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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,

Plaintiffs,

v.

CITY OF PORTLAND, a municipal  
corporation; IN DEFENSE OF ANIMALS,

No. CV 07-00601-MO

DEFENDANTS IN DEFENSE OF  
ANIMALS, MATT ROSSELL, CONNIE  
DURKEE AND KEVIN MIERAS' REPLY  
TO CITY OF PORTLAND'S RESPONSE  
TO MOTION TO DISMISS FOR LACK OF  
PENDENT PARTY JURISDICTION

PAGE 1 – DEFENDANTS IN DEFENSE OF ANIMALS, MATT ROSSELL, CONNIE DURKEE  
AND KEVIN MIERAS' REPLY TO DEFENDANT CITY OF PORTLAND'S RESPONSE TO  
MOTION TO DISMISS FOR LACK OF PENDENT PARTY JURISDICTION

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 MIERAS aka “Bluejay”; CONNIE DURKEE; ALEX LILLI; JOHN DOES 1-10; and JANE DOES 1-10,

Defendants.

## I. INTRODUCTION

Co-defendant City of Portland has opposed defendants In Defense of Animals, Matt Rossell, Connie Durkee and Kevin Mieras’ Motion to Dismiss Plaintiffs’ Complaint for Lack of Pendent Party Jurisdiction. The City of Portland’s opposition disregards the fact that plaintiffs’ allegations do not set forth a common nucleus of operative facts shared by the federal and state claims. In addition, the City of Portland mistakenly contends that the state claims do not predominate. The City overlooks the fact that the state claims are more salient both in terms of the allegations set forth in the Complaint and the remedies sought.

## II. ARGUMENT

### **A. Plaintiffs’ Vague Allegations Fail to Establish That Their Federal Claims Share a Common Nucleus of Operative Facts With the State Claims Asserted Against In Defense of Animals, Matt Rossell, Connie Durkee and Kevin Mieras**

The plaintiffs bear the burden of proving the Court has jurisdiction to decide the case. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). A complaint will be dismissed if, looking at the complaint as a whole, it appears to lack federal jurisdiction either “facially” or “factually.” *See Thornhill Publishing Co., Inc. v. General Telephone & Electronics. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). Thus, in resolving a motion to dismiss for lack of subject matter

jurisdiction, the Court is not limited to allegations in the complaint, but may consider material outside the pleadings. *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). “Unlike a Rule 12(b)(6) motion, a Rule 12(b)(1) motion can attack the substance of a complaint’s jurisdictional allegations despite their formal sufficiency, and in so doing rely on affidavits or any other evidence properly before the court.” *Id.*<sup>1</sup>

Co-defendant City of Portland correctly asserts that supplemental jurisdiction exists where there is a common nucleus of operative facts between the state and federal claims. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). However, the City has failed to consider that plaintiffs’ allegations set forth no “nucleus” of facts for the Court to examine, because the complaint does not state when and under what circumstances In Defense of Animals, Matt Rossell, Connie Durkee or Kevin Mieras engaged in acts forming the basis of plaintiffs’ state law claims. The complaint alleges that In Defense of Animals, Matt Rossell, Kevin Mieras and Connie Durkee “periodically” entered their store and blocked the sidewalks or traffic “on numerous occasions” over a 17 month period beginning on November 12, 2005. Complaint ¶¶ 16-17. The complaint also alleges this group of defendants, plus twenty Doe defendants, “engaged in one or more” of the following: entering the store without permission, blocking the sidewalk or traffic, making noise or threats, acts of vandalism and public nudity. Complaint ¶¶ 36, 47. Though plaintiffs claim Portland Police Bureau officers observed “many of the events,” they fail to indicate whether In Defense of Animals, Matt Rossell, Connie Durkee or Kevin Mieras committed any unlawful act that the Bureau failed to respond to or prevent. See Complaint ¶ 19.

Plaintiffs’ failure to provide even the most basic details regarding their claims, such as who

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<sup>1</sup> Though defendants’ original motion is pursuant to 12(b)(2), its substance raises 12(b)(1) objections as well since it goes to the Court’s subject matter jurisdiction over the claims against them. *See Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 527 (9th Cir. 1983)(noting the court will construe a motion, however styled, to be the type proper for the relief requested).

did what, and when the act occurred, leaves doubt as to whether the state claims against In Defense of Animals, Matt Rossell, Connie Durkee and Kevin Mieras share a common nucleus of operative facts with the federal claims against the City of Portland. See *Hudson v. Yuba County Sheriff's Department*, No. Civ. 06-906-DFL-GGH, 2007 WL 471004 at \*1-2 (E.D. Cal. Feb. 9, 2007). To resolve this doubt, the Court may properly consider material outside the pleadings in ruling on a motion to dismiss for lack of subject matter jurisdiction. *St. Clair*, 880 F.2d at 201.

In declarations totaling 37 pages, plaintiffs' only specific allegations against Mr. Mieras do not share facts in common with the plaintiffs' federal claims against the City of Portland. Plaintiffs allege that in February 2006, Gregg Schumacher heard a voice that sounded like Mr. Mieras, which said "Hey, Gregg! Hey, Gregg!" to him in the vicinity of his home and that Mr. Mieras has engaged in "verbal taunting" of Mr. Mieras. Declaration of Gregg Schumacher ¶ 9; Supplemental Declaration of Gregg Schumacher ¶ 2. Mr. Mieras denied these allegations. Affidavit of Kevin Mieras 12; Supplemental Affidavit of Kevin Mieras ¶ 5. Plaintiffs have recently added Mr. Mieras' operation of the "portlandfurcruelty.com" website as an allegation. Plaintiff's Response to Defendant Miera's Motion for Reconsideration; Scott Castleman Declaration ¶ 2. Even if the Court assumes the allegations are true, the alleged acts are not crimes. Moreover, plaintiffs do not indicate whether they brought the alleged incidents to the attention of the Portland Police Bureau or whether the Bureau failed to appropriately respond to the incidents.

Plaintiffs' only specific allegations against Mr. Rossell are that he asked Mr. Schumacher to place explanatory tags on fur coats, displayed an In Defense of Animals sign on December 9, 2006, and, at some unidentified time, used a bullhorn and set up a television set. Declaration of Gregg Schumacher ¶ 14; Declaration of Scott Castleman ¶ 3. Even if the Court assumes the allegations are true, the alleged acts are not crimes. Moreover, plaintiffs do not indicate whether they brought any

act by Mr. Rossell to the attention of the Portland Police Bureau or whether the Bureau failed to appropriately respond to the incidents. Finally, plaintiffs make no specific allegations against Connie Durkee or against In Defense of Animals.

The plaintiffs' failure to establish a nexus between the City's alleged deprivation of their constitutional rights and their state claims against In Defense of Animals, Matt Rossell, Connie Durkee and Kevin Mieras renders their case readily distinguishable from the cases cited by the City of Portland. Those cases all involved a specific incident that gave rise to both the state and federal claims. *Trustees of the Construction Industry and Laborers Health and Welfare Trust v. Desert Valley Landscape and Maintenance*, 333 F. 3d 923, 925 (9th Cir. 2003) (debt plaintiffs sought to recover under a state claim was the same debt sought under a federal claim); *Ammerman v. Sween*, 54 F.3d 423, 425 (7th Cir. 1995) (state tort claims and federal sex discrimination claim arose from single sexual assault); *Sinclair v. Soniform*, 935 F.2d 599, 603 (3d Cir. 1991) (state tort claims and federal admiralty claims based on same injuries stemming from a single scuba diving incident).

Here, the plaintiffs have not alleged nor presented any evidence that In Defense of Animals, Matt Rossell, Connie Durkee or Kevin Mieras committed any unlawful act that the City of Portland failed to respond to or to prevent. The City correctly asserts that the alleged tort liability of In Defense of Animals, Matt Rossell, Connie Durkee and Kevin Mieras raises questions of their First Amendment right to free speech. However, this does not mean the state claims against them share facts in common with the federal claims asserted against the City if their alleged tortious conduct took place independent of any act by the City. Plaintiffs have failed to demonstrate a common nucleus of operative facts between the City of Portland's alleged violations of the plaintiffs' constitutional rights and the state tort claims against In Defense of Animals, Matt Rossell, Connie Durkee or Kevin Mieras.

**B. Plaintiffs' State Claims Substantially Predominate Because the Complaint and the Relief Requested Focus on the State Claims**

Under 28 USC § 1367(c)(2), a federal court may dismiss state law claims if it appears that the state issues substantially predominate in terms of proof, of the scope of the issues raised, or in the comprehensiveness of the remedy sought. The City mistakenly contends that plaintiffs' state claims against In Defense of Animals, Matt Rossell, Connie Durkee and Kevin Mieras do not predominate because the facts needed to prove those claims are "similar or identical" to the federal claims asserted against the City of Portland. Defendant City of Portland's Memorandum at 5. However, as noted above, the specific allegations against In Defense of Animals, Matt Rossell, Connie Durkee and Kevin Mieras do not overlap with the federal claims against the City of Portland. In addition, the City overlooks the fact that the plaintiffs will have to prove the City acted pursuant to official policy or custom -- an evidentiary issue not presented in the state law claims. *See Monell v. Department of Social Services*, 436 U.S. 658 (1978). Similarly, the plaintiffs' equal protection claim requires that they present evidence that the City treated similarly situated individuals differently than it treated them. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (U.S. 1985).

The City is similarly mistaken in its claim that the number of state claims is irrelevant to the Court's determination of whether the state claims predominate. (Defendant City of Portland's Memorandum at 5). In *Hunter by Conyer v. Estate of Baecher*, a case cited by the City of Portland, the court noted the predominance determination is a "value-laden judgment" that considers whether the state claims are "more salient in the case as a whole." 905 F. Supp. 341, 344 (E.D. Va. 1995). Here, the state claims are more salient than the federal claims. Throughout the complaint, plaintiffs allege that the protests outside their store caused them fear and distress and negatively impacted their business. Complaint ¶¶ 1, 16, 17, 22, 29-48. There is little focus on the City's alleged

violation of their constitutional right to free speech, due process and equal protection of the law.

Moreover, the City also overlooks the fact that the comprehensiveness of the remedy sought also weighs in favor of finding that the state claims predominate. Plaintiffs do not allege a specific amount of monetary damages for their federal claims, but allege \$2.5 million as damages for their state claims. Complaint ¶¶ 26, 30, 31, 37, 42, 45, 48. Moreover, plaintiffs sought a preliminary injunction based solely on their state claims against the pendent party defendants. Complaint at 14; Plaintiff's Motion for Preliminary Injunction at 2.

Finally, the City maintains that the prospect of parallel proceedings weighs against declining jurisdiction here. Defendant City of Portland's Memorandum at 5-6. However, since the claims against the City of Portland do not involve the same set of operative facts as the claims against In Defense of Animals, Matt Rossell, Connie Durkee or Kevin Mieras, a common law tort case against them in state court will not parallel the federal constitutional claims proceeding in this court. Thus, the facts here are different from those in *Hunter*, because in that case both the federal and state claims involved one set of operative facts related to lead paint in a rental residence. *Hunter*, 905 F. Supp. at 13. Therefore, at this early stage in the proceedings, the Court may properly exercise its discretion to decline supplemental jurisdiction.

#### IV. CONCLUSION

Based on the foregoing, Defendants In Defense of Animals, Matt Rossell, Connie Durkee and Kevin Mieras respectfully request that the Court grant their Motion to Dismiss for Lack of Pendent Party Jurisdiction.

RESPECTFULLY SUBMITTED this 11th Day of June, 2007.



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**CERTIFICATE OF SERVICE**

I hereby certify that I served a true copy of the foregoing DEFENDANTS IN DEFENSE OF ANIMALS, MATT ROSSELL, CONNIE DURKEE AND KEVIN MIERAS' REPLY TO CITY OF PORTLAND'S RESPONSE TO MOTION TO DISMISS FOR LACK OF PENDENT PARTY JURISDICTION on the following person(s) on the date indicated below, by the following method:

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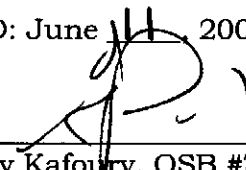
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