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1 2 3 4 5 IN THE CIRCUIT COURT FOR THE STATE OF OREGON 6 FOR THE COUNTY OF MULTNOMAH 7 8 ANDY NGO, an individual, Case No. 20CV19618 9 Plaintiff. PLAINTIFF'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION 10 v. TO AMEND 11 ROSE CITY ANTIFA, an unincorporated association; BENJAMIN 12 BOLEN, an individual; JOHN HACKER, an individual; CORBYN 13 (KATHERINE) BELYEA, an individual; JOSEPH CHRISTIAN EVANS, an 14 individual; MADISON LEE ALLEN, an individual: DOES 1-50. 15 Defendants. 16 17 **Argument** 18 Defendant Bolen has cited the California case of Varian Med. Sys., Inc. v. Delfino, 19 35 Cal.4th 180, 193, 106 P.3d 958, 966–67, 25 Cal.Rptr.3d 298, 308–09 (2005), as being "on point" 20 to the general issue presently before the Court: to what extent, if any, does Bolen's appeal of the 21 Court's limited judgment denying his special motion to strike interfere with the ongoing 22 proceedings in this Court—namely, Plaintiff Ngo's motion for leave to file an amended complaint. 23 Varian does not address the question of amending a complaint while an appeal is pending, and was 24 decided under an entirely different statutory scheme. 25 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 26 27 PLAINTIFF'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO James L. Buchal, (OSB No. 921618) **AMEND** MURPHY & BUCHAL LLP 28 Case No. 20CV19618 P.O. Box 86620

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

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

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

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appeal from an order denying a special motion to strike has the full status of an ordinary final judgment, governed by rules applicable to all final judgments.

Among those rules is a unique statute in California that, in substance, automatically stays proceedings in the lower court pending appeal. § 916(a) of the California Code of Civil Procedure declares:

Except as provided in Sections 917.1 to 917.9, inclusive, and in Section 116.810, the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order.

Oregon's rule is precisely the opposite: "The filing of a notice of appeal does not automatically stay the judgment that is the subject of the appeal." ORS 19.330. Litigants like Bolen are free to seek stays of proceedings, e.g., ORS 19.350, but Bolen has not done so here.

The Varian court also found and relied upon specific legislative history of the anti-SLAPP act confirming that the Legislature knew and relied on § 916(a) and expected that actions would be stayed concerning a defendant who appealed the denial of a special motion to strike. Varian, 35 Cal.4th at 194. Plaintiff is unaware of any such history in Oregon.

For these reasons, the Varian court's invocation of reasoning that the "automatic stay" of § 916(a) is intended to prevent any effect on the appeal, Varian, 35 Cal.4th at 189, has no application here. The differences in the language between § 904.1 and § 19.270(7) underscore this difference. In California, the pendency of the appeal radiates out beyond the judgment appealed from to "the matters embraced therein or affected thereby," while in Oregon, "the jurisdiction of the appellate court is limited," while "the trial court retains jurisdiction over all other matters in the proceeding". Compare Cal. Code Civ. Proc. § 916(a) and ORS 19.270(7).

A final critical distinction between the Oregon and California statutory schemes is that dismissals in Oregon are "without prejudice" (ORS 31.150(1)), while California dismissals are

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PLAINTIFF'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO AMEND Case No. 20CV19618

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1	"with prejudice". Thus the <i>Varian</i> 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 at181, 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 threaten constitutional free speech rights, not to deprive litigants of the benefit of
11	a jury determination that a claim is meritorious. If anything, the fact that a dismissal under ORS 31.150, unlike a judgment dismissing a claim on summary

judgment, is without prejudice, reinforces that conclusion. After a jury has spoken, there is no systematic benefit in requiring a new action to try the same claim to a different finder of fact on the ground that, on a different record early in the course of the first action, a motion to strike should have been granted. The erection of such a legal maze would undermine the systematic values of judicial economy and efficiency, with the only benefit being to give the defendant another bite at the proverbial apple. Nothing in the statutory text or underlying legislative history suggests that the legislature countenanced such a result.

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

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

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## 1 **CERTIFICATE OF SERVICE** 2 I, Carole Caldwell, hereby declare under penalty of perjury under the laws of the State of Oregon that the following facts are true and correct: 3 4 I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within entitled cause. I am an employee of Murphy & Buchal LLP and my business address 5 is P.O. Box 86620, Portland, OR 97286. 6 On October 7, 2021, I caused the following document to be served: 7 8 PLAINTIFF'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO AMEND 9 in the following manner on the parties listed below: 10 Hilary Boyd, Esq. ( ) (BY FEDERAL EXPRESS) 11 Jonathan Henderson, Esq. ( ) (BY FIRST CLASS US MAIL) DAVIS ROTHWELL EARLE & XÓCHIHUA, P.C. (X) (BY E-MAIL) 12 200 SW Market Street, Suite 1800 ( ) (BY FAX) Portland, OR 97201 ( ) (BY HAND) 13 Tel: 503-222-4422 Fax: 503-222-4428 14 hboyd@davisrothwell.com ihenderson@davisrothwell.com 15 16 David D. Park, Esq. ( ) (BY FEDERAL EXPRESS) ELLIOTT & PARK, P.C. ( ) (BY FIRST CLASS US MAIL) 17 324 S Abernethy Street (X) (BY E-MAIL) Portland, OR 97239-8529 ( ) (BY FAX) 18 Tel: 503-227-1690 ( ) (BY HAND) 19 dave@elliott-park.com 20 Michelle R. Burrows, Esq. ( ) (BY FEDERAL EXPRESS) 21 MICHELLE R. BURROWS, P.C. ( ) (BY FIRST CLASS US MAIL) 22 1333 Orenco Station Parkway# 525 (X) (BY E-MAIL) Hillsboro, OR 97124 ( ) (BY FAX) 23 Tel: 503-241-1955 ( ) (BY HAND) michelle.r.burrows@gmail.com 24 25 26 27

PLAINTIFF'S SUPPLEMENTAL BRIEF IN SUPPORT OF

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