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Of Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GREGG SCHUMACHER and LINDA)	
SCHUMACHER, individually and as)	No. CV 07-601-MO
husband and wife, and GREGG)	
SCHUMACHER FURS LLC dba)	PLAINTIFFS' RESPONSE TO
SCHUMACHER FURS & OUTERWEAR,)	DEFENDANT MIERAS' MOTION
)	FOR RECONSIDERATION OF
Plaintiffs)	PRELIMINARY INJUNCTION
)	
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.)	

Defendant Kevin Mieras' motion for reconsideration of the court's preliminary injunction should be denied because: (a) he has not made an appropriate showing under FRCP 60 of valid reasons to reconsider the court's order; (b) the injunction is not overbroad, vague or uncertain, and in any event can be justified on other grounds; (c) the record contains sufficient evidence to demonstrate plaintiffs have satisfied their burden of showing likelihood of prevailing on the merits; and (d) the balance of hardships does not favor Mr. Mieras.

A. DEFENDANT MIERAS HAS NOT MADE AN APPROPRIATE SHOWING UNDER FRCP 60 FOR RELIEF FROM THE PRELIMINARY INJUNCTION.

The only basis for relief under FRCP 60 explicitly argued in defendant Mieras' motion is presentation of newly discovered evidence. Mieras' Memorandum, p. 3. However, it should be noted that for newly discovered evidence to be considered, the moving party must show that such newly discovered evidence "by due diligence...could not have been discovered in time" to present to the court earlier. FRCP 60(b)(2). No such showing is made here.

The only justification offered is that plaintiffs' reply was not filed until the day before the hearing (Mieras' Memorandum, p. 3), but there is no showing defendant Mieras did not know of the 'newly discovered' evidence he offers now, or that it was related in any way to the reply materials filed by plaintiffs.

B. THE INJUNCTION IS NOT OVERBROAD, VAGUE OR UNCERTAIN, AND IN ANY EVENT CAN BE JUSTIFIED ON OTHER GROUNDS.

Defendant Mieras posits that the injunction reaches any form of communication, includes public sidewalks and unfairly limits his First Amendment rights. Mieras' Memorandum, pp. 4, 18. He then goes on to argue the injunction is so vague or uncertain

that Mr. Mieras cannot comply with it. Mieras' Memorandum, pp. 6-8. None of those arguments has merit on the face of this record.

First, the courts will not read an injunction in such a manner as to create a manifest abuse of discretion clearly not intended by the trial court or an absurd result. *Gathright v. City of Portland*, 315 F. Supp. 2d 1099 (D-Or 2004), *affirmed* 439 F3d 573, 581 (9th Cir. 2006). The record confirms the court's extraordinary attention to preserving First Amendment expression as it considered the requested preliminary injunction.

Second, even the authorities relied upon in defendant's memorandum acknowledge speech can be limited if it is threatening normal activity for that venue. Mieras' Memorandum, p. 5. Plaintiffs have alleged and presented substantial evidence the protest activity has interfered with their retail trade, their ability to remain in the existing location and their ability to relocate to another location. Gregg Schumacher Declaration, pp. 2-3, 7-8. Such evidence confirms an actual threat to normal retail activity, even without consideration of personal and property threats already at issue.

Third, Mr. Mieras is purposely taking certain provisions of the injunction out of context. The prohibition on communication expressly refers to contact with the Schumachers, their family members and employees and is not directed at the public as a whole. Preliminary Injunction, p. 2. Even if the court considers *arguendo* evidence already relied upon that Mr. Mieras does not know where Gregg and Linda Schumacher live or know the identities of all their family members and employees, it is evident Mr. Mieras would not be directing his message at those individuals if he does not know who they are or where they live, so it is no limitation on his legitimate rights. The record is clear, and the court has accepted as sufficient, evidence of Mr. Mieras' presence at or

near Gregg and Linda Schumachers' home, as well as oral, written and internet threats to the Schumachers personally, their family, their employees and their property. *See* Gregg Schumacher Declaration, pp. 5-7; Linda Schumacher Declaration, pp. 2, 3-4; Scott Castleman Declaration, p. 6.

The concern over "solid or liquid substances" precluding food or drink being present outside the Schumacher store is similarly absurd. Mieras' Memorandum, p. 7. Defendant's exception to application of the injunction to those "in active concert or participation with" Mr. Mieras is hardly vague or uncertain because Mr. Mieras knows who those persons are. *See* Preliminary Injunction, p. 2; Mieras' Memorandum, p. 7.

The only point plaintiffs agree with Mr. Mieras about is that the injunction is not explicit in applying its terms to future SFO locations as well as the SW Morrison location. *See* Preliminary Injunction, p. 2. The court could clarify its injunction in that respect so there is no uncertainty.

C. THE RECORD CONTAINS SUFFICIENT EVIDENCE TO DEMONSTRATE PLAINTIFFS HAVE SATISFIED THEIR BURDEN OF SHOWING LIKELIHOOD OF PREVAILING ON THE MERITS.

Defendant Mieras generally asserts a lack of evidence of his involvement in any evidence of unconstitutional or unlawful activity, a lack of evidence of tortious conduct as to each element of each tort claim and the court's lack of consideration of any public interests at stake. Mieras' Memorandum, pp. 9ff. He argues he was not engaged in tortious activity because Jason Dahl never observed him doing anything plaintiffs complain of. Jason Dahl Affidavit, p. 2. That is analogous to evidence that a person could not have been negligent in causing an auto accident because he was known to be a careful driver, something that has never been accepted as relevant. Incredibly, he argues that

much of the evidence plaintiffs offer is nothing more than simple annoyances everyone must tolerate in daily life instead of extreme and outrageous behavior. Mieras' Memorandum, pp. 12-13.

The truth is the record does contain evidence to show plaintiffs are likely to prevail on the merits of their claims. As to the intentional infliction of emotional distress claim, the intent to cause severe emotional distress can be inferred from 18 months of at least weekly organized protests, the purposeful anonymity of many of the protestors, the documented behavior of many of the protestors and the court's determination Mr. Mieras' appearance at night near the Schumachers' home. The record already contains evidence Gregg Schumacher has experienced difficulty sleeping due to the stress of the protests and the detrimental effect on his business. Gregg Schumacher Supplemental Declaration, pp. 2-3. It is already a matter of record Linda Schumacher has experienced significant anxiety and distress, attributed to the protests, to the point she has sought counseling and was advised to leave town to get away from the protests. Gregg Schumacher Supplemental Declaration, p. 3. Linda Schumacher Supplemental Declaration, p. 2.

The record amply demonstrates the protest activity includes speech and behavior that a factfinder would have no difficulty perceiving transcends mere annoyance to reach the level of exceeding socially tolerable conduct. The record includes protestors in varying stages of undress pursuing members of the public down the street, shouting obscenities, blocking the sidewalk and blocking the doorway to the SFO store. Exs. 1 and 2 to Gregg Schumacher's Declaration. The record documents death threats from ALF and others. Gregg Schumacher Declaration, p. 6 and Ex. 3 thereto. Kevin Mieras even

acknowledges that he appears in some of the video and photographs of such activity (Mieras Supplemental Affidavit, pp. 3-4), and he is known to be affiliated, or was formerly affiliated, with ALF and In Defense of Animals. The court properly found he had sufficient connection to these activities to be enjoined.

In the same way, there is ample evidence of his liability for intentional interference with economic relations and interference with contract. The record clearly evidences an intention to put SFO out of business. Gregg Schumacher Declaration, pp. 6, 7 and Exs. 4-b, 4-c. There is evidence of orchestrated efforts to contact other landlords and property managers to prevent SFO from relocating to other malls or retail locations, complete with mailing and other contact information. *Id.* There is ample evidence of interference with plaintiffs' customers' willingness or ability to patronize the store. Gregg Schumacher Declaration, pp. 3, 5 and Exs. 3-6. Linda Schumacher Declaration, p. 4. It is equally clear that the stated intention of putting plaintiffs out of business when they operate a lawful business is an improper purpose, and the protests document the employment of improper means to accomplish that improper purpose. *See* Ex. 1-2 to Gregg Schumacher's Declaration. Mr. Mieras' website "portlandfurcruelty.com" has been, and continues to be, an integral part of communication and posting of his photos and video about protest activity at SFO. Scott Castleman Declaration, p. 2. Finally, no matter how Mr. Mieras wants to minimize the effects of the protests, no one has controverted that the SFO store was closing May 31, 2007, evidence plaintiffs want to but can't relocate because of the protest activity, and the aforementioned evidence of interference with their customers. One can hardly imagine the closure of a business as anything less than irreparable injury.

Plaintiffs' trespass claim is based on hitherto uncontroverted evidence of someone surreptitiously placing anti-fur information tags in the pockets of coats for sale inside the SFO store. Gregg Schumacher Declaration, p. 4. There can be no doubt of unauthorized entry for the accomplishment of such a purpose contrary to the business interests of the store. While there may be doubt about Mr. Mieras' personal involvement in that trespass, the other evidence adduced above reflects he may well have had knowledge or complicity in it as a leader of the protests.

As to plaintiffs' nuisance claim, the interference with use and enjoyment of their retail store premises is incontrovertible in light of evidence of customers being mistreated as they enter or exit the store or staying away entirely, together with evidence of blocking the doorway or the sidewalk. *See* Ex. 1-2 to Gregg Schumacher's Declaration. As noted above, Mr. Mieras acknowledges being present during some of this activity. Moreover, PCC 14B.60.010 defines nuisance activity in the City of Portland to include harassment, intimidation, disorderly conduct, assault or menacing, public indecency, trespass, criminal mischief, unlawful operation of sound equipment and indecent exposure. Since all those crimes are defined by statute or elsewhere, and the evidence of such activity has been proffered to the court, there is clear documentation of interference with plaintiffs' use and enjoyment of the property. The evidence speaks for itself, and the court can judge for itself, whether the documented behavior would affect a normal person of ordinary habits and sensibilities. Finally, plaintiffs have presented uncontroverted evidence of being evicted from their SW Morrison Street location, claimed economic losses attributed to the protest activity and emotional distress. Gregg Schumacher Declaration, pp. 3, 9. Complaint, ¶ 48. Again, evidence of irreparable injury is manifest in the court record.

Defendant Mieras' argument that the court failed to consider the public interest is outright specious. Mieras Memorandum, p. 9. PCC 14B.60.010 (and the state statutes it references) already is noted in the record and defines the public's interest in limiting nuisance activity. PCC 18.02.020 concerning noise regulation expresses the public's interest in

Minimiz[ing] the exposure of citizens to the potential negative physiological and psychological effects of excessive noise and protect, promote and preserve the public health, safety and welfare. It is the intent of the City Council to control the level of noise in a manner that promotes the use, value, and enjoyment of property, conduct of business, sleep and repose and reduces unnecessary and excessive sound in the environment.

PCC 14A.50.050 prohibits "any type of permanent or temporary fixture or structure in or upon non-park public property or public right-of-way without a permit or other authorization from the City", and doing so is declared to be a public nuisance. The record shows regular setting up of a TV on the sidewalk, tables for food and beverages for the protestors and erection of signs, all without any evidence of protestors obtaining required permits. Danny Garner Declaration, p. 2. *See also* Ex. A to Kevin Mieras Supplemental Affidavit. The fact that animal rights is a public issue (Mieras Memorandum, p. 9) that is actively debated does not justify any and all conduct related to the public debate of that issue, and the record documents due consideration for the public's interests, as well as protection of the First Amendment rights of protestors.

D. THE BALANCE OF HARDSHIPS DOES NOT FAVOR MR. MIERAS.

Mr. Mieras would have the court believe he has been wrongfully subjected to shame and humiliation as the object of the preliminary injunction. Mieras Memorandum, p. 20; Mieras Supplemental Affidavit, p. 4. He would have the court believe that plaintiffs and some of their employees have acted badly by engaging in some of the same

conduct they complain of. Mieras Memorandum, p. 14. He also asks the court to believe he has been limited in his legitimate protest activity. Mieras Memorandum, p. 18. The record justifies none of those conclusions.

As noted above, Mr. Mieras himself acknowledges he is depicted in some of the photos and video showing some of the more egregious protest activity, so he can hardly complain about being unfairly associated with such behavior. Second, based upon the longevity and consistency of his presence, plaintiffs perceive him to be a leader of the protests. Third, the court properly accepted plaintiffs' evidence Mr. Mieras appeared in the darkness near their home because they recognized his voice, something that cannot be said of any other protestor.

It is ironic Mr. Mieras believes he has the right to engage in expression of his beliefs and opinions, yet he criticizes the Schumachers and their employees for sometimes responding in kind. Mieras Memorandum, p. 14. Mieras Supplemental Affidavit, p. 3. If he believes *he* is engaging in constitutionally protected speech, he cannot deny *plaintiffs* the same right and opportunity. If he believes they are acting inappropriately or unlawfully in confronting him, he must accept responsibility for doing the same to them. In short, he can't have it both ways, especially when the evidence he proffers clearly took place on the same public sidewalk he is using to exercise his own rights. Mieras Supplemental Affidavit, Ex. A. At most, such evidence reflects the plaintiffs' frustration of dealing with 18 months of protests, and it pales in comparison to death threats and the stated intention of closing down a legitimate business.

Finally, it should be noted that the injunction has done nothing to dissuade Mr. Mieras from his involvement in the protests at the SFO store. He was present at the store

on the following two Saturdays after the court's injunction ruling, as he had been before. Danny Garner Declaration, pp. 2-3. His conduct on those occasions was sufficient to motivate SFO employees to contact Gregg Schumacher by telephone to say they were afraid of what was going on outside, and they wanted to close the store early. Gregg Schumacher Supplemental Declaration, p. 2. He was observed repeatedly coming within 15 feet of the store and taking photos through the windows of persons inside. Danny Garner Declaration, pp. 2-3. He is documented to have set up signs outside the store, as was done previously. *Id.* None of this evidences a person who is now afraid to express his opinions because of the operation of a preliminary injunction.

CONCLUSION

Defendant Mieras has presented nothing that should cause the court to reconsider its order partially granting plaintiffs' motion for preliminary injunction as to him. The order was properly issued when it was entered, and it remains so today.

DATED this 8th day of June, 2007.



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