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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

AMERICAN BUDDHA, an Oregon Nonprofit Corporation, Case No.: 1:06-cv-3054

Plaintiff,

vs.

PLAINTIFF'S SUPPLEMENTAL CONCISE
STATEMENT IN RESPONSE TO
DEFENDANT'S OBJECTIONS

THE CITY OF ASHLAND AND THE
WASHINGTON POST COMPANY,

Defendants.

In response to defendant the City of Ashland's objections to Plaintiff's Concise Statement in opposition to the City's motion for Summary Judgment, plaintiff submits the following Supplemental Concise Statement, specifically controverting the facts set forth in the City's Concise Statement.

1. Defendant the City of Ashland operates the Ashland Fiber Network (herein "AFN"). (Holbo Aff., Para. 2).

Plaintiff's Response: Undisputed.

2. Ashland Fiber Network in turn enters into contracts with internet service providers permitting access to AFN's telecommunications system. (Holbo Aff., Para. 2). The internet service providers then contract with individual end-users. (Holbo Aff., Para. 2).

Plaintiff's Response: Irrelevant. There are no "end-users" in an action under 14 USC § 1983 alleging retaliation under color of law against the exercise of political speech, and such commercial relationships have no relevance. If "end-users" are

considered in a First Amendment case like this one, where plaintiff is a publisher and an online library, they are the people who view the websites hosted on Plaintiff's Network, and whose access to plaintiff's Internet speech has been curtailed and threatened by the City's abuse of its ability to regulate speech through its control over AFN.

3. At no time did The City of Ashland have a contract with American Buddha to provide internet¹ access. (Holbo Aff., Para. 3). The only contracts that AFN has are with internet service providers, not with the internet service providers' customers.

Plaintiff's Response: Undisputed that the City had no contract with plaintiff; however, the fact is irrelevant for the purpose the City proposes -- to establish an absence of "duty," because First Amendment obligations do not arise from contract, and are imposed on the City by virtue of being a municipality of the State of Oregon, made subject to the Bill of Rights by the incorporation clause of the Fourteenth Amendment. The City's status as a municipal subdivision of the State of Oregon is undisputed. Contrary to the conclusion the City urges be drawn from its contractual relationship with InfoStructure, the facts establish that City policy gave Holbo unfettered discretion to use the City's contracting power coercively in an effort to get InfoStructure to commit an act that Holbo inferrably knew was unlawful – shutting off Plaintiff's Network. After being sparked by Parker's phone calls and email, Holbo acted according to an established City policy that he subsequently reduced to writing, that gave him unfettered discretion to regulate Internet speech. (Joe Franell Depo., 6:14 – 21; 7:8-23; Exh. 4; Holbo Depo., 21:1-20, referring to the written August 11 policy as "Exhibit 1.") Acting under color of law, Holbo first attempted to deceive InfoStructure, an AFN Internet "retailer," into shutting down Plaintiff's Network by formulating a counterfeit DMCA notice on Parker's behalf that falsely claimed the Washington

¹ Spelling error: "The word "Internet" is a proper noun, so you always capitalize it."
<<http://www.webgrammar.com/grammartips.html#internet>>

Post's copyrights had been infringed, and emailing the counterfeit notice to InfoStructure.” (Exhibit 8; Holbo Depo., 4:18-5:5; 11:9-13:10; 17:1-22.; 31:3-32:4; 37:20-40:21; Joe Franell Depo., 34:2-18; Mike Franell Depo., 5:7-23.) Using his deception as a lever for coercion, Holbo called John Dowd at InfoStructure, and attempted to persuade him to turn off Plaintiff’s Network. (Holbo Depo., 58:3-15.) Dowd did not comply with Holbo’s wish. (Holbo Depo., 58:3-15.) Finally, after deception and coercion of the City’s contractual partners had failed, in order to fulfill the goal of his retaliatory animus against plaintiff’s exercise of political speech, Holbo simply performed the shutoff directly, with the prior approval and subsequent ratification of the Franell brothers, Mike and Joe, (then) City Attorney² and City Information Technology Director, respectively. (Joe Franell Depo., 13:5-14:821:18-2:6; 22:18-25; Exhibit 4; Mike Franell Depo., 5:7-23.)

4. On August 1, 2006, Richard Holbo of AFN received an email from Kathleen Parker, a syndicated columnist, complaining that a website known as American-Buddha.com had taken her column picture and "doctored" it to create a pornographic image she claimed was a copyright infringement (Holbo Aff., , 4, Ex. 2).

Plaintiff’s Response: Disputed. Parker was complaining about an image she accessed on Google.com, but Holbo seized upon her complaint to manufacture a counterfeit copyright claim against plaintiff, and Holbo’s actions were approved by (then) City Attorney Mike Franell. (Exhibit 8; Holbo Depo., 4:18-5:5; 11:9-13:10; 17:1-22; 31:3-32:4; 37:20-40:21; Mike Franell Depo., 5:7-23.) Irrelevant whether Parker claimed copyright infringement – the City has introduced no facts

² Mike Franell resigned under a cloud on February 2, 2007, shortly before a performance review including a review of his handling of City litigation was scheduled to occur. (Supplemental Affidavit of Charles Carreon, Exhibit 13.) On February 6th, articles simultaneously appeared in the Ashland Daily Tidings concerning this litigation, and Mike Franell’s resignation, that appeared to be tendered under pressure. (Exhibits 14 – 16.)

concerning ownership of copyrights, and an individual does not own the copyright on their image. Holbo manufactured a copyright claim alleging ownership by dismissed defendant The Washington Post for retaliatory purposes. (Holbo Depo., 4:18-5:5; 11:9-13:10; 17:1-22; 31:3-32:4; 37:20-40:21)

5. Holbo then contacted the internet service provider hosting that particular website, a company known as Infostructure. (Holbo Aff. Para. 5). Holbo informed Infostructure about the copyright infringement claim by Parker and the name of the website about which Parker was complaining. (Holbo Aff., 5).

1. Plaintiff's Response: Disputed. Holbo did more than "contact" InfoStructure. Using his City computer, Internet access, and email account, he created his own counterfeit DMCA notice by amplifying the information received from Parker, "cutting and pasting" language he found on the Washington Post website without comprehending its meaning, and falsely asserting that a website on Plaintiff's Network was infringing copyrights of The Washington Post. (Holbo Depo., 18:12-19; 20:1-20; 31:3-32:4; 37:20-40:21.) Holbo was not candid about his knowledge of copyright law, although he admitted it was his job to determine whether something "is copyright infringement or is not." (Holbo Depo., 18:12-19; 20:1-20.) Ignorant as he was, Holbo was the policymaker for the City with respect to handling any complaints about Internet content on websites hosted through AFN, and the Franell brothers both approved of Holbo's handling of all such matters at all three relevant times: (a) prior to the August 2, 2006 shutoff of Plaintiff's Network, (b) after the August 2, 2006 shutoff, when Holbo produced a written policy that recorded how AFN would handle such complaints, and (c) at their depositions on November 3, 2006. ((Joe Franell Depo., 6:14-21; 7:8-23; and Exhibit 4; Mike Franell Depo., 5:7-23.)

6. On August 2, 2006 at 4:15 p.m., Holbo spoke with John Dowd, an Infostructure employee. After speaking with Dowd, Holbo disconnected the modem

which provided internet access to the American-Buddha website. At 5: 15 p.m. that same day, the modem was turned back on. (Holbo Aff., Para. 5).

2. Plaintiff's Response: Undisputed that Holbo spoke with John Dowd. However, this fact establishes the reverse of what the City argues. In fact, Holbo called Dowd as a followup to sending his counterfeit DMCA notice to InfoStructure, and attempted to persuade Dowd to turn off Plaintiff's Network, which Dowd had the technical ability to do; however, Dowd repulsed Holbo's use of counterfeit threats from the Washington Post. Relying upon the Franell brothers as his confederates, Holbo turned off Plaintiff's Network himself, inferrably as a purely retaliatory act for which there was no explanation but animus toward plaintiff's political speech. (Holbo Depo., 58:3-15.) It is undisputed and irrelevant, that the modem was turned back on. *First*, the wrongful act is susceptible of repetition. *Second*, in a First Amendment retaliation case, there is no such thing as a *de minimis* violation, as even "a penny" is damage enough. *Third*, approximately forty websites were silenced, and a large number of users of Plaintiff's Network were deprived of their First Amendment rights of Internet free speech. (Charles Carreon Dec. ¶ 13.)

7. The disconnection of the service provided by Infostructure was due to the copyright infringement claim, and not due to the content of the image. The contracts between AFN and the internet service providers do not include any content-based limitations. (Holbo Aff., Para. 6, Ex. 1).

Plaintiff's Response: Disputed. Holbo admitted that, without having any knowledge of copyright law, he formulated a counterfeit DMCA notice on Parker's behalf, pulling information from the Washington Post website to make it appear as if a media giant was making a copyright claim against one of InfoStructure's customers. Holbo further admitted that he sent an email containing the false representation of a copyright claim to InfoStructure, called John Dowd in an effort to persuade him to turn off Plaintiff's Network, and when all that proved unavailing, used the City's power to

turn off Plaintiff's Network. All these acts had the prior approval and subsequent ratification of the Franell brothers, and thereby of the top City officers responsible for granting Holbo arbitrary discretion to regulate speech and give vent to retaliatory animus against plaintiff, under color of law, by virtue of the City's total control over an organ of speech, and Holbo's unfettered discretion to act without fear of consequence in controlling that organ of speech. (Holbo Depo., 18:12-19; 20:1-20; 31:3-32:4; 37:20-40:21; 58:3-15; Joe Franell Depo., 5:19-22; 6:14-21; 7:8-23; and Exhibit 4; Mike Franell Depo., 5:7-23.)

Dated: January 28, 2007

/s/Charles Carreon/s/

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