Mark G. McDougal, OSB #89086
e-mail: mcdougal@kafourymcdougal.com
Natalie McDougal, OSB #04250
e-mail: nataliemcdougal@comcast.net
Gregory Kafoury, OSB #74166
e-mail: kafoury@kafourymcdougal.com
Kafoury & McDougal, Lawyers
320 SW Stark Street #202
Portland OR 97204
ph 503-224-2647; fx 503-224-2673

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 MIERAS aka "Bluejay"; CONNIE DURKEE; ALEX LILLI; JOHN DOES 1-10; and JANE DOES 1-10 Defendants.	No. CV-07-601-HU DEFENDANTS IN DEFENSE OF ANIMALS, MATT ROSSELL AND CONNIE DURKEE'S RESPONSE TO PLAINTIFFS' MOTION FOR RECONSIDERATION OF JUDGMENT OF DISMISSAL

INTRODUCTION

Plaintiffs' Motion for Reconsideration of Judgment of Dismissal as to People for the Ethical Treatment of Animals ("PETA"), In Defense of Animals ("IDA"), Matt Rossell and

Connie Durkee should be denied for a myriad of reasons, including but not limited to the fact that the request for reconsideration does not satisfy the requirements of FRCP 60. In addition, the Anti-SLAPP statute clearly sets out the plaintiffs' burden of proof to overcome an Anti-SLAPP motion and is consistent with the Oregon Rules of Civil Procedure – even if it were not, any conflict should be resolved in favor of the plain language of ORS 31.150, as our legislators made their intent as to the burden of proof unambiguous. Finally, plaintiffs never raised the constitutionality of ORS 31.150, nor did they ever file a motion requesting discovery, which they could have done under ORS 31.150.

I. PLAINTIFFS' HAVE NOT MET THE REQUIREMENTS TO BRING A MOTION FOR RECONSIDERATION[1]

Plaintiffs' Motion for Reconsideration is without basis under FRCP 60. Under FRCP 60(b):

> "...the court may relieve a party or a party's legal representative from a final judgment...for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud...misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or that it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment."

[1] Plaintiffs have raised numerous issues that could be briefed extensively. Defendants have not done exhaustive briefing in that it appears the motion for reconsideration does not fit within Rule 60. To the extent the court entertains a specific substantive argument raised by the motion for reconsideration defendants would appreciate the courts invitation to brief the issue. At this juncture defendants are attempting to limit the rather substantial attorney time and fees that plaintiffs could have to pay if extensive briefing were conducted.

Here, the plaintiffs have failed to meet the requirements for a motion for reconsideration. There was no mistake, newly discovered evidence, fraud etc. warranting reconsideration under FRCP 60(b)(1) through (5). Plaintiffs also do not qualify for reconsideration of this Court's judgment under the catch all language of subsection (6). In *United States v. $39,663.00 in United States Currency*, 971 F.Supp. 486 (D. Or. 1997), the court held that a motion for reconsideration must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. The court gave three examples, including intervening change in controlling law, new evidence, and the need to correct clear error or prevent manifest injustice.

Other courts consider the catch all language of subsection (6) to be more appropriate where some extraordinary circumstances prevented a party from appealing within a reasonable time. "Rule 60(b)(6) has been used sparingly as an equitable remedy to prevent manifest injustice. The rule is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." *United States v. Alpine Land & Reservoir, Co.*, 984 F.2d 1047, 1049 (9th Cir., Nev. 1993). The court in *United States v. Alpine Land & Reservoir* further noted that: "Our review of the cases in this and other circuits illustrates that the courts of appeal have heeded the Supreme Court's admonitions regarding Rule 60(b)(6); such relief is available only where extraordinary circumstances prevented a litigant from seeking earlier, more timely relief." *Id* at 1049.

Plaintiffs have not provided the court any examples of mistake, fraud, extraordinary circumstances, or any other grounds upon which they might be able to seek relief under Rule 60(b). Information or arguments that a party could have put forth prior to judgment but failed to do so does not warrant relief under Rule 60(b)(6). *Schanen v. U.S. Dept. of Justice*, 798 F.2d

348, 349 (9th Cir. Alaska, 1986). Also, mere disagreement with the court's decision does not warrant a Rule 60(b) motion. See *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1983).

II. OREGON'S ANTI-SLAPP STATUTE IS CONSTITUTIONAL AND ITS REQUIREMENT THAT PLAINTIFFS PRESENT SUBSTANTIAL EVIDENCE TO SUPPORT A PRIMA FACIE CASE DOES NOT VIOLATE THEIR DUE PROCESS RIGHTS.

Plaintiffs argue that the requirements of ORS 31.150 are inconsistent in that the standards conflict with those set out in ORCP 21. Plaintiffs further argue that the court should have assumed the truth of the allegations contained in plaintiffs' pleadings and viewed the allegations in the light most favorable to plaintiffs. As plaintiffs themselves point out, ORS 31.150(3) states that "The special motion to strike shall be treated as a motion to dismiss under ORCP 21 A..." However, as provided for under ORS 31.150 and ORCP 21, affidavits, declarations and other documents were submitted by the parties and the court concluded that plaintiffs did not present substantial evidence to support a prima facie case. To hold plaintiffs to a lower standard would defeat the purpose and intent behind Oregon's Anti-SLAPP statute.

Under a motion to dismiss under ORCP 21 A:

> If, on a motion to dismiss...the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleading...all parties shall be given a reasonable opportunity to present affidavits, declarations and other evidence, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits."

Defendants will not take the courts time and list all of the declarations, affidavits, and exhibits that were filed by all parties prior to the court's judgment in this matter. The plaintiffs had every opportunity to provide the court with some facts or evidence to show that they had a chance of prevailing on the merits and failed to do so.

Plaintiffs further claim that they were not allowed discovery. ORCP 21 A states that the court *may* (emphasis added) defer a ruling until further discovery if there are insufficient facts to make a determination on a motion to dismiss. Moreover, the Anti-SLAPP statute, ORS 31.152(2), provides that "[t]he court, on motion and for good cause shown, may order that specified discovery be conducted notwithstanding the stay imposed by this subsection." Plaintiffs' contention that the Anti-SLAPP statute is unconstitutional because discovery is prohibited is simply wrong as the Anti-SLAPP statute allows for discovery. Plaintiffs failure to move the court to allow discovery does not give rise to a reason to disturb the judgment.

Plaintiffs' misstate the Supreme Court's ruling in *Anderson v. Liberty Property* when they state that "[a]s the United 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.'" Plaintiffs' Memorandum, Page 4, citing *Anderson v. Liberty Property*, 477 U.S. 242, 250 n. 5 (1986). Contrary to plaintiffs' assertion, this was not the holding in *Anderson*, nor did the case involve a premature summary judgment motion where the nonmoving party had not been allowed discovery. In *Anderson*, a case involving claims of libel, the Court held that when ruling on a motion for summary judgment the court must use the same substantive evidentiary standard of proof that it would apply at a trial on the merits.[2] In the footnote referred to by the plaintiffs, the court simply notes that with respect to the requirement that the adverse party must make a showing that there is a genuine issue of material fact for trial, Rule 56(f) requires that the

[2] Since *Anderson* involved a claim of libel by a public figure, the Court held that in ruling on a motion for summary judgment, the court must determine whether the nonmoving party will be able to show that the defamatory statement was made with malice, and that the actual malice must be shown with "convincing clarity." *Anderson* at 252. (this rule was established in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

nonmoving party be allowed discovery and the court in *Anderson* assumed that both parties had had ample time for discovery. *Id.* at 250.

Plaintiffs never filed a motion requesting that discovery be allowed, nor did they ever raise the constitutionality of the Anti-SLAPP statute.

Plaintiffs also cite to *Florida Fern Growers Ass'n v. Concerned Citizens of Putnam County*, 616 So2d 562, 570 (Fla. 1993) for the proposition that other states have recognized that overbroad anti-SLAPP procedures might deny a plaintiff of her right to access to the courts. In *Fern Growers Ass'n v. Concerned Citizens*, the plaintiffs sought injunctive relief for intentional and malicious interference with business relations and conspiracy to interfere with those business relations. First, this case involved the Noerr-Pennington doctrine, a creature of anti-trust law, which addresses the constitutional right to petition the government for redress. Second, this is a Florida case, whose holding is based entirely on the courts disagreement with *Sierra Club v. Butz*, 349 F.Supp. 934 (N.D.Cal.1972). In *Sierra Club*, the court held that liability could only be imposed for First Amendment activities involving petitioning the government for redress of grievances if the petitioning was a "sham". *Sierra Club* at 938-39. The plaintiffs in that case, a logging company, wanted to impose a pleading standard of malice. The court in *Sierra Club* held that simply pleading malice was not enough to put a halt to free speech activities. *Sierra Club* at 938-39.

Plaintiffs assert that the District Court applied California procedure subjecting them to a summary judgment standard without the benefit of discovery. There is no evidence that the District Court applied California procedure in this case. Oregon has its own anti-SLAPP statute, and its own procedures and cases interpreting those procedures. See ORS 31.150; *Gardner v.*

Martino, 2005 WL 3465349 (D. Or. 2005); *Card v. Pipes*, No. CV-03-6327-HO, Order at pp. 17-18 (D. Or. Mar. 1, 2004).

III. ORS 31.150 IS CONSTITUTIONAL AND DOES NOT VIOLATE OREGON'S RIGH TO A JURY TRIAL

Contrary to plaintiffs' assertion, the right to a jury trial is not absolute. Under FRCP 56(c) a case may be dismissed if the moving party shows that there is no genuine issue as to any material fact. See *Fujitsu Microelectronics, Inc. v. Lam Research Corp.*, 174 Or. App. 513 (2001), holding that "...an otherwise proper grant of summary judgment does not violate constitutional jury trial protections." *Id.* at 522. See also, *Reed v. Western Union Telegraph Co.*, 70 Or. 273 (1914)("...the court may take the case from the jury and decide the issue as a matter of law.")

IV. DEFENDANTS HAVE SATISFIED THE FIRST PRONG OF THE ANTI-SLAPP TEST AS PLAINTIFFS' CAUSES OF ACTION ARISE SOLELY FROM PROTECTED ACTIVITIES

Under Oregon's Anti-SLAPP statute, the defendants first must show that one or more of the plaintiffs' claims arises out of constitutionally protected conduct. As previously noted the claims of plaintiffs arise out of defendants' oral or written statements in a place open to the public or a public forum in connection with an issue of public interest 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) and (d).

Plaintiffs argue that defendants have never disputed the illegality of the conduct underlying the plaintiffs' causes of action. Defendants have disputed that they were engaged in illegal activity. There is no evidence, on the face of the pleadings or otherwise that would lead a finder of fact to conclude that defendants' conduct in question was illegal.

For the foregoing reasons, plaintiff's motion for reconsideration should be denied.

RESPECTFULLY SUBMITTED this 22nd day of August, 2007,

Gregory Kafoury, OSB #74166
Mark G. McDougal, OSB #89086
Natalie McDougal, OSB #04250
Of Attorneys for Plaintiffs IDA, ROSSELL, and DURKEE