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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Portland Division

**OBSIDIAN FINANCE GROUP, LLC and  
KEVIN D. PADRICK,**

Plaintiffs,

v.

**CRYSTAL COX,**

Defendant.

Civil No. CV 11-0057 HZ

**MEMORANDUM IN SUPPORT  
OF FRCP 12(B)(6) MOTION TO  
DISMISS OR ALTERNATIVE  
MOTION FOR SUMMARY  
JUDGMENT**

Plaintiffs Obsidian Finance Group, LLC and Kevin Padrick move to dismiss defendant Crystal Cox's counterclaims (as set forth in Defendants' Counter Complaint) pursuant to Federal Rule of Civil Procedure 12(b)(6) because defendant has failed to state plausible claims against plaintiffs. Alternatively, plaintiffs move for summary judgment under FRCP 56 because no evidence exists to support defendant's counterclaims. The Court should therefore dismiss them in their entirety.

#### **I. LEGAL STANDARD GOVERNING MOTION TO DISMISS**

In considering a Rule 12(b)(6) motion to dismiss, the court must accept all of the claimant's material factual allegations as true and view all facts in the light most favorable to the claimant. *Reynolds v. Guisto*, 2009 WL 2523727, \*1 (D. Or.). However, it need not accept as true any legal conclusion set forth in a pleading. *Id.* The pleading must set forth facts supporting a plausible claim for relief and not merely a possible claim for relief. *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009). A claim has facial plausibility when the claimant pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* For a pleading to survive a motion to dismiss, "the non-conclusory factual content, and reasonable inference from that content must be plausibly suggestive of a claim entitling the plaintiff to relief." *Id.*

#### **II. LEGAL STANDARD ON MOTION FOR SUMMARY JUDGMENT**

Summary judgment is proper if the supporting papers "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "The moving party must show an absence of an issue of material fact. Once the moving party shows the absence of an issue of material fact, the nonmoving party must go beyond the pleadings and designate specific facts showing a genuine

issue for trial." *Far West Federal Bank v. Director, Office of Thrift Supervision*, 787 F. Supp. 952, 955 (D. Or. 1992), *aff'd*, 119 F.3d 1358 (9th Cir. 1994) (citations omitted). A factual issue is only genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505 (1986). A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material fact. *Id.* at 249-50.

### III. DEFENDANT'S COUNTERCLAIMS SHOULD BE DISMISSED

#### A. Claim One- Conspiracy

In her first claim, defendant contends that plaintiffs conspired with others to threaten defendant with physical force. (Counter Complaint ¶¶ 20-21). Defendant does not allege any facts to support her allegations of a conspiracy. Instead, she pleads the existence of a conspiracy in a conclusory fashion. The claim should therefore be dismissed under Rule 12(b)(6) and, under the circumstances, defendant should not be given leave to replead. *See Bell Atlantic v. Twombly*, 550 U.S. 544, 557, 127 S.Ct. 1955 (2007) (granting motion to dismiss where plaintiff failed to allege factual content sufficient to support plausible claim of conspiracy).

Alternatively, the Court should grant summary judgment on this claim in favor of plaintiffs because there will be no admissible evidence that plaintiffs engaged in any conspiracy. (Padrick Decl. ¶ 2).

#### B. Claim Two- Harassment

In her second claim, defendant contends that plaintiffs have harassed her by filing this lawsuit and engaging in "selective prosecution." (Counter Complaint ¶ 22). Oregon courts have not recognized a tort claim for "harassment". But in any event, the only fact that defendant

points to as a basis for her claim is the filing of this lawsuit. Under Oregon law, statements made in connection with litigation are subject to an absolute privilege from liability in tort. *See Wallusli v. Dymow*, 323 Or. 337, 348 (1996); *Wollam v. Brandt*, 154 Or. App. 156, 162 n.5 (1998). As a result, defendant has failed to state a claim against plaintiffs, and the claim should be dismissed.

**C. Claim Three- Defamation**

Defendant's third claim is for defamation, again apparently based on the filing of this lawsuit. (Counter Complaint ¶¶ 23-24). As explained above, plaintiffs are protected by an absolute privilege from defamation liability in filing and pursuing this lawsuit. *Wallulis*, 323 Or. at 348; *Wollam*, 154 Or. App. at 162 n.5. Second, defendant fails to provide any factual content to support her claim—she merely alleges defamation in conclusory fashion. This claim should be dismissed under FRCP 12(b)(6).

Based on the foregoing, the Court should dismiss defendant's counterclaims in their entirety.

DATED this 9th day of September 2011.

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Attorney for Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR ALTERNATIVE MOTION FOR SUMMARY JUDGMENT** on:

Crystal L. Cox  
PO Box 505  
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Crystal @CrystalCox.com

- by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed to said party's last-known address and depositing in the U.S. mail at Portland, Oregon on the date set forth below.

DATED this 9th day of September 2011

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