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

Defendants.

CV No. 07-CV-00601-MO

Defendant People For The Ethical Treatment Of Animals, Inc.'s ("PETA")
RESPONSE TO PLAINTIFFS' MOTION FOR RECONSIDERATION

I. INTRODUCTION

This Court entered a final judgment dismissing defendant People for the Ethical Treatment of Animals, Inc., (PETA) from this matter on July 6, 2007. Now, over five weeks later, plaintiffs ask this Court to vacate its final judgment under Fed. R. Civ. P. 60 based on two legal arguments they could have presented during the pendency of this matter, but did not, and because they continue to disagree with one of this Court's findings.

As a threshold matter, this Court should deny plaintiffs' motion in its entirety without considering the substance of their arguments because plaintiffs have not alleged any cognizable ground for relief under Rule 60. Nor can plaintiffs satisfy the only *potentially* applicable ground therein, Rule 60(b)(6), because they have not shown that "extraordinary circumstance beyond their control" justify setting aside the final judgment in this matter.

If this Court considers the substance of plaintiffs' arguments at all, it should deny their motion in its entirety because not one of plaintiffs' legal theories have merit. Oregon's anti-SLAPP statute is not unconstitutional. That the statute permits consideration of competing declarations is no different than Oregon's Code of Civil Procedure, and is identical to anti-SLAPP statutes in at least eight other states, not one of which has been found unconstitutional following enactment. Plaintiffs' argument that this Court was required to weigh the evidence before it is simply false, and is based on plaintiffs' mischaracterization of the relevant statutory provisions. Nor were plaintiffs unconstitutionally denied the ability to conduct discovery. They simply failed to pursue the discovery available to them under Oregon's anti-SLAPP statute.

This Court did not err in finding that PETA satisfied its *prima facie* burden. Plaintiffs' argument that they only sued PETA for engaging in illegal conduct, and that they should be able to carve out such illegal, unprotected conduct in such a way that PETA cannot invoke its rights under the anti-SLAPP statue strains credulity. The uncontroverted evidence in this case is that PETA never engaged in *any* of the conduct alleged by plaintiffs, but that plaintiffs sued PETA

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because unknown and unaffiliated protestors incorporated PETA's constitutionally protected advocacy materials into signs and posters that were then used during protests outside Schumacher Furs. Plaintiffs' suit against PETA arose from conduct in the furtherance of PETA's right to free speech, and falls squarely within Oregon's anti-SLAPP statute.

This Court properly granted PETA's special motion to strike. No grounds justify vacating the final judgment. Plaintiffs' motion should be denied in its entirety.

II. ARGUMENT

A. Plaintiffs Have Not Shown That Extraordinary Circumstances Beyond Their Control Justify Setting Aside the Final Judgment in this Matter and This Court Should Deny Their Motion at the Threshold.

1. Plaintiffs' only *potential* basis for relief is Rule 60(b)(6).

Plaintiffs seek to set aside the final judgment in this matter "pursuant to FRCP 60" based upon alleged "manifest injustice" and "an erroneous finding." (Plaintiffs' Motion for Reconsideration, p. 2). Plaintiffs' motion and accompanying memorandum are completely silent regarding which provision of Rule 60 they seek to invoke, and this Court should deny their motion for that reason alone.[1]

Regardless, Rule 60 contains seven grounds for relief from a final judgment, not one of which includes plaintiffs' stated grounds of "manifest injustice" or "an erroneous finding."[2] Thus, the only *potential* ground for plaintiffs' motion is Rule 60(b)(6), the so-called "catch-all" provision, which grants a district court discretion to set aside a final judgment for "any * * * reason justifying relief." However, the grounds "justifying relief" under Rule 60(b)(6) are *far*

[1] If plaintiffs improperly raise a specific Rule 60 ground for relief for the first time in any reply memorandum, PETA reserves its right to move this Court for an Order permitting sur-reply briefing pursuant to L.R. 7.1(e)(3).

[2] Rule 60(a) includes a single ground for relief—clerical errors. Rule 60(b) includes six grounds: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud or other misconduct by the opposing party; (4) the judgment is void; (5) the judgment was satisfied, or a prior related judgment was vacated, and (6) "any other reason justifying relief."

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narrower than the text of the rule itself suggests, and do not include the grounds alleged here by plaintiffs.

2. To obtain relief from a final judgment under Rule 60(b)(6), a plaintiff must show that extraordinary circumstances beyond their control justify setting aside the judgment.

Rule 60(b)(6) "has been used sparingly as an equitable remedy to prevent manifest injustice." *United States v. Alpine Land & Reservoir Co.,* 984 F.2d 1047, 1049 (9th Cir. 1993). "Neglect or lack of diligence is not to be remedied through Rule 60(b)(6)." *Lehman v. United States,* 154 F.3d 1010, 1017 (9th Cir. 1998). Rather, the U.S. Supreme Court has held that the rule "should only be applied in extraordinary circumstances." *Liljeberg v. Health Services Acquisition Corp.,* 486 U.S. 847, 864 (1988), quoting *Ackerman v. United States,* 340 U.S. 193 (1950). "A party seeking to re-open a case under Rule 60(b)(6) must demonstrate both injury and circumstances beyond his control that prevented him from proceeding with the prosecution or defense of the action in a proper fashion." *Delay v. Gordon*, 475 F.3d 1039, 1044 (9th Cir. 2007).

Extraordinary circumstances justifying relief under Rule 60(b)(6) include the post litigation discovery that a judge held a personal stake in the litigation;[3] relief from a default judgment entered while the movant imprisoned and physically unable to appear and defend himself;[4] and a party's flat repudiation of the terms of a settlement agreement.[5]

While plaintiffs claim they have suffered a "manifest injustice," they failed to raise the two legal arguments they make in support of this position during the pendency of this litigation. (*See* Plaintiffs' Motion, p. 2). The mere fact that a party failed to raise legal arguments that were available to them during the course of litigation is not an "extraordinary circumstance" justifying relief under Rule 60(b)(6). *See Hamilton v. Newland,* 374 F.3d 822, 825 (9th Cir. 2004) (denying a Rule 60(b)(6) motion, and concluding "[t]here was no change of circumstances

[3] *Liljeberg,* 486 U.S. at 864.
[4] *Klapprott v. United States,* 335 U.S. 601 (1949).
[5] *Keeling v. Sheet Metal Workers Int'l Ass'n,* 937 F.3d 408, 410 (9th Cir. 1991).

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between the time when [the movant] filed his habeas petition and the time when he filed his 60(b) motion apart from his belated attempt to argue a legal theory he should have raised earlier."); *Glover v. Shearson Lehman Hutton, Inc.,* 879 F. Supp. 1028, 1032 (N.D. Cal. 1994) (denying a Rule 60(b) motion after stating that, "[i]f a party simply inadvertently failed to raise the arguments earlier, the arguments are deemed waived."); *Publishers Resource, Inc., v. Walker-Davis Publications, Inc*., 762 F.2d 557, 561 (7th Cir. 1985) ("Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.").

An unexplained failure to present a legal argument cannot satisfy Rule 60(b)(6) because the relief afforded by the rule depends upon a showing of extraordinary circumstances that were beyond the moving party's control and somehow prevented him from taking timely action. *See Gordon*, 475 F.3d at 1044 (holding that circumstances justifying relief must have been "beyond [the moving-party's] control."); *Greenawalt v. Stewart*, 105 F.3d 1268, 1273 (9th Cir. 1997) (party only entitled to relief under Rule 60(b)(6) where "extraordinary circumstances *prevented him* from taking timely action * * *.") (emphasis added). Plaintiffs have shown neither that their failure to make legal arguments during the pendency of this litigation is an "extraordinary circumstance" justifying relief, or that they were prohibited from making such arguments through no fault of their own. This Court should follow *Hamilton, Glover,* and *Publishers Resource* and decline to consider the merits of plaintiffs' newly hatched legal theories.

Plaintiffs present one additional argument in their motion. They argue that this Court made an "erroneous finding" that defendants satisfied their burden of proof under Oregon's anti-SLAPP statute. Plaintiffs may disagree with this Court's decision, but the mere fact that they continue to believe their position was the correct one is not a sufficiently "extraordinary circumstance" to justify relief under Rule 60(b)(6). *See Backlund v. Barnhart,* 778 F.2d 1386, 1388 (9th Cir. 1983). If plaintiffs disagreed with this Court's findings, the proper channel was an appeal to the Ninth Circuit. Instead, plaintiffs allowed their time to file an appeal to expire, and then filed the instant Rule 60 motion. Courts disapprove of such tactics, and have held that

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a party's act of bypassing an appeal in favor of a Rule 60(b) motion objecting to the district court's findings is improper, and is a sufficient reason to deny the motion. *See Ackermann,* 340 U.S. at 198 ("Petitioner made a considered choice not to appeal * * *. His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relived of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong * * *. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from."); *Stein v. State Farm Mutual Ins. Co*., 934 F. Supp. 1171, 1174 (D. Hawaii 1996) (denying a Rule 60(b)(6) motion after holding, "[b]y failing to appeal in the instant case, plaintiffs foreclosed this opportunity and allowed their case to come to a close.").

Plaintiffs' Rule 60(b)(6) motion is similar to that filed in *Strobel v. Morgan Stanley Dean Witter,* 2007 WL 1053454, at *3 (S.D. Cal. April 10, 2007) (slip opinion), the substance of which the Court refused to consider. *Strobel's* reasoning applies here with equal force to plaintiffs' argument that this Court should reconsider its alleged "erroneous finding:"

> The Rules allowing for motions for reconsideration are not intended to provide litigants with a second bite at the apple. Rather, reconsideration is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." * * * In an adversarial system such as ours, more often than not one party will win and one party will lose. Generally, it follows that the losing party will be unhappy with the Court's decision. Rarely does the losing party believe that its position lacked merit, or that the Court was correct in ruling against it. Rather than either accept the Court's ruling or appeal it, it seems to have instead become *de rigueur* to file a motion for reconsideration. The vast majority of these motions represent simply a rehash of the arguments already made, although now rewritten as though the Court was the opposing party and its Order the brief to be opposed. It is easy for each litigant to consider only his or her own motion, and the seemingly manifest injustice that has been done to them. But the cumulative effect is one of abuse of the system and a drain on judicial resources that could be better used to address matters that have not yet been before the court once, let alone twice.

Neither plaintiffs' failure to raise legal arguments that were available to them during the pendency of this litigation, nor their belief that one of this Court's findings was erroneous,

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constitute sufficiently extraordinary circumstances beyond their control to justify setting aside the final judgment in this matter more than a month after it was entered, and after their time for appeal has expired. Plaintiffs' motion should be denied at the threshold, and this Court should not consider the substance of their arguments.

B. Plaintiffs' Legal Arguments are Meritless, and Do Not Justify Setting Aside the Final Judgment in This Matter.

This Court should not consider the substance of the legal arguments presented in plaintiffs' brief, because plaintiffs' have not satisfied their threshold burden under Rule 60(b)(6). But even if this Court does consider the substance of plaintiffs' arguments, it should reject each of them as meritless and deny plaintiffs' motion to set aside the final judgment in this matter.

1. Oregon's anti-SLAPP statute is not unconstitutional, and plaintiffs' arguments to the contrary are based solely on their mischaracterization of the substantive provisions of the statute.

Plaintiffs claim this Court's application of Oregon's anti-SLAPP statute violated their constitutional right to a jury trial by "requiring" the Court to weigh the evidence before it, as well as their constitutional right to due process by requiring them to prove their claims without "any right to discovery." (*See* Plaintiffs' Supporting Memorandum, pp. 3 & 4.) Plaintiffs' arguments fail because they are based entirely on their mischaracterization of Oregon's anti-SLAPP statute.

a. Oregon's anti-SLAPP statute does not require weighing of the evidence and does not violate the constitutional right to a jury trial.

Plaintiffs argue that application of Oregon's anti-SLAPP statute in this case violated their right to a jury trial because the Court was required to "weigh" the evidence before it in determining whether they had shown a probability of success on the merits. (See Plaintiffs' Supporting Memorandum, pp. 3 & 4.) Plaintiffs' assertions are false, and do not accurately represent the relevant provisions of Oregon's anti-SLAPP statute.

At page 3 of their brief, plaintiffs state:

> The statute requires the trial court to "consider the pleadings and supporting and opposing affidavits" and weigh the competing

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> evidence in determining whether plaintiff has shown a probability of prevailing. ORS 31.150(4).

ORS 31.150(4) *actually* provides:

> In making the determination under subsection (1) of this section, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

Plaintiffs' attempt to infuse Oregon's anti-SLAPP statute with a provision that requires a court to weight the evidence before it is highly misleading. ORS 31.150 contains no such requirement. Rather, the statute simply requires a court to consider both the pleadings filed by the plaintiff as well as the supporting and opposing affidavits submitted by the parties.

As counsel for In Defense of Animals (IDA) note in their brief, this is no different from the standards set forth in ORCP 21, which is cited in subsection (1) of Oregon's anti-SLAPP statute. Both allow the court to "consider" the pleadings and competing affidavits in ruling on a specific motion. There is nothing unconstitutional about these provisions. In arguing otherwise, plaintiffs, in effect, are asking this Court to declare the text of a key provision of Oregon's Code of Civil Procedure to be unconstitutional. Moreover, contrary to plaintiffs' repeated assertions, the Oregon and California anti-SLAPP statutes include *identical* substantive provisions governing the evidence that a court may consider when ruling on a special motion to strike.[6] The identical language of California's statute has been upheld in the face of constitutional challenges such as the one presented here by plaintiffs. *See Willbanks v. Wolk,* 121 Cal. App. 4th 883, 905, 17 Cal Rptr. 3d 497 (2004).

This Court should decline plaintiffs' invitation to strike Oregon's statute down as unconstitutional based on the single, pre-enactment advisory opinion from New Hampshire that

[6] ORS 31.150(4) provides: "[i]n making the determination under subsection (1) of this section, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based. Cal. Code Civ. Pro. § 425.16(b)(2) provides, "[i]n making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based."

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they cite in their brief.[7] That is particularly true because, in addition to Oregon, at least eight other states have anti-SLAPP statutes providing that a court may consider supporting and opposing affidavits in ruling on a special motion to strike, *not one of which* has been held constitutionally infirm following enactment.[8]

As discussed by IDA, plaintiffs' do not have an absolute right to a jury trial. Oregon courts have upheld summary judgment procedures and motions to strike complaints based on heightened pleading requirements from attack on grounds that they violate a party's constitutional right to a jury trial. *See Fujitsu Microelectronics, Inc. v. Lam Research Corp.,* 174 Or. App. 513 (2001); *Reed v. Western Union Telegraph Co.,* 70 Or. 273 (1914).

Oregon's anti-SLAPP statute does not impermissibly require a court to weigh the evidence before it. Nor, as plaintiffs incorrectly suggest, did PETA urge this Court to weigh the evidence before it in ruling on PETA's special motion to strike. (*See* Plaintiffs' Supporting Memorandum, p. 4). Rather, PETA spent considerable time listing all the evidence submitted by plaintiffs that was in any way related to PETA. (*See* PETA's Reply Memorandum in Support of its Special Motion to Strike, pp. 3-4). After arguing its *prima facie* case, PETA then argued that, *even accepting all of plaintiffs' evidence as true*, plaintiffs had still not shown a probability of

[7] *Opinion of the Justices*, 138 N.H. 445, 451, 641 A2d 1012 (1994).

[8] *See* La. Code Civ. Proc. Ann. Art. 971(2) ("In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based."); 14 Maine Rev. Statues § 556 ("In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based."); Indiana Code § 34-7-7-9(c) ("The court shall make its determination based on the facts contained in the pleadings and affidavits filed and discovered under the expedited proceeding."); Cal. Code Civ. Pro. § 425.16(b)(2) ("In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based."); Minn. Stat. Ann. § 554.02 (staying discovery upon filing of anti-SLAPP motion to strike, and requiring non-moving party to produce clear and convincing evidence in the form of affidavits that the acts of the moving party are not immunized from liability); Utah Code Ann. § 78-58-103 (allowing moving party to file an answer supported affidavits alleging anti-SLAPP grounds, which the court must grant if the moving party proves its grounds by clear and convincing evidence); Mass. Gen. Laws ch. 231, § 59H ("In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.")

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success on the merits of their claims. Specifically, PETA argued, "as set forth below, even if this Court credits all of the admissible evidence submitted by plaintiffs, it is clear that they have not met their burden under ORS 31.150(3)." (PETA's Reply Memorandum in Support of Special Motion to Strike, p. 13.) It cannot be said that PETA urged this Court to weigh the evidence before it in determining whether plaintiffs had shown a probability of success on the merits, where PETA specifically argued that plaintiffs did not meet their burden even if this Court accepted all of their evidence as true.

This Court should reject plaintiffs' argument that this Court's application of Oregon's anti-SLAPP statute violated their constitutional right to a jury trial.

b. Plaintiffs' due process rights were not violated because they were not denied discovery under Oregon's anti-SLAPP statute.

Plaintiffs argue this Court's application of Oregon's anti-SLAPP statute denied them of their due process rights "by applying an evidentiary standard which required them to prove their claims without discovery." (Plaintiffs' Supporting Memorandum, p. 4.)

Plaintiffs' due process argument is once again based on their mischaracterization of Oregon's anti-SLAPP statute. Oregon's anti-SLAPP statute does not require a plaintiff opposing a special motion to strike to proceed without discovery. To the contrary, Oregon's statute specifically provides, "the court, on motion and for good cause shown, may order that specific discovery be conducted * * * ." ORS 31.152(2). The mere fact that plaintiffs were required to file a motion and show cause prior to conducting discovery in response to PETA's anti-SLAPP motion did not violate their constitutional right to due process. Plaintiffs do not cite any case law in support of such a position, and California courts have upheld identical provisions of that state's anti-SLAPP statute from similar challenges. *See Jarrow Formulas, Inc., v. LaMarche,* 31 Cal. 4th 728, 740 (2003) ("The legislature has provided * * * substantive and procedural limitations that protect plaintiffs against overbroad application of the anti-SLAPP mechanism.

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Courts deciding anti-SLAPP motions, for example, are empowered to mitigate their impact by ordering 'that specific discovery be conducted notwithstanding' the motion's pendency.").[9]

The discovery provisions of Oregon's anti-SLAPP statute are not constitutionally infirm. Regardless, this Court should find that plaintiffs waived any claim they might have had to the contrary because they never raised this issue during the pendency of this litigation. *See Glover,* 879 F. Supp. at 1032 (denying Rule 60(b) motion after stating that, "[i]f a party simply inadvertently failed to raise the arguments earlier, the arguments are deemed waived.").

Plaintiffs' failure to take advantage of the legal procedures available to them is also not a sufficient ground to vacate the final judgment in this matter under Rule 60. In *In re Zimmerman,* 869 F.2d 1126, 1128 (8th Cir. 1989), the court upheld a district court's decision to deny a plaintiff's Rule 60(b)(6) motion in similar circumstances, holding:

> Doe does not deny that these procedures were legally available to her, and she has given the Bankruptcy Court, District Court and this Court no explanation for her failure to use them. We find unpersuasive Doe's argument that * * * the "integrity of the federal courts" requires that her motion be granted. As the District Court pointed out, "The integrity of the court[s] is protected not only by not allowing parties to manipulate one court against another, but also by requiring parties to avail themselves of available procedures."

The only cases cited by plaintiffs in support of their due process arguments have been shown to be inapposite by defendant IDA. (*See* IDA Opposition Memo, pp. 5-6.) PETA joins in IDA's arguments, and emphasizes, as did IDA, that *Florida Fern Growers v. Concerned Citizens of Putnam County*, 616 So. 2d 562, 570 (Fla. 1993), had nothing to do with an anti-SLAPP statute. Rather, the *Florida Fern Growers* court declined to adopt a *judicial doctrine* that had

[9] The provisions of the Oregon and California anti-SLAPP statutes governing discovery are identical. ORS 31.152(2) provides, "The court, on motion and for good cause shown, may order that specific discovery be conducted notwithstanding the stay imposed by this subsection." Cal. Code Civ. Pro. § 425.16(3)(g), in turn, provides, "The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision."

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afforded *absolute immunity* to otherwise tortious conduct taken in furtherance of the constitutional right to petition the government for redress of grievances. *See id,* 564, 566, 570.

Plaintiffs' argument that this Court's Order granting PETA's special motion to strike was "analogous" to a "premature summary judgment" ruling also ignores the entire purpose of Oregon's anti-SLAPP statute. The purpose of summary judgment is to resolve legal issues and undisputed issues of fact at the close of discovery, prior to a trial on the merits. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-33 (1986). In contrast, the purpose of anti-SLAPP statues such as Oregon's is to provide a defendant with "a remedy to expose and dismiss at an early stage * * * non-meritorious actions which chill * * * the valid exercise of the constitutional rights of freedom of speech." *Lafayette Morehouse, Inc. v. Chronicle Pub. Co.*, 44 Cal. Rptr. 2d 46, 48, 37 Cal. App. 4th 885 (1995). The purpose of Oregon's anti-SLAPP statute would be compromised if a defendant was required to wait until after a full-blown, resource intensive, discovery process to file its anti-SLAPP motion. For this reason, the Oregon statute instead permits the motion to be filed at the outset, but specifies that a party opposing the motion may seek leave to conduct discovery prior to filing a response. There is no authority to support plaintiff's argument that this statutory scheme is unconstitutional.

2. This Court correctly found that plaintiffs' claims against PETA arose from conduct in furtherance of PETA's constitutional right to free speech.

Plaintiffs argue this Court erred in finding that PETA met its initial *prima facie* burden, which required PETA to show that plaintiffs' claims arose from conduct in furtherance of its constitutional right to free speech, or in connection with a document presented in a place open to the public on a matter of public importance. *See* ORS 31.150(2). Plaintiffs argue PETA could not have met its burden because they did not sue PETA for engaging in protected conduct; rather, they sued PETA for engaging in illegal conduct, such as "public nudity, harassment, vandalism, and blocking public sidewalks." (Plaintiffs' Supporting Memorandum, pp. 6-8.)

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Plaintiffs presented this identical argument in their brief opposing PETA's special motion to strike, and at oral argument in this matter. However, plaintiffs provided no evidence in support of their position. The mere fact that plaintiffs disagree with this Court's finding that PETA satisfied its initial burden is an insufficient ground to vacate the final judgment in this matter under Rule 60, particularly after plaintiffs let their time for appeal expire. *See Ackermann,* 340 U.S. at 198; *Backlund,* 778 F.2d at 1388; *Strobel,* 2007 WL 1053454, at *3.

If this Court considers plaintiffs' renewed argument, the Court should affirm its previous finding that PETA satisfied its initial *prima facie* burden because the uncontroverted evidence demonstrates that PETA never engaged in any of the illegal conduct alleged by plaintiffs.

To the contrary, the evidence submitted by both parties demonstrates that plaintiffs named PETA as a defendant in this matter solely because unknown and unaffiliated protestors happened to have incorporated PETA's constitutionally protected advocacy materials into signs and posters they used during protest activities at or near Schumacher Furs. (*See* Declaration of Matt Rice in Opposition to Plaintiffs' Motion for Preliminary Injunction, ¶14 (identifying PETA's advocacy materials in plaintiffs' submissions); Declaration of Megan Hartman, ¶¶ 8-9 (same).) In fact, plaintiffs have conceded that it was only the *appearance* of these constitutionally protected materials outside their store that led them to sue PETA. (*See* Plaintiffs' Response to PETA's Special Motion to Strike, p. 7) (noting that the appearance of PETA's signs and literature outside the store "would lead any reasonable observer to conclude that PETA is participating in at least some of the complained of activity.").

Yet at no point have plaintiffs ever linked PETA or anyone associated with PETA to *any* of the illegal or tortious conduct they alleged in their complaint. There is simply no evidence that PETA engaged in any illegal conduct, or that PETA directed or ratified the illegal conduct of others. *See NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 930-931, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982) (concluding that an advocacy organization cannot be held liable for unlawful conduct of protestors absent proof that the organization specifically authorized or ratified the

unlawful conduct, because holding otherwise would "impermissibly burden the rights of political associations that are protected by the First Amendment.").

Plaintiffs cite *Flatley v. Mauro,* 39 Cal. 4th 299, 314, 139 P.3d 2 (2006) in support of their argument, but *Flatley* is clearly distinguishable. As noted at page 7 of PETA's anti-SLAPP reply memorandum, *Flatley* simply held that, "in the narrow circumstance where either the defendant *concedes* the illegality of its conduct, or the illegality *is conclusively shown* by the evidence," the defendant's conduct falls outside the scope of the anti-SLAPP statute. *Id.* (emphasis added). *Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty,* 129 Cal. App. 4th 1228, 1246 (2005), which plaintiffs also cite, reached an identical conclusion.[10] *Flatley* and *Huntingdon* are inapplicable here, because PETA has certainly never "conceded," nor have plaintiffs "conclusively shown," that PETA engaged in, directed or ratified any illegal conduct.

To the contrary, it is uncontroverted that PETA has no connection whatsoever with any of the illegal conduct alleged by plaintiffs. PETA's act of distributing anti-fur advocacy materials to individuals who request them is not tortious or illegal conduct; rather, it is constitutionally protected free speech that this Court properly found to be protected under Oregon's anti-SLAPP statute. *See Lovell v. City of Griffin*, 303 U.S. 444, 452, 58 S. Ct. 666, 82 L. Ed. 949 (1938) (striking down an ordinance that barred distribution of religious literature as violating the First Amendment and noting "[t]he ordinance cannot be saved because it relates to distribution and not to publication. Liberty of circulating is as essential to that freedom as liberty of publishing."); *Talley v. State of California,* 362 U.S. 60, 64, 80 S. Ct. 536, 4 L. Ed. 2d 559 (1960) (striking down an ordinance that prohibited distribution of handbills and leaflets after noting that such materials "have been historic weapons in the defense of liberty."); *Lamont v.*

[10] *See Huntingdon Life Sciences,* 129 Cal. App. 4th at 1246 ("If a defendant concedes or the evidence conclusively establishes the conduct complained of was illegal, as a matter of law the defendant cannot make a prima facie showing the action arises from protected activity.").

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Postmaster General of the United States, 381 U.S. 301, 305, 85 S. Ct. 1493, 14 L. Ed. 2d 398 (1965) (distribution of materials through the mail is constitutionally protected speech).

Plaintiffs' argument that they sued PETA for illegal conduct, not for its protected activities, is directly contradicted by the record in this case, which shows that plaintiffs have no evidence that PETA or anyone associated with PETA engaged in any illegal conduct. California courts interpreting identical provisions of that state's anti-SLAPP statute have rejected the argument that a plaintiff faced with an anti-SLAPP motion to strike may simply disavow the protected activities that actually gave rise to their claims by recharacterizing the complaint as one aimed exclusively at unprotected conduct. *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 824 (1994).

The defendants in *Wilcox* filed a special motion to strike when they were sued for defamation by a trade association after soliciting donations to help fund a lawsuit against the association. *Id.* at 814-15. The association argued that the defendants could not meet their initial prima facie burden under California's anti-SLAPP statute because the association was *not* challenging their protected activity, but was *instead* only challenging statements made by members of the association that were defamatory as a matter of law. *Id.* at 821.

The Court rejected the association's attempt to carve out the protected activity, and granted the motion to strike, noting, "[t]his argument [by the association] points out why traditional pleading-based motions such as demurrers and motions to strike are ineffective in combating SLAPP's and why the Legislature believed there was a need for a special motion to strike * * *. *In a SLAPP complaint, the defendant's [protected activities] are made to appear as defamation, interference with business relations, restraint of trade and the like.* For this reason the Legislature provided, in determining a motion under the anti-SLAPP statute, 'The court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" *Id.* (emphasis added).

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Here, the uncontroverted evidence in the record demonstrates that neither PETA nor anyone acting on behalf of or in conjunction with PETA participated in, organized, or promoted the demonstrations that form the basis of this lawsuit—let alone did PETA authorize or ratify the illegal conduct alleged by plaintiffs. Instead, the evidence shows that PETA was named as a defendant because unknown and unaffiliated protestors incorporated PETA's constitutionally protected advocacy materials into signs and posters that were then used during protest activities at or near Schumacher Furs. On these uncontroverted facts, this Court properly found that plaintiffs' claims against PETA arose from PETA's constitutionally protected activities, and then concluded that plaintiffs had failed to show a probability of success on the merits of their five common-law tort claims against PETA.

III. CONCLUSION

This Court should deny plaintiffs' Rule 60 motion to set aside the judgment in this matter at the threshold because plaintiffs have not satisfied any of the grounds justifying relief. Neither plaintiffs' unexplained failure to raise two legal arguments that were available to them during the pendency of this litigation, nor plaintiffs' disagreement with one of this Court's findings constitutes "extraordinary circumstances beyond their control" that would justify vacating its final judgment. Even if this Court considers plaintiffs' arguments it should nonetheless decline plaintiffs' invitation to disturb the final judgment in this matter because Oregon's anti-SLAPP statute is not unconstitutional, and because this Court correctly found that PETA satisfied its initial *prima facie* burden.

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