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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-MO **SUPPLEMENTAL BRIEFING REGARDING EVIDENCE AND DEFENSES IN DEFENDANT MEIRAS' MOTION TO STRIKE**

The Court requested briefing on two questions.

1. How the Court should respond to a claim from Defendant Meiras that he has been sued for conduct protected by the Constitution.

2. Whether the record before the Court contains substantial evidence supporting a prima facie case against Defendant Kevin Meiras on Plaintiffs' Fifth Claim for Relief (Interference with Business Relations) and Plaintiffs' Sixth Claim for Relief (Interference with Contract).

1. If Defendant asserts that he has only engaged in protected activity, the Court should, first, consider the challenged action and decide whether it is protected speech.

If Defendant Meiras claims that he only engaged in constitutionally protected activity, the Court must consider in the first prong of the analysis whether the challenged action is protected speech. *Paul for Council v. Hanyecz*, 85 Cal App 4th 1356 (2001) (Money laundering has no constitutional protection, and defendants fail to meet their burden as a matter of law.) Where, as here, the challenged action includes violations of city ordinances, "as a matter of law, [no] defendant can[] make a prima facie showing the action arises from protected activity." *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 129 Cal App 4th 1228, 1246, 29 Cal Rptr 3d 521 (2005).

The *Huntingdon* case held that *NAACP v. Claiborne Hardware Co.*, 458 US 886, 102 S.Ct. 3409 (1982) *reh den* 459 US 898, 103 S. Ct. 199 (1982), does not apply where the action arises under statutes that proscribe the challenged action; nor does it apply where an individual is defending his own actions instead of his association with a group. *Huntingdon* 129 Cal App 4th at 1257-1258. This case is substantially different than *NAACP v. Claiborne Hardware*. In *Claiborne Hardware*, the Court evaluated whether the evidence at trial was sufficient for liability to attach to a national organization and the organization's members on the basis of assembly and speech. The Court held that

attendance at the organization's meetings could not create liability for individuals. *Claiborne Hardware,* 458 US at 924. Nor could an organization be held liable for speech of one of its members without a finding that the organization separately authorized or ratified unlawful conduct. *Claiborne Hardware,* 458 US at 931.

The issue before the *Claiborne Hardware* Court, though, is not before this Court. The *Claiborne Hardware* Court had to decide whether political speech that contained threats of violence had lost its protected status and become actionable. *Claiborne Hardware,* 458 US at 927.

Conduct may touch on an issue of free speech but yet still not be protected under Anti-SLAPP motions. "[I]f the defendant's act was burning down the developer's office as a political protest the defendant's motion to strike could be summarily denied without putting the developer to the burden of establishing the probability of success on the merits". *Wilcox v. Superior Court*, 27 Cal App 4th 809 (1994).

Analysis under the second prong, the sufficiency of the evidence, only comes after the defendant has established that he is charged with a constitutionally protected activity. Here, Defendant cannot do so.

2. Plaintiffs have submitted evidence that satisfies the appropriate standard.

The Anti-SLAPP Motion to Strike must be treated as a Motion to Dismiss. ORS 31.150(1). As a motion to dismiss, all facts should be viewed in the light most favorable to the non-moving party. *L. H. Morris Electric v. Hyundai Semiconductor*, 203 Or App 54, 63 (2005) *citing Kelly v. Olinger Homes*, 200 Or App 635, 641, 117 P3d 282 (2005).

In an Anti-SLAPP Motion to Strike, after a defendant demonstrates that he has been sued for actions taken in furtherance of the constitutional right to petition or the

constitutional right of free speech, the plaintiff must establish that there is a probability of prevailing on the claim by submitting substantial evidence that supports a prima facie case. ORS 31.150 (2)-(3). Where a plaintiff shows evidence of violation of a municipal code, he has established a probability of prevailing. *See Huntingdon* 129 Cal App 4th at 1263-1264. These Anti-SLAPP motions should be used only to dismiss non-meritorious litigation meant to chill the valid exercise of protected speech activity. *Sipple v. Foundation for Nat. Progress*, 83 Cal Rptr. 2d 677, 682 (Cal. App. 1999).

To determine whether sufficient evidence is before the Court, the question in the second prong of analysis, the Court should apply the standard used in California where Anti-SLAPP jurisprudence is more fully developed: that is, plaintiff must simply demonstrate that the challenged cause of action has "minimal merit." *Navellier v. Sletton*, 29 Cal 4th 82 (2002); *Flately v. Mauro*, 121 Cal.App.4th 1523 (2004). To hold Plaintiff to a higher standard violates Plaintiffs' due process rights by forcing them to meet an evidentiary standard only properly applied following discovery. *Celotex Corp. v. Catrett*, 477 US 317 (1986) (premature summary motion cannot be granted without allowing the responding party an opportunity to take necessary discovery); *Anderson v. Liberty Lobby, Inc.*, 477 US 242 (1986) (summary judgment should be refused where the nonmoving party has not had the opportunity to discover information that is essential to her opposition); *See also, Opinion of the Justices*, 138 NH 445 (1994) (New Hampshire Supreme Court holds that Anti-SLAPP legislation based on the California Anti-SLAPP statute would violate constitutional right to jury trial). Viewing the facts in the light most favorable to the non-moving party under a "minimal merit" analysis allows constitutional application of the Anti-SLAPP statute under *Celotex Corp.*

At the hearing on this matter, the Court grouped the analysis of the Fifth and Sixth claims, and Plaintiffs do so here as well. The Court has already determined that the evidence supported the existence of a professional business relationship, and turned to the questions of (1) whether the interference was intentional, and (2) whether the record contained evidence of improper means and purpose.

Evidence of intent to interfere is, without question, before the Court. Defendant Meiras provided live testimony at the hearing that he maintained a website address that mimicked the Plaintiffs' website. http://shumacherfurs.com takes visitors to his anti-fur website. Decl. of Plaintiffs' Counsel Herbert G. Grey in Support of Plaintiffs' Response to Meiras' Motion to Reconsider Preliminary Injunction. Although Defendant Meiras testified that he created only insignificant internet traffic at his web addresses, the only possible conclusion to draw from his use of similar Schumacher internet addresses is an intent to draw people away from the Schumacher site to keep them from the information they sought there. Whether he is or was successful in this endeavor is irrelevant: it is evidence of his intent to interfere with plaintiffs' ability to run their business.

The totality of the evidence proves improper means. For example, a passerby said to one of the people with whom Mr. Meiras protests, "I would be scared to go in that store." The response from the protestor was "Good. We're getting the job done, then." Decl. of Scott Castleman in Support of Plaintiffs' Motion for a Preliminary Injunction, Para. 6. This evidence clearly indicates that the intent of the protestors is not dialogue on a matter of public interest. Their intent, and their improper means, was to generate fear. Defendant Meiras seems to be one of the leaders of the protests and protestors. Decl. of Gregg Schumacher in Support of Plaintiffs' Motion for a Preliminary Injunction, Para. 3.

The other Declarations all contain evidence of improper means—harassment, intimidation, violation of noise ordinances, public nudity, and blocking sidewalks. *See* Decl. of Scott Castleman, Decl. of Gregg Schumacher, Decl. of Linda Schumacher.

The damage being done is also clearly before the Court. Schumacher Furs has closed as a result of the intimidation and harassment by protestors organized and led by Defendant Meiras. Decl. of Gregg Schumacher in Support of Plaintiffs' Motion for a Preliminary Injunction, Paragraph 3. The evidence is sufficient to defeat a Motion to Strike at the pre-discovery stage.

CONCLUSION

The challenged action clearly has no constitutional protection, so Meiras cannot satisfy the first prong. Therefore, the Motion must be denied. Plaintiff has presented sufficient evidence to establish Defendant Meiras' liability, and the Anti-SLAPP Motion to Strike should not be turned into a pre-discovery Motion for Summary Judgment.

DATED this 28th day of June, 2007.

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