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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION**
12

13 CITIZENS FOR FREE SPEECH, LLC,
14 and MICHAEL SHAW,

15 Plaintiffs,

16 v.

17 COUNTY OF ALAMEDA; ALAMEDA
18 COUNTY EAST COUNTY BOARD OF
ZONING ADJUSTMENTS; FRANK J.
19 IMHOFF, SCOTT BEYER, and
20 MATTHEW B. FORD, in their official
capacity as members of the Alameda
21 County East County Board of Zoning
Adjustments,

22 Defendants.
23

Case No. 4:18-cv-00834-SBA

**DEFENDANTS' REPLY BRIEF IN
SUPPORT OF MOTION TO
DISMISS; DECLARATION OF
MATTHEW D. ZINN IN SUPPORT**

Date: July 11, 2018

The Hon. Sandra Brown Armstrong

24 Defendants submit this reply brief to request that the Court award Defendants their
25 attorneys' fees incurred as a result of Plaintiffs' non-compliance with the meet-and-confer
26 requirement of the Court's standing order. During the meet-and-confer, Plaintiffs failed to
27 disclose their intent to amend the Complaint in response to Defendants' motion to dismiss.

28 Plaintiffs had ample advance knowledge of the arguments in Defendants' Motion to

1 Dismiss. Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction asserted
2 that Plaintiffs were not likely to succeed on the merits of their claims for substantially the
3 same reasons advanced in the motion to dismiss. *See* Dkt. 27. Additionally, counsel for
4 Defendants e-mailed counsel for Plaintiffs a summary of the arguments in Defendants'
5 Motion to Dismiss well in advance of the Court-ordered meet-and-confer. Declaration of
6 Matthew D. Zinn ("Zinn Decl."), ¶ 3. Finally, as required by the Court's standing order,
7 counsel for the parties met and conferred on May 24. *Id.* at ¶ 4. At no point during the meet-
8 and-confer did Plaintiffs' counsel indicate that they intended to file an amended Complaint
9 in an attempt to moot Defendants' motion. *Id.*¹

10 The First Amended Complaint makes no material change to the original complaint,
11 but rather merely adds immaterial factual detail and legal argument. *Compare, e.g.,* Dkt. 1,
12 ¶¶ 14, 20, *with* Dkt. 42, ¶¶ 20, 24. It is thus a purely procedural gambit, serving no purpose
13 other than to moot Defendants' motion. It requires Defendants to file a new motion and
14 delays the Court's resolution of Defendants' contentions.

15 Plaintiffs' conduct has led to Defendants incurring attorneys' fees unnecessarily. Had
16 Plaintiffs' counsel taken the Court's meet-and-confer requirement seriously and disclosed
17 their intent to amend the Complaint, Defendants would not have filed the Motion to
18 Dismiss. Instead, Defendants would have waited to receive the First Amended Complaint
19 and would have moved to dismiss that complaint. Zinn Decl., ¶ 6.

20 Accordingly, Defendants' respectfully request that this Court order Plaintiffs to pay
21 the attorneys' fees incurred by Defendants in filing this reply and in modifying the motion
22 to dismiss to address the First Amended Complaint. These fees could have been avoided had
23 Plaintiffs complied with the standing order. *See Fredericks v. Equilon Enters., LLC*, No.
24 C10-5758 SBA, 2012 U.S. Dist. LEXIS 134225, at *2 (N.D. Cal. Sept. 19, 2012) (imposing
25 adverse consequences for failure to comply with the Court's standing order). The Court has
26

27 _____
28 ¹ Instead, Plaintiffs' counsel first informed counsel for Defendants of their intent to amend
the Complaint by phone on June 4, 2018. *Id.* at ¶ 5.

DECLARATION OF MATTHEW D. ZINN

I, Matthew D. Zinn, declare as follows:

1. I am an attorney licensed to practice in the State of California and a partner at Shute, Mihaly & Weinberger LLP, attorneys for Defendants. I have personal knowledge of the facts set forth herein, except as to those stated on information and belief, and as to those, I am informed and believe them to be true. If called as a witness, I could and would competently testify to the matters stated herein.

2. On May 15, 2018, I emailed Timothy Kassouni, Counsel for Plaintiffs, informing him that Defendants intended to file a motion to dismiss the complaint. We arranged to confer on May 17. Due to Mr. Kassouni’s participation in an extended arbitration, we agreed to reschedule the conference.

3. On May 21, I e-mailed Mr. Kassouni a summary of the arguments contained in the motion to dismiss. Mr. Kassouni indicated his continued unavailability. As a result, we stipulated to extend Defendants’ time to respond to the complaint to May 29 to allow time to meet and confer.

4. On May 24, I conferred with Timothy Kassouni via telephone. At no time during the meet-and-confer did Mr. Kassouni indicate that Plaintiffs intended to amend their complaint rather than file an opposition to the motion to dismiss. We agreed that both sides were fully aware of the issues likely to be aired on the motion to dismiss. Defendants filed the motion to dismiss later that day.

5. I first learned of Plaintiffs’ intent to amend their complaint over a week later when I received a voicemail message from Mr. Kassouni’s co-counsel on June 4 and spoke with him later that day.

6. Had Defendants known that Plaintiffs would amend their complaint, Defendants would have stipulated to the filing of the amended complaint and waited until after Plaintiffs filed that amended complaint to file a motion to dismiss.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

