutional right of free speech in connection with a public issue or an issue of public interest. ORS 31.150(2)(c)–(d). Here, that cannot be done, as Plaintiffs have specifically exempted any lawful exercise of the constitutional right to free speech from this action, including the injunctive relief sought in their preliminary injunction motion. Plaintiffs have alleged *conduct* arguably violating federal and/or state statutes, as well as Portland city ordinance. Complaint ¶¶ 17, 20, 36, 47. Plaintiffs herein seek only reasonable time, place and manner restrictions outside the Schumachers' store rather than a wholesale prohibition of all protest activity, and they seek limitation on protest activity at the Schumachers' home and other unlawful interferences with their legitimate efforts to operate their business. *See* prayer of Complaint, pp. 14-15; Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, pp.2, 4-5, 11-12.

Plaintiffs have sued groups and individuals who have allegedly interfered with their ability to operate their business in its current location, or to relocate it to another location, in a manner already prohibited by tort or criminal law. Complaint ¶¶ 34-37, 39-42. Plaintiffs allege conduct by defendants beyond the lawful exercise of free speech. *Id.*

at ¶¶ 16-21, 36, 41, 44, 47. Plaintiffs do not intend, nor do they actually seek, to hinder or limit lawful free expression under the U.S. or Oregon Constitutions. In California, the Anti-SLAPP statute protects private conversations. *Wilcox v. Superior Court*, 27 Cal App 4th 809, 815 (1994). It even protects a media speaker's freedom to attack the way a medical professional conducts his professional duties. *Liebermann v. KCOP Television*, 110 Cal 4th 156, 164 (2003). However, the statute does not in California, nor should it here, create a license to break the law.

Like California courts, Oregon has adopted a two-step process in determining whether to strike anti-SLAPP claims under the statute. See, e.g., *Slaney v. Ranger Insurance Co.*, 115 Cal. App. 4th 306 (2004). First, the court decides whether the *defendant* has made a threshold showing that the challenged action is one arising from protected activity. If the court finds such a showing has been made, it then determines whether the *plaintiff* has demonstrated a probability of prevailing on the claim. Significantly, the court cannot weigh the moving party's evidence, but addresses the factual and legal issues as in a motion for summary judgment. To survive, plaintiffs must put forth "substantial evidence." ORS 31.150(3).

The "substantial evidence" requirement, though, is not triggered until defendants carry their "initial burden of making a prima facie showing that the claim against which the motion is made arises out of a statement, document or conduct" protected by the statute. ORS 31.150(3). That means defendants herein must satisfy the court all of their statements and conduct are protected speech before plaintiffs are required to come forward with evidence of their own showing the likelihood of prevailing.

When California courts interpreted the plaintiffs' "probability of prevailing" prong, the court placed on plaintiff the requirement to "state and substantiate a legally sufficient claim," or "[p]ut another way, the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" *Jarrow Formulas, Inc. v. LaMarche*, 31 Cal. 4th 728, 741 (2003) citing *Rosenthal v. Great Western Fin. Securities*, 14 Cal. 4th 394, 412 (1996), *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Ca. 4th 53,67 (2002), and *Wilson v. Parker, Covert & Chidester*, 28 Cal 4th 811, 821 (2002). To protect a plaintiff's right to a jury trial, California courts do not require that the claim be proven to the trial court. *Id.*, citing *Briggs v. Eden Council for Hope and Opportunity*, 19 Cal 4th 1106 (1999).

Defendants have yet to carry their burden, and the record is already replete with evidence of substantial evidence on behalf of plaintiffs.

MOTION TO DISMISS FOR LACK OF PENDENT JURISDICTION

The parties agree supplemental (aka pendent) jurisdiction is predicated upon 28 USC § 1367, under which jurisdiction is proper where the relationship between federal and state claims is such they "form part of the same case or controversy under Article III of the United States Constitution." 28 USC § 1367(a). The "common nucleus of operative facts" test such that plaintiff "would ordinarily be expected to try them all in a single judicial proceeding" continues the former common law standard under the statute. *See United Mine Workers v. Gibbs*, 383 US 715, 725 (1966). *Kirschner v. Klemons*, 225 F3d 227, 239 (2d Cir. 2000). Supplemental jurisdiction extends to claims by any party that are

sufficiently related to the federal claim to be part of the same case or controversy." 28 USC § 1367(a). The court may decline to exercise supplemental jurisdiction only if there is a novel or complex issue of state law, the state law claims substantially predominate over the federal claim, the court has dismissed the federal claim upon which jurisdiction is based or if in exceptional circumstances there are other compelling reasons for declining jurisdiction. *See* 28 USC § 1367(c). It should be noted defendant City of Portland has admitted the court likely has supplemental jurisdiction over plaintiffs' state law claims. City's Answer, ¶ 4.

In addition, supplemental jurisdiction "includes claims that involve the joinder or intervention of additional parties," *Id.* a doctrine known as supplemental party jurisdiction. Accordingly, as long as the claims arise from the same nucleus of operative facts, the federal court may adjudicate claims against defendants who are not parties to the federal claim; i.e., plaintiffs need not show an independent basis for federal jurisdiction as to such parties. *Mendoza v. Zirkle Fruit Co.*, 301 F3d 1163, 1172-1173 (9th Cir. 2002).

The parties herein disagree about the application of supplemental jurisdiction in this case, which involves common allegations of the free speech rights of the respective parties under the First Amendment to the U.S. Constitution, as well as alleged interference with interstate commerce, interstate travel, and use of the Internet. *See* Complaint, ¶¶ 1, 22 and prayer. More significantly, defendants' invitation to the court to decline supplemental jurisdiction because state law claims predominate over the federal claims (IDA's Memorandum in Support of Motion to Dismiss, pp. 4-5) is conspicuously inconsistent with their own argument in support of their Special Motion to Strike, where

they expressly note that "this action arises out of conduct in furtherance of the exercise of the constitutional right of free speech in connection with a public issue or an issue of public interest...." *See* IDA Defendants' Special Motion to Strike, pp. 2-3; IDA Defendants' Memorandum in Support of Special Motion to Strike, p. 4. In short, the parties agree that free speech lies at the heart of the entire case, operative facts that tie the federal and state law claims together into a nucleus of operative facts that justifies the exercise of supplemental jurisdiction.

Moreover, the authorities defendants rely upon to support their argument that state law issues predominate over federal law claims are unpersuasive. First, they opine there is no similarity in operative facts between the federal and state claims (Memorandum, pp. 2-3), when in fact plaintiffs allege protestor defendants were breaking the law on a number of occasions while the police watched. Complaint, ¶¶ 18-19, 35, 36. The same alleged conduct lies at the heart of all those claims. It is true that some of the alleged speech and conduct occurred at times and places other than immediately outside the Schumachers' store, but they are nonetheless alleged to be part of the same pattern of conduct. Complaint, ¶¶ 1, 22.

MOTION TO MAKE MORE DEFINITE & CERTAIN

Defendants' motion to require plaintiffs to make more definite and certain which defendants are alleged to have engaged in what conduct is similarly lacking in merit. First, plaintiffs have endeavored to make specific allegations where the identity of the perpetrators is known. However, given the circumstances of the events that have given rise to this lawsuit, it is impossible for plaintiffs in many instances at this stage of the proceedings to attribute certain conduct to particular defendants because the identities of

many individual protestors and their group affiliation, if any, is unknown to plaintiffs, even though it is likely known to some or all of the defendants. However, recitations of those facts that are attributable to certain defendants are set forth in plaintiffs' reply memoranda. Plaintiffs' Reply to PETA's Response, pp. 3-5. Plaintiffs' Reply to IDA, Rossell, Durkee & Mieras' Response, pp. 3-4.

Beyond those known instances, there is a strong likelihood of confusion over actual responsibility, as is evident in the declaration of Mr. Rice on behalf of PETA, who says PETA makes available its signs and other information to other third parties. Rice Declaration, pp. 3-4. As noted above, plaintiffs have alleged and presented evidence of PETA's participation in the protest activity, which PETA denies. Rice Declaration, pp. 2-3. When the defendants themselves contribute to the confusion, they should not be allowed to exculpate themselves summarily prior to conducting discovery.

MOTION TO STRIKE CERTAIN PORTIONS OF DECLARATIONS

I. Motion to strike declarations in entirety

Defendants IDA, Matt Rossell, Connie Durkee, and Kevin Mieras have moved to strike the entire declarations of Plaintiffs Gregg and Linda Schumacher and witness Scott Castleman because the introductions to their declarations do not contain the specific words "personal knowledge." However, a closer review of Gregg Schumacher's and Scott Castleman's declarations state that the declarants are "personally familiar with the facts recounted herein." Gregg Schumacher Declaration, p. 2. Scott Castleman Declaration, p. 2. Linda Schumacher's declaration states that she works at Schumacher Furs and has personally observed the activities discussed in her declaration. Linda Schumacher Declaration, pp. 2, 3, 5.

Defendants clearly are attempting to elevate form over substance. Indeed, while a declarant is required to have personal knowledge of the facts contained in his or her declaration, this knowledge is not established by merely reciting the words "personal knowledge," but rather by explaining or demonstrating a personal knowledge of such facts. *See Sheet Metal Workers' International Ass'n v. Masidon Ind.*, Inc., 84 F.3d 1186, 1193 n.9 (9th Cir. 1996)(personal knowledge established by affiant's statement that he was the officer manager and became familiar with the relevant events)(citing *Ondis v. Barrows*, 538 F.2d 904, 907 n.3 (1st Cir.1976)); *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990)(personal knowledge can be inferred from the affidavit).

As noted above, Gregg Schumacher has sufficiently demonstrated that he has personal knowledge of the facts contained in his declaration not only by stating that he is "personally familiar with the facts recounted herein," but also by stating that he is the owner and manager of Schumacher Furs. In this position, Gregg Schumacher has personally observed and been targeted by much of the illegal conduct at issue in this case. Likewise, Linda Schumacher has adequately demonstrated that she personal knowledge of the facts contained in her declaration by stating that she works at Schumacher Furs and has personally observed the protestors' illegal conduct. Her declaration also states that she has seen the protestors harass customers and employees and that she has also personally been harassed and intimidated by the protestors. Finally, Scott Castleman has sufficiently demonstrated a personal knowledge of the events described in his declaration by stating that he was hired by Schumacher Furs to provide security services and in that capacity has personally monitored and documented protest activity since September 2006. In sum, all of the declarations submitted by the Plaintiffs are based upon personal knowledge and should not be stricken.

II. Motion to strike portions of the declarations

In addition to arguing that the declarations should be stricken in their entirety, Defendants IDA, Rossell, Durkee, and Mieras also argue that specific portions of the

declarations should be stricken due to the same objection - lack of personal knowledge or conclusory. Defendants allot 15 pages to a dissection of the declarations and claim that the declarants lack personal knowledge of virtually everything contained in their declarations. For example, defendants object to the following statement in Gregg Schumacher's declaration: " 'Individual members of the mobs have also entered our store to disrupt our business.' Declaration, p. 3. *Mobs are not membership organizations*. To make such an assertion is beyond Schumacher's personal knowledge." Defendants' Motion to Strike, p. 3, para. 4 (emphasis added). Either defendants' comment is sarcastic, or they believe Gregg Schumacher is asserting that a mob is an actual organization with enrolled members. To clarify, Gregg Schumacher is asserting that individuals from the "mob" of protestors entered Schumacher Furs, and such a statement is within his personal knowledge.

The Defendants' motion also objects to the following sentence contained in Gregg Schumacher's declaration:

> "The intimidation and harassment have continued unabated to the present time.' Id. Intimidation and harassment do not exist in the air. Only people can be intimidated or harassed, and the declaration does not say who, if anyone, felt they were intimidated or harassed. Further, such a declaration would be beyond Schumacher's personal knowledge."

Defendants' Motion to Strike, p. 3, para. 5. Plaintiffs do not understand and, therefore, cannot respond to the comment that intimidation and harassment "do not exist in the air." Regarding the other objections to this sentence, Gregg Schumacher does state in his declaration that he has felt intimidated and harassed, and such a statement is within his personal knowledge. *See* Gregg Schumacher's Declaration p. 7 ("I take these threats seriously and they generate a significant amount of fear . . . ").

Amazingly, defendants even assert that the fact that "[s]omeone smeared feces" on the store windows is "beyond Schumacher's personal knowledge." Defendants'

Motion to Strike, p.4-5, para. 14. This event is clearly within Schumacher's personal knowledge as he personally saw the feces-smeared windows and has attached pictures of such to his declaration. *See* Exs. 2-l, 2-m, 2-n. Again, Defendants devote 15 pages to arguing that the declarants lack personal knowledge of virtually everything contained in their declarations. Rather than responding to each objection separately, Plaintiffs' simply refer the court to the declarantions to confirm declarants' personal knowledge of the facts contained in their declarations.

III. Hearsay objections

The declarations at various points refer to statements and letters from customers regarding their inability to enter the store due to the protests and the intimidation and harassment they felt when trying to shop at Schumacher Furs. Defendants object to these statements as hearsay. *See* Defendants' Motion to Strike, p. 5, 10, 14. The record documents many customers and passers-by who have documented their statements to plaintiffs that they have been subjected to the protestors' threats, harassment, and intimidation and will testify at trial about their experiences. Due to the short time period plaintiffs have had to prepare for the preliminary injunction hearing, they have been unable to obtain declarations from these customers and passers-by. However, as the Ninth Circuit has made clear, this Court may still properly consider these statements and letters in the context of this hearing:

> The urgency of obtaining a preliminary injunction necessitates a prompt determination and makes it difficult to obtain affidavits from persons who would be competent to testify at trial. The trial court may give even inadmissible evidence some weight, when to do so serves the purpose of preventing irreparable harm before trial.

Flynt Distributing Company Inc., v. Harvey, 734 F.2d 13891394 (9th Cir. 1984); citing 11 Wright and Miller, Federal Practice and Procedure, Civil, § 2949 at 471 91973). *See Ross-Whitney Corp. V. Smith Kline & French Laboratories,* 207 F.2d 190, 198 (9th Cir.

1953)(preliminary injunction may be granted on affidavits). Furthermore, the Supreme Court has recognized that "preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). In fact, some federal appeals courts do not apply the Federal Rules of Evidence to preliminary injunction hearings in general. *See S.E.C. v. Cherif*, 933 F.2d 403, 412 n. 8 (7th Cir.1991); *Asseo v. Pan Am. Grain Co.*, 805 F.2d 23, 25-26 (1st Cir.1986). It follows that it would be proper for this Court to consider the customers' statements and letters, and other statements challenged as hearsay, in this preliminary injunction hearing.

Defendants also object to statements that refer to Defendant Animal Liberation Front (hereinafter "ALF") as an organization which "commits acts of violence to achieve its goals," and objects to Plaintiff Counsel Herbert Grey's declaration as hearsay and multiple hearsay. Defendants' Motion to Strike, p. 6. Herbert Grey's declaration contains excerpts of FBI testimony before Congress concerning ALF, and specifically the FBI refers to ALF as a serious domestic terrorist threat. These statements regarding ALF are not offered to prove the truth of the matter asserted, but to show knowledge of the organization which supports a reasonable fear in Gregg and Linda Schumacher when they receive threatening letters and communication from ALF.

Finally, throughout defendants' Motion to Strike, certain statements are challenged because they are "not linked to a specific defendant." The declarants have provided facts that are within their personal knowledge regarding ongoing illegal conduct and which are relevant to this Court's determination regarding whether to impose a preliminary injunction to prohibit this illegal conduct. The fact that the declarants have not linked each incident to a specific person is not grounds to strike those portions of the declarations and Defendants have offered no such authority for doing so.

CONCLUSION

None of the defendants' motions have legal or factual merit, and they should be denied.

DATED this 16th day of May, 2007.

Herbert G. Grey, OSB #81025
Jill Odell, OSB # 973581 (adm. pending)
4800 SW Griffith Drive, Suite 320
Beaverton, OR 97005-8716
Telephone: 503.641.4908
Facsimile : 503.641.8757
Email : hgrey.law1@verizon.net
Email : jillodell@verizon.net

Jonathan A. Clark, OSB # 02274
960 Liberty Street SE, Suite 250
Salem, OR 97302
Telephone: 503.581.1229
Facsimile : 503.365.0374
Email : jonathan@jaclawoffice.com

Of Attorneys for Plaintiffs