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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 RESPONSE TO  
EVIDENTIARY OBJECTIONS  
(DESIGNATED AS MOTION TO STRIKE)

THE CITY OF ASHLAND AND THE  
WASHINGTON POST COMPANY,

Defendants.

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Defendant the City of Ashland (“the City”) has “moved to strike” certain evidentiary submissions in support of plaintiff American Buddha’s opposition to the City’s motion for summary judgment.<sup>1</sup> Plaintiff responds here to the arguments of each disputed item of evidence, identifying the relevance thereof to plaintiff’s claims for relief.

The Affidavit of Charles Carreon Complies With Professional Rules

The City misinterprets two provisions of the Oregon Rules of Professional Conduct (“ORPC”) to argue that the affidavit of Charles Carreon ought to be stricken. ORPC 3.7(a) “prevents a lawyer only from trying a case [and] does not prevent a lawyer from assisting in pretrial matters.” *Formal Opinion* No. 2005-8.<sup>2</sup> Thus, it is ethical to submit an affidavit of counsel in a pretrial proceeding.<sup>3</sup> ORPC 3.4 precludes a lawyer

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<sup>1</sup> FRCP 12(f) provides for striking any “the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter” found in a “pleading.” The “pleadings” are the complaint, answer, and other allegations that define the scope of the action.

<sup>2</sup> Online at the Oregon State Bar website: <<http://www.osbar.org/ethics/toc.html>>

<sup>3</sup> It is also ethical for an attorney who may be called to testify at trial to try the case nevertheless, if withdrawal or disqualification “would work a substantial hardship on the client,” or “the lawyer is

from making factual assertions in trial, based on personal knowledge “except when testifying as a witness.” ORCP 3.4 clearly does not apply when a lawyer is sitting in the witness box. Nor does it apply when the lawyer is uploading his affidavit to the Federal court website. The affidavit of plaintiff’s counsel is ethically proper in all particulars.

The City’s Counsel’s Arguments Violate the Advocate’s Duty of Candor

The argument by the City’s counsel had no basis in law or fact. “A lawyer shall not ... assert a position ... unless there is a basis in law or fact for doing so that is not frivolous....” ORPC 3.1. By misrepresenting the meaning of two ORPC provisions, the City’s counsel made a “false statement of law to a tribunal,” thus violating the duty of candor to the court imposed by ORPC 3.3. Violating the duty of candor to the court provides valid grounds for *sua sponte* sanctions under 28 USC §1927, awardable against an attorney who “multiplies the proceedings in any case unreasonably and vexatiously.” Imposition of sanctions is proper if the advocate acted “recklessly or in bad faith.” *Barnd v. City of Tacoma*, 664 F.2d 1339, 1343 (9<sup>th</sup> Cir. 1982). The duty of candor was breached recklessly and in bad faith by cynically accusing opposing counsel of an ethical lapse, in order to multiply the proceedings and gain unwarranted tactical advantage. Such conduct exceeds the proper limits of zealous advocacy. In upholding an award of sanctions under § 1927, the Ninth Circuit held: "An attorney does not simply act as an advocate for his client; he is also an officer of the court. As such, an attorney has a duty of good faith and candor in dealing with the judiciary." *United States v. Associated Convalescent Enters. Inc.*, 766 F.2d 1342, 1346 (9th Cir. 1985). The remaining arguments in the City’s motion are equally lacking in merit; accordingly, plaintiff restates arguments previously made, to foreclose the City from claiming victory by virtue of having spoken last.

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appearing pro se.” ORPC 3.7 (a)(3) and (4). In this case, plaintiff is a nonprofit corporation that would not have resources to obtain counsel from a source other than current counsel, forcing the abandonment of this litigation, which would certainly work a substantial hardship on plaintiff. Additionally, plaintiff’s counsel has suffered direct harm by the acts of the City, in that his email and professional websites were also cutoff during the August 2, 2006 shutdown of Plaintiff’s Network, thus making his presence in this case analogous to that of a pro se litigant.

Paragraphs 4 – 13 of The Carreon Affidavit Are Relevant

For ease of reference, the full text of paragraphs 4 – 13 of the Carreon affidavit are set forth below, with argument as to their relevance directly below each paragraph.

4. Since 2005, plaintiff has used an AFN MAC address to operate a network of approximately forty websites hosted on an Internet “server” computer, plus various email accounts and online business software applications (“Plaintiff’s Network”).

Relevance: Establishes that the City provides plaintiff with access to the Internet, that is utilized for a free speech purpose – the publication of websites through Plaintiff’s Network onto the Internet. Thus AFN is a government-operated organ of speech. The fact that forty websites, and thousands of Internet visitors, were and are affected by the City’s retaliatory conduct is relevant to the extent of the harm to consumers of Internet speech, relevant to the seriousness of the retaliation, relevant to the harm suffered by plaintiff, and relevant to the equitable balancing test the Court must apply when determining, under the “strict scrutiny” standard whether, assuming arguendo *any* state interest in regulating Internet speech, whether that interest is “compelling,” and whether the regulation is “narrowly tailored” to impose the minimum burden on First Amendment rights. The fact that forty websites and thousands of Internet users are affected by the City’s shutoff of a single modem with a single mouse click provides a relevant focus on who controls that mouse click, and whether they do so with due reverence for the precious First Amendment rights of Internet readers and publishers. In this case, Rick Holbo established a policy that gave him absolute power over free speech, and the City approved that policy at the highest levels, and ratified that

policy several months later, with top City employees manifesting absolute approval of Holbo's conduct in cutting off Plaintiff's Network.

5. The largest website on Plaintiff's Network is the American Buddha Online Library ("ABOL"), hosted at [www.american-buddha.com](http://www.american-buddha.com), a membership website with a member list of approximately fifty-thousand and growing.

Relevance: Establishes that plaintiff utilizes AFN, a publicly-funded organ of speech, in a substantial manner that actually communicates with over fifty-thousand people, who have taken time to become members of an online library – a quintessential forum for free speech in the modern day.

6. ABOL provides access to a library of literary and artistic works exclusively to members to warrant, prior to gaining admission, that they will use all of the media materials found therein "for private study, scholarship or research."

Relevance: Establishes that Plaintiff's Network and ABOL operate lawfully within the scope of 17 USC §108, the "library exception" to copyright liability. The library exception is available because the people have first right to utilize creative works for "study, scholarship or research," a purpose furthered by Plaintiff's Network and ABOL.

Libraries are bastions of free thought and free speech.

7. ABOL also features ... satirical political photo-collages.<sup>4</sup>

Relevance: A satirical political photo-collage is political speech, which is what the First Amendment protects. As the remainder of plaintiff's evidence establishes, the subject of a satirical political photo-collage, Kathleen Parker, complained to City employee Richard Holbo, who retaliated against plaintiff by turning off Plaintiff's Network. Political speech is "the essence of First Amendment expression." *White v. Lee*,

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<sup>4</sup> The original paragraph contains a typographical error, replaced here with ellipses to clarify meaning.

227 F3d 1214, 1228 (9<sup>th</sup> Cir. 2000). Thus, it is actionable to retaliate against a political speaker, even if the damage is as small as “a penny.” *Elrod v. Burns*, 427 US 347, 359 n. 13, 96 SCt 2673 (1976).

8. ABOL has implemented security measures to keep all of its digital content behind the “ABOL Signup Page.”

Relevance: Establishes plaintiff’s substantial investment in the operating a website that effectively self-regulates access to its media archives.

Establishes greater degree of harm to speech because dedicated users have shown an interest in the website content sufficient to cause them to become library members. Establishes that ABOL is a legitimate library. Libraries are bastions of free speech, and in disputes over copyright, possess expanded statutory rights under 17 USC § 108 to copy and distribute copyrighted media in way not allowed to private individuals.

9. Plaintiff’s Network also hosts the web-version of a Southern Oregon political magazine, The Ashland Free Press, at [www.ashlandfreepress.com](http://www.ashlandfreepress.com).

Relevance: Establishes that, among the forty websites turned off by Rick Holbo’s retaliatory silencing of the MAC Address for Plaintiff’s Network, one was the home page for a local *political* magazine, thus the sort of speech worthy of the highest degree of First Amendment protection.

10. The Ashland Free Press has covered various financial and employment problems that have dogged AFN over the last several years. The Ashland Free Press reported critically on the process whereby AFN chose to employ Joe Franell as AFN head, notwithstanding the City’s employment of his brother Mike Franell as the City Attorney.

Relevance: Establishes that political speech that was silenced by Rick Holbo’s retaliatory silencing of the MAC Address for Plaintiff’s Network was specifically directed toward criticizing the two top administrators at

the City who knew of, approved, and thereafter ratified Holbo's policy of turning off MAC addresses according to his own wishes, without any regard for the First Amendment rights of Internet publishers and readers.

11. Plaintiff's Network is managed by Pine Creek Hosting, LLC ("PCH"). After the August 2<sup>nd</sup> shutoff, Plaintiff's Network registered PCH as its agent for receipt of notices of Infringement under the DMCA ("Plaintiff's Designated Agent").

Relevance: Establishes that, for purposes of the Declaratory Relief claim, this Court can rely upon Plaintiff's Network's system of self-regulation to protect the rights of copyright holders who present valid DMCA notices.

12. When PCH receives a DMCA notice, rather than simply turning off Plaintiff's Network, it has direct access to Plaintiff's Network server, and can remove only the particular webpages designated by the complainant, thus utilizing the "least intrusive means" of providing the regulation of free speech necessary to protect the interests of copyright holders.

Relevance: Establishes that, in fact, plaintiff is a responsible Online Service Provider that has established an infrastructure to implement the DMCA protocol for responding to an asserted copyright infringement on Plaintiff's Network, that in every case will apply only to a small number of webpages on one website. This is relevant to determining whether any regulation of speech by the City should be allowed whatsoever.

13. When AFN/Holbo turned off Plaintiff's Network, approximately forty websites were silenced, all email accounts on Plaintiff's Network became unusable, and the Internet connections and email accounts utilized by plaintiff and your affiant were shut down.

Relevance: Establishes the extent of the harm to plaintiff's First Amendment rights, and that of Internet users making use of Plaintiff's Network to transmit and receive communications. Since plaintiff is a

nonprofit entity that exists to serve its library mission, plaintiff has standing to assert these harms to its mission. Establishes further that the City lacks sufficiently subtle means to administer the DMCA “notice and takedown” procedure, because the DMCA does not allow many websites to be taken down because one website on a network is alleged to be publishing infringing media. Proper implementation of the DMCA strikes the right balance between the First Amendment and copyright holders’ claims of infringement. This fact establishes that the City is technically incapable of implementing the DMCA. Currently, its actions are as overbroad as if the City electrical department were to turn off an entire neighborhood’s power in order to address a malfunction at one house. It is equally wrong to impair the First Amendment rights of an entire network to address allegations of copyright infringement on one website on the network.

#### The Deposition Testimony of The City’s Designated Witness Is Relevant

The City designated Joe Franell as its witness to testify as to matters designated by plaintiff in a deposition notice propounded pursuant to FRCP 30(b)(6). No relevance objections were made at the deposition, and one would have thought such matters waived. The true reason for the City’s proposition of this outlandish argument is that Joe Franell’s testimony damns the City. Joe Franell’s testimony documents his complete ratification of the actions taken by Holbo, his entire ignorance of copyright law, the DMCA, and the First Amendment, and his potential interest in looking into the legal issues raised by this case at some future date. As the Information Technology Director for the City, and as its chosen witness to testify as to matters relevant to this action, Joe Franell’s testimony establishes an essential element of plaintiff’s *Monell* claim – top management’s acquiescence in a policy of un-benign neglect of constitutional rights.

Evidence of Plaintiff's Compliance With the DMCA,  
The City's Non-Compliance, Is Highly Relevant

The relevance of the DMCA to this action should be obvious to the City – the DMCA has been judicially confirmed by the Ninth Circuit as the safe path to walk between the First Amendment rights of website publishers and the copyrights of parties claiming Internet infringement. It is absolutely necessary that the City have such a policy, and since the institution of this litigation, the City has in fact managed to put together a proper DMCA policy.<sup>5</sup> It is admitted by Joe Franell's testimony that the City had no DMCA policy as of November 3, 2006, when his deposition was conducted. There is no merit to the City's motions to strike exhibits relevant to the plaintiff's own knowledge of and reliance upon DMCA procedures to protect the operation of Plaintiff's Network. The City has been tardy in developing its own knowledge of how to perform the duties it assumed by creating and operating AFN. That does not make plaintiff's evidence of the City's willful ignorance of the DMCA procedures inadmissible. Accordingly, the Court is respectfully requested to overrule all objections to testimony and exhibits relevant to the City's failure to perform within the standards established by the DMCA, and of plaintiff's knowledgeable efforts to operate Plaintiff's Network in conformance therewith.

Dated: January 28, 2007

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<sup>5</sup> <<http://www.ashlandfiber.net/acceptable.htm>>