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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

No. CV 07-601-MO

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF JUDGMENT OF DISMISSAL AS TO PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, IN DEFENSE OF ANIMALS, MATT ROSSELL, AND CONNIE DURKEE

ROSSELL; KEVIN MEIRAS aka "Bluejay"; CONNIE DURKEE; ALEX LILLI; JOHN DOES 1-10; and JANE DOES 1-10

I. INTRODUCTION

This Court granted special motions to strike pursuant to ORS 31.150 as to defendants People for the Ethical Treatment of Animals, In Defense of Animals, Matt Rossell, and Connie Durkee. Plaintiffs respectfully request the Court to reconsider its judgment of dismissal, issued July 6, 2007, as such dismissal is manifestly unfair because: (1) Oregon's anti-SLAPP statute, ORS 31.150 contains internally inconsistent standards for adjudication applied unconstitutionally against plaintiffs herein; (2) ORS 31.150 violates plaintiffs' right to a trial by jury under the Oregon constitution; and (3) the court improperly required plaintiffs to satisfy the second prong of the anti-SLAPP test when defendants could not as a matter of law satisfy the first prong of the anti-SLAPP test because plaintiffs' claims arise from conduct that is not constitutionally protected.

II. ARGUMENT

A. Oregon's Anti-SLAPP Statute, ORS 31.150, is Internally Inconsistent and Resulted in the Court Holding Plaintiffs to an Unconstitutional Burden of Proof Prior to Discovery.

According to the plain language of the statute at issue, ORS 31.150, a special motion to strike "shall be treated as a motion to dismiss under ORCP 21." ORS 31.150 (1). It is well established that in considering motions to dismiss, the trial court assumes the truth of all allegations in the pleadings, including any inferences that may be drawn therefrom, and views the allegations and inferences in the light most favorable to the nonmoving party. *L. H. Morris Electric v. Hyundai Semiconductor*, 187 Or App 32, 35, 66 P3d 509 (2003). However, this burden of proof standard conflicts with the

anti-SLAPP statutory provisions that require the plaintiff to establish a "probability that plaintiff will prevail" by "presenting substantial evidence to support a prima facie case." ORS 31.150 (3). Additionally, the statute requires the trial court to "consider pleadings and supporting and *opposing* affidavits" and weigh the competing evidence in determining whether plaintiff has shown a probability of prevailing. ORS 31.150 (4). Indeed, in this case, the Court appeared to weigh the parties' conflicting evidence during the hearing on the special motions on June 18, 2007, but did not assume the truth of the allegations contained in plaintiffs' pleadings nor view the allegations in the light most favorable to the plaintiffs.

Defendant People for the Ethical Treatment of Animals ("PETA") urged the Court not to rely on the allegations in plaintiffs' complaint, and argued that plaintiffs must come forward with evidence that would be admissible at trial. *See* Defendant PETA's Reply Memorandum in Support of its Special Motion to Strike at 8 ("the plaintiff cannot rely on the allegations of the complaint, but must produce evidence that would be admissible at trial"). Defendant PETA cites California cases for this proposition, however, Oregon's anti-SLAPP statute differs from California's anti-SLAPP statute in this respect. Because California's statute does not state that the motion shall be treated as a motion to dismiss, California case law regarding the burden of proof regarding anti-SLAPP motions is inapposite.

The statutory requirement that plaintiffs must present "substantial evidence" prior to discovery violates their due process rights by not allowing them to pursue their claims at all, or to take any discovery unless they first prove by admissible evidence facts to support their claims. This result is manifestly unfair to plaintiffs and violates their constitutional rights to due process by

applying an evidentiary standard which requires them to prove their claims without discovery, which plaintiffs cannot meet, especially in light of the unusually clandestine nature of the acts underlying the claims in this case. Moreover, the court's ruling has triggered a potential liability for plaintiffs to pay the moving defendants' attorney fees. As the United States Supreme Court has held in the analogous context of a premature summary judgment motion, a dispositive motion must "be refused where the nonmoving party has not had the opportunity to discover information that is essential to her opposition." *Anderson v. Liberty Lobby*, 477 U.S. 242, 250 n.5 (1986). *See also Celotex Corp. Catrett*, 477 US 317, 326 (1986).

A summary judgment motion is limited by several due process limitations, such as requiring the nonmoving party to have an opportunity to take necessary discovery (*See* FRCP 56(f)), and forbidding the trial court from resolving the merits of disputed factual claims. Oregon's special motion to strike is not bound by these limitations, and according to *one* section of the statute, allows the trial court to weigh disputed factual issues.[1] The lack of these limitations have caused other states to recognize that although anti-SLAPP statutes are designed to protect a defendant's constitutional rights, an overbroad anti-SLAPP procedure "would seem to extend to these activities a broader protection than the constitution itself provides," and would deny a plaintiff her right of "access to the courts." *Florida Fern Growers Ass'n v. Concerned Citizens of Putnam County*, 616 So2d 562, 570 (Fla. 1993).

Concerning the case at hand, although plaintiffs voiced concerns on the record that the anti-

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[1] For example, Defendant Kevin Mieras testified at the hearing on June 18, 2007, that he had never been at the Schumachers' residence. The Court appeared to credit that testimony, which conflicted with allegations contained in plaintiffs' pleadings.

SLAPP procedure was being applied in a manner which held them to a summary judgment standard prior to discovery, the Court stated that it was not imposing such a standard. However, according to California's anti-SLAPP procedure, upon which defendants and the Court relied, the trial court *does* "address[] the factual and legal issues as in a motion for summary judgment." *Slaney, v. Ranger Insurance Co.*, 115 Cal App 4th 306, 318 (2004)(citing *Paul for Council v. Hanyecz*, 85 Cal App 4th 1356 (2001)). As such, applying the California procedure to the case at hand inappropriately subjected plaintiffs to a summary judgment standard without benefit of discovery and unjustly exposed them to liability for defendants' attorney fees. California cases are simply not instructive on this point because, unlike the California statute, the Oregon statute specifically states that an anti-SLAPP motion should be treated as a motion to dismiss.

B. ORS 31.150 Violates Oregon's Constitutional Right to Trial by Jury.

Article I, section 17, of the Oregon Constitution states, "In all civil cases the right of Trial by Jury shall remain inviolate." The right to trial by jury extends to all cases for which the right existed when the state constitution was adopted in 1857 and guarantees the right to have a jury determine all issues of fact. *Lakin v. Senco Products, Inc.*, 329 Or 62, 987 P2d 463, opinion clarified 329 Or 369, 987 P2d 476 (1999). If an anti-SLAPP motion was truly treated as a motion to dismiss, as stated in one part of the statute, the statute may pass constitutional muster, since in motions to dismiss the court does not resolve the merits of disputed factual claims. However, the statute requires plaintiffs to present substantial evidence prior to discover to survive a special motion to strike, and in determining whether a plaintiff has established a probability of prevailing on the claim, the court "shall consider pleadings and supporting and opposing affidavits stating the facts upon which the

liability or defense is based." ORS 31.150 (4). Therefore, according to this provision of the statute, the trial court is required to weigh the pleadings and affidavits and adjudicate a factual dispute. Because the Oregon Constitution guarantees the right to a jury trial in this case, plaintiffs are entitled to have a jury resolve all disputed factual issues, and the anti-SLAPP procedure violates this right. For these exact reasons, the New Hampshire Supreme Court determined that a statute modeled on the California version would be unconstitutional, stating:

> Unlike [a motion to dismiss and motion for summary judgment] wherein the court does not resolve the merits of a disputed factual claim, the procedure in the proposed bill requires the trial court to do exactly that. In determining whether a plaintiff has met the burden of showing a probability of prevailing on the merits of his or her claim, the trial court that hears the special motion to strike is required to weigh the pleadings and affidavits on both sides and adjudicate a factual dispute. Because a plaintiff otherwise entitled to a jury trial has a right to have all factual issues resolved by the jury, the procedure is the proposed bill violates [the Constitution].

Opinion of the Justices, 138 NH 445, 451, 641 A2d 1012 (1994)(citations omitted). The New Hampshire Supreme Court's analysis is instructive to the instant case, and this Court should also find that ORS 31.150 violated plaintiffs' constitutional right to have factual disputes resolved by a jury.

C. Defendants Cannot Satisfy the First Prong of the Anti-SLAPP Test Because Plaintiffs' Causes of Action Arise From Unprotected Conduct.

Plaintiffs' causes of action arise from conduct which are indisputably unprotected, such as public nudity, harassment, vandalism, and blocking public sidewalks. Plaintiffs have always recognized defendants' constitutional rights to free speech, and lawful demonstrations and protests do not underlie their claims. In the context of California's similar two-prong test, California courts have made clear that if a defendant's conduct did not arise from a constitutional free expression right, the burden does not shift to the plaintiff to show its claims have minimal merit. *See, e.g.,*

Flatley v. Mauro, 121 Cal App 4th 1523, 18 Cal Rptr 3d 472 (2004). The court in *Flately* provides a useful overview of California case law on this issue, stating:

> [T]hat a cause of action arguably may have been "triggered" by protected activity does not entail that it is one arising from such. In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity. In other words, *Navellier* requires, as with any other legal issue, a critical analysis of whether the statutory predicate is met - in this case the existence of protected activity. As *Paul for Council* emphasizes, if the unprotected nature of the activity is effectively conceded, then the burden does not shift. Or as explained in *Kashian*, if the conduct as a matter of law is unprotected, the minimal merit burden does not shift to plaintiff. Finally, as noted in *Chavez v. Mendoza*, if the defendant indisputably concedes the conduct is unprotected, the special motion to strike burden does not shift to the plaintiff.

Flately, 18 Cal Rptr 3d at 484-85 (emphasis in original)(citing *Navellier v. Sletten*, 29 Cal 4th 82 (2002); *Paul for Council v. Hanyecz*, 85 Cal App 4th 1356 (2001); *Kashian v. Harriman*, 98 Cal App 4th 892 (2002); *Chavez v. Mendoza*, 94 Cal App 4th 1083 (2001). *See also Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 129 Cal App 4th 1228, 1245 (2005)("Vandalism, of course, is not a legitimate exercise of free speech rights, and if the complaint arose only from such conduct it would not be subject to an anti-SLAPP motion.").

In the current case, defendants have never disputed the illegality of the conduct underlying plaintiffs' causes of actions; rather, defendants argue that plaintiffs have not presented substantial evidence that defendants are legally responsible for such illegal acts. In arguing that PETA has met its burden under the *first* prong, PETA states, "the problem with plaintiffs' argument is that they have not introduced any evidence to show that PETA. . . participated in demonstrations at Schumacher Furs at any time material to this action." PETA's Reply Memorandum in Support of its Special Motion to Strike at 10. However, the proper analysis for the first prong should be upon

the causes of actions themselves, not whether plaintiffs have sufficient evidence to ultimately impose liability upon particular defendants for these illegal acts; that showing is not required until the second prong is reached. Defendant PETA conflated, and the Court conflated, the two prongs of the test and required plaintiffs to introduce evidence of the defendants' ultimate liability for the illegal acts before defendants satisfied the first prong of the test, which as a matter of law cannot be satisfied because the conduct underlying plaintiffs' causes of action are unprotected. Simply put, the Court ruled that defendants met their initial burden under the first prong because plaintiffs did not meet their burden under the second prong, that is, plaintiffs did not have sufficient evidence that linked defendants to the illegal acts underlying plaintiffs' claims. However, pursuant to a proper application of the anti-SLAPP statute, plaintiffs do not have any burden of proof until the first prong is met, which did not occur here.

Plaintiffs have conceded from the outset of this litigation that discovery is needed to obtain admissible evidence of defendants' responsibility for coordinating and facilitating the illegal actions directed at plaintiffs. This is due to the unusually clandestine nature of the illegal acts and because Defendant City of Portland failed to arrest protestors who were violating the law, which would have led to information about the protestors, their activities, and how the protests were organized. Plaintiffs should not be required to produce evidence of defendants' ultimate responsibility at this point of the litigation because the defendants are unable to meet their initial burden of proof under the first prong and because plaintiffs have not been afforded the opportunity to conduct discovery. At the hearing, the Court questioned whether plaintiffs could ever satisfy the second prong of the test as to PETA in light of *NAACP v. Claiborne Hardware Co.*, 458 US 886 (1982), which held that an

organization is not liable for the unlawful conduct of its members without proof that the organization authorized or ratified the unlawful conduct. However, as *Huntingdon* made clear, *Claiborne Hardware* is inapposite to cases which are brought pursuant to statutes which proscribe threats of violence and where threats are made against specific individuals, such as the case at hand.

CONCLUSION

For the reasons discussed above, the Court should grant plaintiffs relief from its judgment of dismissal, and plaintiffs should be allowed to proceed with discovery as to all defendants.

DATED this 13th day of August, 2007.

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