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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 AND
)	OBJECTIONS TO PLAINTIFF’S
v.)	RESPONSE TO CONCISE
)	STATEMENT OF FACTS
THE CITY OF ASHLAND AND THE WASHINGTON POST COMPANY,)	
)	
Defendants.)	

Pursuant to Local Rule 56.1(b)(3), defendant responds to “Plaintiff’s Concise Statement of Material Disputed Facts.”

INTRODUCTION

The claim before the Court is whether the disconnection of a modem hosting plaintiff’s website somehow violated the First Amendment. Defendant’s Concise Statement of Facts established that the only reason for the disconnection was a copyright infringement claim made by a third party, Kathleen Parker (Defendant’s Concise Statement, ¶ 7). Plaintiff filed no opposition pursuant to the requirements of Local Rule 56.1(b) to Defendant’s Concise Statement, and offered no factual evidence controverting this. Given this admitted fact, and the nature of the First Amendment claim, the majority of “facts” asserted by plaintiff in its statement are not

relevant to the Court's determination. They should be stricken as they do not comply with the requirements of Local Rule 56.1(c)(2) which provides that a party "may reference only the material facts which are necessary for the court to determine the limited issues presented in the summary judgment and no others." For this reason, paragraphs 6-12, 16-18, 20-24, 26-34, 36 and 37 are objected to by defendant and should be stricken as they are not relevant.

Additionally, plaintiff's Concise Statement of Facts is seven pages long. Local Rule 56.1(d) states: "Unless approved by the Court in advance, the concise statement may not be longer than five (5) pages." Pages six and seven of the Concise Statement should be excluded.

RESPONSE TO CONCISE STATEMENT

In addition to the objections made above, defendant files the following specific responses and objections to plaintiff's Concise Statement.

1. Admit.

2. Admit.

3. Admit.

4. Admit that the goal of AFN is to provide advanced telecommunication services to the citizens of Ashland (J. Franell deposition, p. 25, ll. 12-18, Ex. 3 to Plaintiff's Response).

Admit that this "could" include high speed internet services, television or other video services (J. Franell deposition, p. 25, ll. 19-25, Ex. 3 to Plaintiff's Response). Admit that these various forms for potential communication involve speech (J. Franell deposition, p. 26, ll. 1-2, Ex. 3 to Plaintiff's Response).

5. Deny. AFN is not an internet service provider. AFN enters into contracts with internet service providers who then contract with individual end users (Defendant's Concise Statement of Facts, ¶ 2). The deposition testimony relied on by plaintiff is directly contrary to what it is cited for. Mr. Franell actually testified: "We don't host websites. All we do is provide

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connection to the internet. How those connections are used is not something that we, um, we dictate.” (J. Franell deposition, p. 26, ll. 22-24, Ex. 3 to Plaintiff’s Response).

6. Deny. Plaintiff offers no admissible evidence supporting this statement of fact. Therefore, defendant denies it. This statement is also not relevant to the claim before the Court.

7. Deny. For the reasons set forth in defendant’s motion to strike the affidavit of Charles Carreon, plaintiff has offered no admissible evidence supporting this statement of fact. Therefore, it is denied. This statement is also not relevant to the claim before the Court.

8. Deny. For the reasons set forth in defendant’s motion to strike the affidavit of Charles Carreon, plaintiff has offered no factual evidence supporting this assertion. It also has no relevance to the claim before the Court.

9. Deny. As set forth in defendant’s motion to strike the affidavit of Charles Carreon, plaintiff has not offered any admissible evidence supporting this fact. Further, this statement has no relevance to the claim before the Court.

10. Deny. Plaintiff has offered no factual evidence supporting this assertion. Further, this assertion has no relevance to the claims before the Court.

11. Deny. Plaintiff has offered no factual evidence supporting this assertion. Further, these assertions have no relevance to the claim before the Court.

12. Deny. Plaintiff has offered no factual evidence supporting this assertion. Further, the assertion has no relevance to the claim before the Court.

13. Deny. The testimony relied on by plaintiff does not support this statement. Mr. Franell explained that the City might shut down a modem if there was a claim of a copyright infringement, an instruction from an internet service provider to disable a modem for nonpayment of a bill, a transmission negatively affecting network performance, viruses, spams, networks attacks and other instances of violations of the acceptable use policy (J. Franell deposition, p. 28, ll. 20-25, p. 29, ll. 1-23, Ex. 3 to Plaintiff’s Response).

14. Admit.

15. Deny. Holbo disconnected the modem due to the copyright infringement claim made by Parker (Defendant's Concise Statement of Material Facts, ¶ 5, 6, and 7). The deposition testimony relied on by plaintiff does not support the assertions made. Holbo actually testified that AFN does not take down websites because of pornographic or obscene material (Holbo deposition, p. 17, ll. 23-25, p. 18, ll. 7, Ex. 10 to Plaintiff's Response), but that it will take down a modem due to a copyright infringement claim (Holbo deposition, p. 18, ll. 8-11, Ex. 10 to Plaintiff's Response).

16. Admit that the email sent by Parker states this. Deny that this has any relevance to the issue before the Court.

17. Deny. Holbo did not turn off plaintiff's network. Holbo turned off the modem providing internet service to American Buddha's website (Defendant's Concise Statement of Material Facts, ¶ 6). The deposition testimony relied on by plaintiff does not support the conclusions set forth in this paragraph. Further, these assertions have no relevance to the claim before the Court.

18. Deny. Plaintiff has offered no admissible evidence supporting this. Further, this paragraph has no relevance to the claim before the Court.

19. Admit.

20. Deny. The deposition testimony relied on by plaintiff does not support this argumentative conclusion. Further, it is not relevant to any issue before the Court.

21. Deny. The deposition testimony relied on by plaintiff does not support this argumentative conclusion. Further, it is not relevant to any issue before the Court.

22. Deny. The deposition testimony relied on by plaintiff does not support this argumentative conclusion. Further, it is not relevant to any issue before the Court.

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23. Deny. The deposition testimony relied on by plaintiff does not support this argumentative conclusion. Further, it is not relevant to any issue before the Court.

24. Deny. The deposition testimony relied on by plaintiff does not support this argumentative conclusion. Further, it is not relevant to any issue before the Court.

25. Deny. Holbo turned the modem off due to the copyright infringement claim (Defendant's Concise Statement of Material Facts, ¶ 7). He did not testify that he did it because Dowd would not.

26. Admit that Mr. Mike Franell testified that Mr. Holbo was not on "a lark and a frolic." Object as this has no relevance to the claim before the Court.

27. Object to the argumentative nature of this paragraph as it violates Local Rule 56.1. Admit that Franell testified that Holbo "did what he was supposed to do." Also object as it has no relevance to the claim before the Court.

28. Admit that Congress enacted 17 U.S.C. §512. Object to this paragraph as citation of a statute is not a statement of fact pursuant to Local Rule 56.1 and because the statute has no relevance to the claim before the Court.

29. Admit. Object as this has no relevance to the claim before the Court.

30. Admit that Mr. Franell testified that he did not know if a DMCA notice must be sworn to under penalty of perjury. Plaintiff fails to cite to any other testimony supporting this paragraph so defendant cannot admit or deny the remainder. Object as this paragraph has no relevance to the claim before the Court.

31. Admit that as of August 2006, the City of Ashland did not have a written DMCA policy. Object as it has no relevance to the claim before the Court.

32. Admit that as of August 11, 2006, the City of Ashland had a copyright infringement process. Object as it has no relevance to the claim before the Court.

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33. Admit. Object as this has no relevance to the claim before the Court.

34. Deny. The testimony relied on does not support the conclusions set forth in this paragraph. Further, the argumentative nature of this paragraph violates Local Rule 56. Further, defendant objects to this paragraph as it has no relevance to the claim before the Court.

35. Deny. Mr. Franell actually testified that the City turns off modems in response to copyright infringement claims (J. Franell deposition, p. 21, ll. 18-23, Ex. 3 to Plaintiff's Response).

36. Admit that Mr. Franell testified that he did not know whether the City's existing policy complied with the Digital Millennium Copyright Act because his relationship is as a wholesaler to ISPs. Defendant objects to this paragraph as it is not relevant to any claim before the Court.

37. Admit. Defendant objects to this paragraph as it is not relevant to the claim before the Court.

DATED this 15th day of February, 2007.

HOFFMAN, HART & WAGNER, LLP

By: /s/ Karen O'Kasey
Karen O'Kasey, OSB No. 870696
Of Attorneys for Defendant The City of Ashland
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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of February, 2007, I served the foregoing
DEFENDANT'S REPLY AND OBJECTIONS TO PLAINTIFF'S RESPONSE TO CONCISE
STATEMENT OF FACTS on the following party:

Charles Carreon
Online Media Law, PLLC
423 Gateway Drive, #64
Pacifica, CA 94044

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

/s/ Karen O'Kasey
Karen O'Kasey