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Of Attorneys for Defendant The City of Ashland

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

AMERICAN BUDDHA, an Oregon Nonprofit Corporation,)	No. 06-CV-3054-PA
)	
Plaintiff,)	DEFENDANT’S REPLY IN
)	SUPPORT OF MOTION TO
v.)	STRIKE
)	
THE CITY OF ASHLAND AND THE WASHINGTON POST COMPANY,)	
)	
Defendants.)	
)	

The issue raised by the City of Ashland’s Motion for Summary Judgment is whether the City’s disconnection of a modem hosting plaintiff’s website somehow violated the First Amendment. In response to the Motion for Summary Judgment, plaintiff filed an affidavit from its attorney making various assertions and attaching excerpts of depositions, most of which have no relevance to the issue before the Court. Defendant filed a motion to strike portions of the affidavit on that basis.

Evidence submitted in response to a motion for summary judgment must be admissible at trial. Fed. R. Civ. Proc. 56(e). Defendant’s first objection to the affidavit was that portions of it consisted not of a witness’s statement, but of counsel’s own assertions about facts not relevant to the claim. Defendant moved to strike those paragraphs on the basis of irrelevance. Plaintiff fails

to explain why the size, nature or content of its website or whether it has implemented security measures to keep its content behind a “sign-up” page is relevant to whether plaintiff’s First Amendment rights, if any, were violated by the disconnection of the modem.

Defendant could also not discern from the affidavit whether Mr. Carreon was testifying as an attorney or as a witness on behalf of American Buddha. In response, plaintiff does not clarify this. Under the Oregon Rules of Professional Conduct, a lawyer cannot offer “evidence” in the form of his or her own opinion. A lawyer cannot testify about facts unless testifying as a witness. Oregon Rule of Professional Conduct 3.4. While a lawyer can testify at trial on behalf of a client, that testimony must relate only to an uncontested issue. Oregon Rule of Professional Conduct 3.7. Plaintiff seems to argue that these rules of professional conduct did not apply to an affidavit filed in response to a motion for summary judgment. Evidence offered in response to such a motion must be admissible at trial. Therefore, there is no basis for making a distinction between testimony at trial and testimony in an affidavit.

Counsel’s affidavit also made various assertions regarding the Ashland Free Press. As set forth in Defendant’s Reply, and its original Motion to Strike, the Ashland Free Press is not the plaintiff, and American Buddha brought no retaliation claim of any kind against the City based on any alleged connection to the Ashland Free Press. To the extent that the Court considers plaintiff’s argument about “retaliation,” the evidence offered is purely speculative in nature and cannot be used to defeat summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (Ninth Circuit (1989)). (A summary judgment motion cannot be defeated by relying on solely conclusory allegations unsupported by any factual data.).

Plaintiff’s evidence regarding how its network is managed and how it addresses a Digital Millennium Copyright Act (“DMCA”) notice is also not relevant to the issue before the Court. Plaintiff argues that this information is relevant in determining whether any regulation of speech by the City should be allowed (Plaintiff’s Response to Objections, pg. 6). That issue is not

before the Court. The question before the Court is whether the City's disconnection of a modem because of a copyright infringement claim violated the First Amendment. Further, plaintiff's argument that the City did not follow proper DMCA protocol is irrelevant. Plaintiff did not bring, and does not have, a DMCA claim against the City. That statute provides no protection to those accused of copyright infringement, as plaintiff was in this case. As set forth in Defendant's Reply, all of plaintiff's arguments about the DMCA have no bearing on the issues.

In response to defendant's motion to strike excerpts of deposition testimony, plaintiff argues that relevancy objections should have been made during the discovery deposition, and were waived. This is incorrect. Relevance is not a valid objection during a discovery deposition. Further, no such objections are deemed waived if not made at the time of the deposition. Fed. R. Civ. Proc. 26(b); Fed. R. Civ. Proc. 30(c). As set forth in Defendant's Reply and Objections to Plaintiff's Response to its Concise Statement of Facts, Mr. Franell's alleged ignorance of copyright law and the DMCA is not relevant to plaintiff's claim. For these reasons, defendant's motion to strike the portions of the affidavit and exhibits moved against should be granted.

DATED this 19th day of March, 2007.

HOFFMAN, HART & WAGNER, LLP

By: /s/ Karen O'Kasey
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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of March, 2007, I served the foregoing
DEFENDANT'S REPLY IN SUPPORT OF MOTION TO STRIKE on the following party:

Charles Carreon
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by electronic means through the Court's Case Management/Electronic Case File system.

/s/ Karen O'Kasey
Karen O'Kasey