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UNITED STATES DISTRICT COURT

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 DURKEY**; **ALEX LILLI**; **JOHN DOES 1-10**; and **JANE DOES 1-10**,

Defendants.

CV 07-601 MO

DEFENDANT CITY OF PORTLAND'S RESPONSE TO MOTION TO DISMISS FOR LACK OF PENDENT PARTY JURISDICTION ON BEHALF OF IN DEFENSE OF ANIMALS, MATT ROSSELL, CONNIE DURKEE, AND KEVIN MEIRAS

(Filed by Defendant City of Portland)

I. INTRODUCTION

Defendants In Defense of Animals, Matt Rossell, Connie Durkee and Kevin Meiras ("co-Defendants") have filed a motion to dismiss plaintiffs' Complaint for lack of jurisdiction. Defendant City of Portland opposes co-defendants' motion.

II. PLAINTIFFS' STATE LAW CLAIMS AGAINST CO-DEFENDANTS ARE PART OF THE SAME "CASE OR CONTROVERSY" AS PLAINTIFFS' CLAIMS AGAINST DEFENDANT CITY OF PORTLAND

Under 28 U.S.C. § 1367(a),

> in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a). (Emphasis added.) *See also Trustees of the Construction Industry and Laborers Health and Welfare Trust et al. v. Desert Valley Landscape & Maintenance, Inc. et al.,* 333 F.3d 923, 925 (9th Cir. 2003) ("Pendant party jurisdiction is constitutional so long as the pendent state law claim is part of the same "case or controversy" as the federal claim.") "The conferral of jurisdiction by § 1367(a) is broad…" *Picard v. Bay Area Regional Transit District,* 823 F. Supp. 1519, 1526 (N.D. Cal. 1993).

"Nonfederal claims are part of the same "case" as federal claim when they "'derive from a common nucleus of operative fact' and are such that a plaintiff 'would ordinarily be expected to try them in one judicial proceeding.'" *Trustees of the Construction Industry, supra,* 333 F.3d at 925 (quoting *Finley v. United States,* 490 U.S. 545, 549 (1989), quoting *United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 725 (1966).) "A loose factual connection between the claims is generally sufficient." *Ammerman v. Sween ,* 54 F.3d 423, 424 (7th Cir. 1995) (citing *Wright, Federal Practice and Procedure § 3567.1* at 117 (2d ed. 1984). A single type of injury is one "case or controversy," regardless of the legal theories of causation. *See Sinclair v. Soniform, Inc. et al.,* 935 F.2d 599, 603 (3rd Cir. 1991).

In *Sinclair,* a scuba diver suffered decompression sickness while diving in navigable waters off the coast of New Jersey. He brought claims against the boat's captain and owner, against the dive master, and against the manufacturer of his buoyancy compensator that allegedly failed during the dive. The diver claimed all three groups of defendants were negligent, although for different reasons. *Id*. at 600-601. The injured diver had sued the boat owner and captain, and

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the dive master in federal court, invoking the court's admiralty jurisdiction. *Id*. at 601.

The Third Circuit held that the diver's claims arose from a common nucleus of operative fact. *Id.* at 603. "Both sets of claims are based on the same purported injuries stemming from the same scuba diving incident. Those injuries were allegedly caused by the negligence of both the crew and the manufacturer." *Id.*

In the present case, plaintiffs' claims arise from the protests that have occurred at their retail store in downtown Portland from November 2005 until the present. (Complaint, ¶16.) Plaintiffs essentially allege the City's police bureau has either acquiesced in, or collaborated with, the unlawful and tortious activity of the City's co-defendants. (See Complaint, ¶¶ 18, 19, 20(a)-(b).)[1] Certainly, plaintiffs are alleging the behavior of all the defendants has led to their injuries. With this type and degree of alleged linkage, plaintiffs' claims against the City and their claims against the co-defendants arise from a "common nucleus of operative fact."

Moreover, it is fair to say the common legal and factual issue paramount in all the claims against all parties is the purported First Amendment activity of both the co-defendants and of the plaintiffs, and the City's legal responsibility, if any, to police or manage that activity. This legal and factual anchor ties the claims against the City to the claims against the co-defendants. If the actions about which plaintiffs' complain are protected by the First Amendment or a similar privilege, then plaintiffs' claims will fail.

Furthermore, the federal claims against the City and the state law claims against the co-defendants will involve many of the same witnesses. Many of the co-defendants are likely to be subpoenaed to testify at trial related to the claims against the City. In fact, during the hearing on plaintiffs' motion for a preliminary injunction, some of these co-defendants have already offered testimony demonstrating the interconnection between their purported speech activities and the

[1] The City has denied these allegations. (See Answer and Affirmative Defenses, ¶¶ 18, 19, 20(a)-(b).) However, for purposes of the co-defendants' motion to dismiss, the Court must accept the allegations in the Complaint as true.

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City's policing of those activities. See Affidavit of Matt Rossell, ¶ 8. ("I have constantly worked with the police to make sure that activities that I have engaged in were not in violation of any ordinances.") See Affidavit of Kevin Mieras, ¶ 9. ("I have checked with the police to make sure that activities that I have been engaged in were not in violation of any ordinances.")

Recall, although plaintiffs have asserted three federal claims against defendant City of Portland, (see Complaint, ¶¶ 23-27), plaintiffs have also asserted five state law claims against the City, all of which plaintiffs have also asserted against the co-defendants.[2] (See Complaint, ¶¶ 28-42, 46-48.) The commonality of much of the evidentiary presentation required to resolve the claims at trial affirms that the plaintiffs' claims against the City and the co-defendants arise from a "common nucleus of operative fact." *See, Pickard, supra,* 823 F. Supp. at 1527. Co-defendants are simply mistaken when they contend otherwise. (See co-defendants' memorandum, p. 5.)

III. THERE ARE NO FACTUAL PREDICATES AUTHORIZING THE COURT TO DECLINE THE EXERCISE OF SUPPLEMENTAL JURISDICTION OVER THE CO-DEFENDANTS.

If a district court is conferred the power to exercise supplemental jurisdiction under 28 U.S.C. § 1367(a), then that court can decline to assert such jurisdiction "only if one of the four categories specifically enumerated in *section 1367(c)* applies." *Executive Software N. Am., Inc., v. United States Dist. Ct.,* 24 F.3d 1545, 1555-56 (9th Cir. 1994). (Emphasis added.) These enumerated factors are:

> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

[2] The trespass claim is the sole state law claim asserted against the co-defendants only. (See Complaint, ¶¶ 43-45.)

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Id. at 1556. See also 28 U.S.C. § 1367 (c).

In order to exercise its discretion to decline supplemental jurisdiction, a district court must identify "a factual predicate that corresponds to one of the *section 1367(c)* categories." *Id.* at 1557. However, "[o]nce that factual predicate is identified, the exercise of discretion, of course, still is informed by whether remanding the pendent state claims comports with the underlying objective of "most sensibly accommodating" the values of "economy, convenience, fairness and comity." *Id.*

Co-defendants appear to argue that subsection (2) applies, and that the state law claims are predominant over the federal claims. (See co-defendants' memorandum, p. 4.) Co-defendants argue the state law claims will require different proof than the federal claims, and point out the tally of state law claims outnumbers the tally of federal claims. (See co-defendants' memorandum, p. 5.) Co-defendants are wrong.

First, as explained earlier, the prosecution and defense of the federal claims involve an enormous amount of overlap in terms of proof with the state law claims because the free speech issue permeates the entire case and is related to the defense of all the claims, both federal and state.

> If the facts needed to prove each claim are similar or identical, it cannot be concluded that the state law claims predominate over the federal claims or that the scope of the case will be expanded by exercising supplemental jurisdiction over the appended claim.

16 *Moore's Federal Practice,* § 106.65 (Matthew Bender 3d ed.)

Also, the particular tally of claims is irrelevant because the City and co-defendants are both defending five of the six state law claims in plaintiffs' Complaint.

Second, co-defendants do not seem to be arguing that plaintiffs should have no forum to litigate their state law claims. Rather, although not explicitly stated, co-defendants seem to be saying that state court is the appropriate and better forum to litigate these claims. However, the fact of possible parallel proceedings actually weighs against the Court as a factor in declining to

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exercise supplemental jurisdiction. *See Hunter by Conyer v. Estate of Baecher,* 905 F. Supp. 341, 345 (E.D. Va. 1995) (obvious that splitting action between two jurisdictions will result in repetition of efforts between state and federal court.) Judicial economy and convenience weigh in favor of trying all the claims in one proceeding. That proceeding should occur in this Court.

The Court should deny co-defendants' motion.

Dated this 31st day of May, 2007.

Respectfully submitted,

/s/ William W. Manlove
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Of Attorneys for Defendant City of Portland

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