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IN THE CIRCUIT COURT FOR THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

ANDY NGO, an individual,

Plaintiff,

v.

Case No. 20CV19618

**PLAINTIFF’S SUPPLEMENTAL
BRIEF IN SUPPORT OF MOTION
TO AMEND**

ROSE CITY ANTIFA, an
unincorporated association; BENJAMIN
BOLEN, an individual; JOHN
HACKER, an individual; CORBYN
(KATHERINE) BELYEA, an individual;
JOSEPH CHRISTIAN EVANS, an
individual; MADISON LEE ALLEN, an
individual; DOES 1-50.

Defendants.

Argument

Defendant Bolen has cited the California case of *Varian Med. Sys., Inc. v. Delfino*, 35 Cal.4th 180, 193, 106 P.3d 958, 966–67, 25 Cal.Rptr.3d 298, 308–09 (2005), as being “on point” to the general issue presently before the Court: to what extent, if any, does Bolen’s appeal of the Court’s limited judgment denying his special motion to strike interfere with the ongoing proceedings in this Court—namely, Plaintiff Ngo’s motion for leave to file an amended complaint. *Varian* does not address the question of amending a complaint while an appeal is pending, and was decided under an entirely different statutory scheme.

The *Varian* case held that “the perfecting of an appeal from the denial of a special motion to strike automatically stays all further trial court proceedings *on the merits* upon the causes of action

1 affected by the motion.” *Varian*, 35 Cal.4th at 187 (emphasis added). After the defendants’ motion
2 to strike was denied in *Varian*, they appealed, but the trial court nevertheless proceeded with a jury
3 trial resulting in an award of substantial damages against defendants. *Id.* at 188. The defendants’
4 appeal of the anti-SLAPP denial was then dismissed as moot by the California Court of Appeals.
5 When the judgment on the jury verdict came before the California Supreme Court, it reversed the
6 judgment on the ground that under California law, the anti-SLAPP appeal by the defendants against
7 the entire complaint left the lower court without subject matter jurisdiction to proceed to trial.

8 The *Varian* court focused its analysis on whether the trial court proceeding (in that case,
9 entry of a final judgment) “affects the effectiveness of an [anti-SLAPP] appeal.” Specifically, the
10 Court assessed whether “the possible outcomes on appeal and the actual or possible results of the
11 proceeding are irreconcilable,” and whether “the very purpose of the appeal is to avoid the need for
12 that proceeding.” *Id.* at 190. The court noted that “an appeal does not stay proceedings on ancillary
13 or collateral matters which do not affect the judgment [or order] on appeal even though the
14 proceedings may render the appeal moot.” *Id.* at 191 (internal quotations omitted). In rendering its
15 decision, the California Supreme Court observed that “some anti-SLAPP appeals will undoubtedly
16 delay litigation even though the appeal is frivolous or insubstantial,” but “[s]uch an assessment is,
17 however, a question for the Legislature, and the Legislature has already answered it.” *Id.* at 196.
18 Accordingly, the court reversed the entry of judgment and remanded for a new trial. *Id.* at 201.

19 This Court, however, has unquestionable subject matter jurisdiction under Oregon law to
20 permit Plaintiff Ngo to file his proposed amended complaint. Oregon’s anti-SLAPP statutory
21 scheme is markedly different from that of California. While Oregon specifies that the Court is to
22 “enter a limited judgment denying the [anti-SLAPP] motion” (ORS 31.150(1)), the California
23 scheme provides that “[a]n order granting or denying a special motion to strike shall be appealable
24 under Section 904.1”. Cal. Code Civ. Proc. § 425.16(i). Section 904.1 creates no special “limited
25 judgment,” governed by special rules, but simply says that an appeal “may be taken from any of the
26 following,” including § 904.1(a)(13), identifying orders under § 425.16. Thus in California, an

1 “with prejudice”.¹ Thus the *Varian* court placed great weight on the fact that “granting a motion to
2 strike under section 425.16 results in the dismissal of a cause of action on the merits”. *Varian*,
3 35 Cal.4th at 193. Allowing a lower court to proceed to adjudicate the claims against an anti-
4 SLAPP movant is thus regarded as “irreconcilable with a judgment for the plaintiff on that cause of
5 action following a proceeding on the merits”. *Varian*, 35 Cal.4th at 181, 25 Cal.Rptr.3d 298, 303,
6 106 P.3d 958, 962 (2005).

7 The Oregon Court of Appeals, however, has taken an entirely different view of the nature of
8 the decision on a special motion to strike:

9 The purpose of the special motion to strike procedure, as amplified in the
10 pertinent legislative history, is to expeditiously terminate unfounded claims that
11 threaten constitutional free speech rights, not to deprive litigants of the benefit of
12 a jury determination that a claim is meritorious. If anything, *the fact that a*
13 *dismissal under ORS 31.150, unlike a judgment dismissing a claim on summary*
14 *judgment, is without prejudice, reinforces that conclusion. After a jury has*
15 *spoken, there is no systematic benefit in requiring a new action to try the same*
16 *claim to a different finder of fact on the ground that, on a different record early in*
17 *the course of the first action, a motion to strike should have been granted. The*
18 *erection of such a legal maze would undermine the systematic values of judicial*
19 *economy and efficiency, with the only benefit being to give the defendant another*
20 *bite at the proverbial apple. Nothing in the statutory text or underlying legislative*
21 *history suggests that the legislature countenanced such a result.*

22 *Staten v. Steel*, 222 Or.App. 17, 32, 191 P.3d 778, 789 (2008) (emphasis added). It is thus apparent
23 that the Oregon Court of Appeals would not adopt the somewhat bizarre result in *Varian*, and set
24 aside a jury verdict “on the ground that, on a different record early in the course of the first action, a
25 motion to strike should have been granted”. *Staten*, 222 Or. App. at 32. Under Oregon law, unless
26 an asserted anti-SLAPP defendant moves for and receives some sort of stay, the lawsuit proceeds,
27 and if resolved adversely to the defendant, it is of no moment that a motion to strike should have
28 been granted.

25 ¹ *E.g., Mallard v. Progressive Choice Ins. Co.*, 188 Cal.App.4th 531, 536, 115 Cal.Rptr.3d 487, 491
26 (2010); *Dowling v. Zimmerman*, 85 Cal.App.4th 1400, 1412, 103 Cal.Rptr.2d 174, 184 (2001);
27 *Schaffer v. City & Cty. of S.F.*, 168 Cal.App.4th 992, 997, 85 Cal.Rptr.3d 880, 883 (2008).

1 **CERTIFICATE OF SERVICE**

2 I, Carole Caldwell, hereby declare under penalty of perjury under the laws of the State of
3 Oregon that the following facts are true and correct:

4 I am a citizen of the United States, over the age of 18 years, and not a party to or interested
5 in the within entitled cause. I am an employee of Murphy & Buchal LLP and my business address
6 is P.O. Box 86620, Portland, OR 97286.

7 On October 7, 2021, I caused the following document to be served:

8 **PLAINTIFF’S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO AMEND**

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