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15 SPEECH, LLC; MICHAEL SHAW

16 **UNITED STATES DISTRICT COURT**
17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
18 **OAKLAND DIVISION**

19 CITIZENS FOR FREE SPEECH, LLC;
20 MICHAEL SHAW;

21 Plaintiffs,

22 vs.

23 COUNTY OF ALAMEDA; ALAMEDA
24 COUNTY EAST COUNTY BOARD OF
ZONING ADJUSTMENTS; FRANK J.
IMHOFF, SCOTT BEYER, and
MATTHEW B. FORD, in their official
capacities as members of the Alameda
County East County Board of Zoning
Adjustments,

25 Defendants.

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

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' REQUEST FOR FEES
AS SET FORTH IN THE REPLY
BRIEF IN SUPPORT OF MOTION TO
DISMISS (Doc#43)**

26 Plaintiffs CITIZENS FOR FREE SPEECH, LLC; and MICHAEL SHAW hereby
27 bring their response to the request for attorney's fees sought by Defendants, as
28 contained in the Reply Brief in Support of Motion to Dismiss and the accompanying
Declaration (Doc#43). This Response is made and supported by the following

PLAINTIFFS' RESPONSE TO RESPONSE TO DEFENDANTS' REQUEST FOR FEES

1 Memorandum of Points and Authorities and the attached Declaration of Timothy
2 Kassouni, Esq.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. INTRODUCTION**

5 Defendants filed a “Reply Brief” seeking affirmative relief in the form of attorneys’
6 fees as a sanction against Plaintiffs for alleged bad faith in the meet and confer process
7 required by Section 4 of this Court’s Standing Order on civil matters. The request sought
8 in the Reply brief should be denied without further briefing.

9 **II. ARGUMENT**

10 **A. Neither the Federal Rules of Civil Procedure Nor The Local Rules**
11 **Permit Defendants to Seek Affirmative Relief By Way of a Reply Brief.**

12 In the Reply Brief (Doc# 43), Defendants request this Court “order Plaintiffs to pay
13 the attorneys’ fees incurred by Defendants in filing th[e] reply and in modifying the motion
14 to dismiss to address the First Amended Complaint.” *Id.* at p.2:20-21. The applicable
15 Rules do not permit Defendants to seek an order of this Court by way of a Reply Brief to
16 a Motion which does not seek the relief. Fed. R. Civ. P 7 (b)(1) requires that “[a] request
17 for a court order must be made by motion. The motion must: (A) be in writing unless
18 made during a hearing or trial.” Further, Local Rule 7-1(a) requires that “Any written
19 request to the Court for an order must be presented by one of the following means: (1)
20 Duly noticed motion pursuant to Civil L.R. 7-2.”

21 The Reply Brief is not a duly noticed Motion to which Plaintiffs have been given the
22 opportunity to oppose pursuant to Local Rule 7-3. Thus, the Reply Brief which seeks an
23 order awarding fees is not permitted by the Rules and constitutes a fugitive filing that
24 must be stricken and/or disregarded.

25 **B. Even If the Court Were To Consider The Request, No Fees Are**
26 **Warranted.**

27 As set forth in the Declaration of Matthew Zinn accompanying the Reply, counsel
28 met and conferred as to the Defendants’ Motion to Dismiss (Doc# 38) on May 24, 2018.

1 Later that same day, Defendants filed the Motion. Mr. Zinn notified Mr. Kassouni that the
2 Motion had already been drafted and that Defendants were waiting to file the Motion until
3 after the meet and confer had occurred. See Declaration of Timothy Kassouni, Esq., ¶ 3
4 attached hereto as **EXHIBIT 1**.

5 At the time the meet and confer was being held, Plaintiffs were in the process of
6 associating undersigned counsel to assist Mr. Kassouni with the case. *Id.* at ¶ 4. Prior to
7 the meet and confer, the Plaintiffs had not considered the possibility of amending the
8 Complaint in an effort to address the issues raised in the Motion. *Id.* at ¶ 5. On May 25,
9 2018, undersigned counsel noticed his appearance (Doc# 39). It was only after
10 undersigned counsel appeared in the case did Plaintiffs consider amending the
11 Complaint, which is their right under Rule 15. *Id.* at ¶ 6. See *Lacey v. Maricopa Cty.*,
12 693 F.3d 896, 927 (9th Cir.2012). As set forth in the Declaration of Mr. Zinn, on June 4,
13 2018, undersigned counsel spoke with Mr. Zinn and informed him of Plaintiffs' intent to
14 amend the Complaint.

15 Plaintiffs participated in the meet and confer in good faith. At the meet and confer,
16 Plaintiffs had not considered the option of amending the complaint. However, even if
17 they had, Defendants were not prejudiced by Plaintiffs' failure to notify them of the intent
18 to amend the complaint in response to the Motion. As evidenced by Mr. Zinn's
19 Declaration, in which he confirms that the meet and confer occurred the same day the
20 Motion was filed, the Motion to Dismiss was already entirely drafted when the meet and
21 confer occurred. Even if Plaintiffs *had* notified Mr. Zinn of an intent to amend the
22 complaint, and in response the Defendants elected not to file the Motion, the Defendants
23 would have had to amend the already-completed Motion anyway after the Amended
24 Complaint was filed. Defendants' contention of prejudice and additional expense are
25 therefore meritless. The Motion was already drafted before the meet and confer, and the
26 alterations to the Motion that resulted from the Amended Complaint would have been
27 made under either scenario.

28 The only expense that was not justified here was the Reply Brief's improper

1 attempt to seek fees. The Reply Brief did not address anything associated with the
2 Motion. Moreover, the Motion was mooted as a matter of law upon the filing of the
3 Amended Complaint, rendering a Reply unnecessary and improper. See *Ramirez v. Cty.*
4 *of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015).

5 Thus, because there was no bad faith exhibited in the meet and confer, and the
6 Defendants have suffered not real prejudice, there is no basis for an order awarding fees.

7 **III. CONCLUSION**

8 It is not permitted by the Rules of Civil Procedure to seek an order for attorneys'
9 fees by way of a Reply Brief. Moreover, there is no factual or legal basis for an award of
10 fees, as Plaintiffs have not acted in bad faith and Defendants were not prejudiced.
11 Plaintiffs respectfully request the Court deny Defendants' request for sanctions in the
12 form of an award of fees.

13 DATED: This 26th day of June, 2018.

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17 And

18 ROBISON, SHARP, SULLIVAN & BRUST
19 71 Washington Street
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20 /s/ Frank C. Gilmore
21 FRANK C. GILMORE, SBN 283859
22 TIMOTHY KASSOUNI, ESQ., SBN 142907
23 R.S. RADFORD, ESQ., SBN 137533
Attorneys for Plaintiffs/Appellants CITIZENS
FOR FREE SPEECH, LLC; MICHAEL SHAW

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EXHIBIT 1

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**DECLARATION OF TIMOTHY KASSOUNI IN SUPPORT OF PLAINTIFFS’
RESPONSE TO DEFENDANTS’ REQUEST FOR FEES AS SET FORTH IN THE
REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS (Doc#43)**

I, Timothy Kassouni, state under penalty of perjury as follows:

1. I am over the age of 18 years of age, and make the following statements on my own personal knowledge, except where stated to be on my information and belief.

2. I am an attorney licensed to practice before this Court, a member of the law firm Kassouni Law, and am co-counsel of record for Plaintiffs, Citizens for Free Speech, LLC, and Michael Shaw in the above-captioned matter.

3. As set forth in the Declaration of Matthew Zinn accompanying the Reply, counsel met and conferred as to the Defendants’ Motion to Dismiss (Doc# 38) on May 24, 2018, at approximately 4:00 P.M. Later that same day, Defendants filed the Motion. My understanding based upon the meet and confer conversation was that the Motion had already been drafted and that Defendants were waiting to file the Motion until after the meet and confer had occurred.

4. At the time the meet and confer was being held, Plaintiffs were in the process of associating Frank C. Gilmore, Esq., as co-counsel in this case.

5. Prior to the meet and confer, Plaintiffs had not considered the possibility of amending the Complaint in an effort to address the issues raised in the Motion.

6. On May 25, 2018, Frank C. Gilmore, Esq. noticed his appearance (Doc# 39). It was only after Frank C. Gilmore, Esq., appeared in the case did Plaintiffs consider amending the Complaint, which is their right under Rule 15.

DATED: This 26th day of June, 2018.

/s/ Timothy Kassouni
TIMOTHY KASSOUNI, ESQ., SBN 142907

CERTIFICATE OF SERVICE

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Pursuant to FRCP 5(b), I certify that I am an employee of Robison, Sharp, Sullivan & Brust, and that on this date I caused to be served a true copy **PLAINTIFFS' RESPONSE TO DEFENDANTS' REQUEST FOR FEES AS SET FORTH IN THE REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS (Doc#43)** on all parties to this action by the method(s) indicated below:

_____ by placing an original or true copy thereof in a sealed envelope, with sufficient postage affixed thereto, in the United States mail at Reno, Nevada, addressed to:

Matthew D. Zinn, Esq
Winter King, Esq.
Aaron M. Stanton, Esq.
Shute, Mihaly & Weinberger, LLP
396 Hayes Street
San Francisco, California 94102
Attorneys for Defendants

X by using the Court's CM/ECF Electronic Notification System addressed to:

Matthew D. Zinn, Esq
Email: Zinn@smwlaw.com
Winter King, Esq.
Email: King@smwlaw.com
Aaron M. Stanton, Esq.
Email: Stanton@smwlaw.com

_____ by placing an original or true copy thereof in a sealed envelope for personal delivery/hand delivery of original addressed to:

_____ by facsimile (fax) addressed to:
_____ by Federal Express/UPS or other overnight delivery addressed to:

DATED: This 26th day of June, 2018.

/s/ Mary Carroll Davis
Employee of Robison, Sharp, Sullivan & Brust