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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL SAVAGE,
aka (Michael Weiner)

No. 3:07 cv 06076 SI

Plaintiff,

vs.

Counsel on American-Islamic
Relations, Inc. and Does
1-100

Defendants.

**OPPOSITION TO MOTION FOR
AWARD OF FEES**

INTRODUCTION

Defendant seeks to take a rather basic set of off the shelf pleadings and elevate them to an epic accomplishment with epic fees. As this motion response shows, it was defendant who stubbornly refused to discuss a resolution of this case before filing, after filing, before the Rule 12 motion was filed and after it was filed. Defendant obstructed settlement and refused discussion at all times. They created a tempest because it suited their purpose. Discussion was never an option for them.

The present motion is primarily a political polemic which ironically calls upon the Court to award fees as a form of punishment for Michael Savage's First Amendment protected views. It is couched in the format of a fee request but it is written with obvious political implications seeking punishment of Savage. Thinly veiled but transparent is the extraordinarily mistaken belief that by placing Savage's political views before this this Court punishment in the form of fees will be imposed. The brief of defendant essentially lies about the interaction between plaintiff and defense counsel as a high level of friendliness and cooperation is misrepresented as plaintiff's counsel making threats. The Court is then shown Savage's attacks on Senator Obama via his comments and videos of the Rev. Wright. There is a convoluted argument that the later posting of these videos somehow shows that the lawsuit filed months before was in bad faith but its real purpose seems obvious. It is an insulting excuse for making an appeal to this Court for a political imposition of fines in the form of purported fees. This has to be one of the most blatant, misguided appeals to injustice that has been filed in this District.

This response makes no excuse for the filings of Michael Savage. This response is honest, direct and does not sugar coat any aspect of the case. It is a direct statement of why the lawsuit was filed and what happened after it was filed. Counsel respects the Court's views on this case and the detailed opinion that provided counsel with the opportunity to meaningfully address the Court's concerns about the viability of an amended complaint.

1 With that in mind, counsel and Savage are proud of the lawsuit and their attempt to
2 expose the hypocrisy of CAIR and its supporters. Counsel and Savage are still convinced that
3 CAIR acted unlawfully in its conduct and that Savage could (and has) made a good faith case to
4 show that CAIR intended its conduct to support terrorism. While reasonable people may differ
5 on the First Amendment issues, reasonable differences are the essence of a democracy and the
6 courts should encourage the peaceful resolution of differences and should never financial punish
7 a party for raising meaningful issues of public concern.

8 **This Court's Opinion Supports Plaintiff's Assertion that No Fees Should Be Awarded**

9 This Court issued a lengthy and carefully documented opinion in this case. There were
10 factual conclusions drawn from both the pleadings and from supplementary materials filed by
11 defendant. Plaintiff recognizes that the Court acted properly in reviewing extrinsic facts.
12 Plaintiff does believe that some of the facts that the Court relied upon in its decision *should not*
13 *have been decided* without an evidentiary hearing¹.

14 However, that is water under the bridge and while plaintiff respectfully disagrees with
15 some of the key factual conclusions there is no question that once those facts were decided, the
16 logical application of those facts to the law favored the defendant and supported the Court's
17 decision. Plaintiff will not seek to reinvent the wheel by arguing those points. However,
18 plaintiff is entitled to have the Court consider that had the facts been differently determined, the
19 outcome would also have been have potentially different.

20 Along these same lines, there is no question that the Court had the right to listen to the
21 full Savage performance and to draw conclusions after doing that. Plaintiff appreciates that the
22 Court did listen to almost two hours of material and recognizes that for some of the factual
23 conclusions drawn by the Court, this listening is the equivalent of holding a "... hearing on
24 disputed facts and the scope and method of the hearing is within the sound discretion of the

25
26 ¹"Upon holding an evidentiary hearing to resolve material disputed facts, the district court
27 may weigh evidence, assess credibility, and make findings of fact that are dispositive on the Rule
28 12(b)(3) motion." . Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133, 1140 (9th Cir. 2004).

1 district court." Id. at 1139. However, plaintiff respectfully submits that some of the Court's
2 factual findings were based upon a lesser inquiry and plaintiff submits that he was not given a
3 sufficient opportunity to present evidence on those points. Perhaps some of the fault here is
4 plaintiff's. Maybe plaintiff should have insisted on a full hearing once the Court's written
5 findings were made. However, plaintiff took a different direction. Plaintiff reviewed the Court's
6 findings and believed that the RICO would be viable once amended. The First Amendment
7 issues that were so strongly and effectively addressed in the Court's opinion could be and were
8 both addressed and avoided. (See the Amended Complaint that was not filed but is attached
9 hereto. Exhibit 1 is the Amended RICO, Exhibit 2 (in 2 parts) are the supporting exhibits).

10 **Factual Findings That Could Have "Gone the Other Way".**

11 The Court rejected plaintiff's contention that the use in this case was a commercial use.
12 Had the Court found that the use was commercial, the balancing of factors would have been more
13 favorable to plaintiff. Plaintiff accepts the fact that (as this Court has noted) that even such a
14 commercial use can "traditionally have had a claim to fair use protection." *Campbell*, 510 U.S.
15 at 583. Therefore, "[e]ven assuming that the use had a purely commercial purpose, the
16 presumption of unfairness can be rebutted by the characteristics of the use." *Hustler Magazine*,
17 796 F.2d at 1152-53.

18 Plaintiff submits that factual determination went against Savage without much discussion
19 and it is not impossible that with further proof the factual finding could have gone the other way.
20 As the unfiled Amended RICO shows, CAIR was founded to only mimic a civil rights
21 organization so that American Muslims would not know their true purpose and nature. This
22 allegation is supported by Exhibits that include transcripts of surreptitious recordings of the
23 founders of CAIR. It is also based upon internal documents of the founding group. The idea
24 that a political group such as Hamas may have the same rights as a "commercial" user of a
25 segment is an new concept. Until now, we have essentially contemplated three groups of users.
26 Legitimate commentators, commercial users who may or may not fall within "fair use" and
27

1 criminal copyright infringers. The interesting issue in the CAIR case is this. If Savage could
2 have proven that CAIR was part of a criminal enterprise, is their use of the segment social
3 commentary because they have chosen to limit their surface use to “civil rights”. There is no
4 case on this point. The *Hustler* case sets the outlines of the analysis but it is a fact based inquiry
5 and there is new law to be made as well. Savage had the right to explore this new area,
6 especially if the Court credits him with a genuine belief, supported by substantial facts that tie
7 CAIR to Hamas in a very direct manner.

8 The fact based aspect of this case is critical. The *Hustler* case must have initially seemed
9 like an obvious copyright violation. It is hard to imagine that Rev. Falwell’s lawyers were
10 cheerfully expecting an easy victory. They focused on a set of egregious facts and made new
11 law. Savage is also focusing on egregious facts and he is arguing that *Hustler* does not apply.

12 "The crux of the profit/nonprofit distinction is not whether the sole motive of the
13 use is monetary gain but whether the user stands to profit from exploitation of the
14 copyrighted material without paying the customary price." *Harper & Row*
15 *Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 105 S. Ct. 2218, 2231-32, 85
16 *L. Ed. 2d 588* (1985); see also *Iowa State University Research Foundation, Inc. v.*
17 *American Broadcasting Companies, Inc.*, 621 F.2d 57, 61 (2d Cir. 1980)
18 (*Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1152
19 (9th Cir. Cal. 1986))

20 “Profit” can mean creating political cover to allow CAIR to carry out illegal conduct in
21 the United States. “Profit” can more generically mean any use other than the First Amendment
22 protected use that allows “Fair Comment”. This Court made a call that favored CAIR. The call
23 was that regardless of ulterior motives, there was a First Amendment use that required protection,
24 even if that use was contrived to hide CAIR’s genuine purpose.

25 There is really no case that says that this is the only finding the Court could make. There
26 is a grey area here. The Court could have recognized the surface legitimacy of the use but made
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1 a finding that the commercial or criminal use so outweighed the public benefit use that a
2 copyright infringement should be found. The Court did not do this and plaintiff did not ask for
3 reconsideration and did not appeal. Therefore, the Court is justified in finding that its position
4 was reasonable and fair. However, the fact that the Court made a “reasonable and fair” judgment
5 does not mean that Savage lacked a strong and even compelling counter argument. The decision
6 to shift the emphasis to the RICO makes complete sense. Damages are higher. The issues are
7 broader and the First Amendment issues are not as present. This does not mean that the
8 copyright action was without good cause. It simply means that the Court’s logic and reasoning
9 was respected by Savage and he addressed the Court’s concerns in a manner that he felt was both
10 rational and responsive to what the Court wrote.

11 Plaintiff may have won the battle on reconsideration or appeal but every lawyer must pick
12 his battles and the RICO battle better focused the core issues. This is good judgment but Savage
13 and his counsel.

14 *Hustler* itself cites the Congressional Record for the point that the inquiry is ultimately a
15 fact based one. It cited the Report of the Committee on the Judiciary of the House as follows:

16 Although the courts have considered and ruled upon the fair use doctrine over and
17 over again, no real definition of the concept has ever emerged. Indeed, since the
18 doctrine is an equitable rule of reason, no generally applicable definition is
19 possible, and each case raising the question must be decided on its own facts. . . .

20 Beyond a very broad statutory explanation of what fair use is and some of the
21 criteria applicable to it, the courts must be free to adapt the doctrine to particular
22 situations on a case-by-case basis.

23 H.R. Rep. No. 94-1476, 94th Cong., 2nd Sess. 65-66 reprinted in 1976 U.S. Code Cong.
24 & Ad. News 5659, 5679-80 [hereinafter cited as "House Report"].

25 (*Hustler* at fn. 4)

26 This Court cited the factual basis for the *Hustler* decision several times. At 5:3-5 of this
27

1 Court's order, the factual underpinning of the *Hustler* case is cited:

2 It found that Moral Majority had not sold the copyrighted work as its own, but had used it
3 for political comment about the plaintiff and to rebut the plaintiff's personal attack. *Id.* at
4 1153.

5 (Order 5:3-5)

6 The Order at 5:8-9 noted that:

7 "[t]he Ninth Circuit concluded that Moral Majority's
8 copying of the entire parody was reasonably necessary to provide such comment ..."
9 Again, this is a fact based determination.

10 The Court also applied the *Harper & Row* by factually distinguishing plaintiff's
11 allegations. The Court's decision pointed out that CAIR did not "purloin" the tapes and that
12 Savage was the first to broadcast them. This is a factual distinction between *Harper & Row* and
13 Savage. However, while *Harper & Row* did reach the conclusion that the Nation stole the right
14 to first publication, the case was not limited to a theft or first publication scenario.

15 Its holding did not require an pure theft nor a first publication. As Savage read(s) *Harper*
16 & *Row* the theft finding went to the good faith vs. bad faith aspect of the analysis. Savage sought
17 to argue that using his work to promote the "cover story" of a terror organization was the type of
18 bad faith that mirrored a theft. This Court disagreed but this disagreement should be respected
19 because it is the type of disagreement that arises when unusual facts are applied to an area of law
20 that is well developed but often very subjective in terms of application. CAIR has no basis to
21 characterize this type of intelligent discourse, as bad faith. As the record reflects, there is no a
22 single attempt by CAIR to discuss the issues or work out a compromise with Savage. Since they
23 prevailed on the copyright they can argue that they thought they would win but plaintiff
24 respectfully submits that CAIR benefitted from the "fight" itself and didn't want to discuss or
25 resolve these issues. The fact that this Court has carefully considered both sides and found that
26 the First Amendment protected CAIR should not be confused by CAIR as a judicial endorsement

1 of all things that CAIR does. It also should not be considered a rejection of the allegation by
2 Savage that CAIR has ulterior motives. CAIR's brief reads as if the Court has endorsed CAIR
3 as the Muslim NAACP. Plaintiff respectfully submits that CAIR may be more analogous to
4 other less savory groups but plaintiff also understands that the Court feels that the same
5 protections that shield(ed) the NAACP over the years will apply to CAIR regardless of whether
6 CAIR's motives are as pure as those of the NAACP. The request for fees seems to assume that
7 the CAIR=NAACP and that Savage is a bigot argument has not only been accepted by this Court
8 but that somehow the Court will therefore award astounding fees to CAIR. It is this set of
9 assumptions that plaintiff cites as offensive and which draw attention away from the core issues
10 in a fee application, the merits of the dispute.

11 . Plaintiff submits that to the extent the pleadings allowed this Court to make factual
12 findings, he was acting in good faith. Any attorney can read the cases and paraphrase the
13 important language to create a pleading that has little factual content but on its surface hits the
14 hot buttons necessary to survive a Rule 12 motion. (The Court could then order evidentiary
15 hearings on key points.) It takes an honest plaintiff to set forth specific facts that address the
16 issue of law and facts that are important to a judicial determination. Savage did this and he did it
17 in a honest manner that allowed this Court to quickly go to the heart of the dispute.

18 CAIR has never had a case go to trial. Perhaps a disingenuous pleading that would have
19 misled the Court but survived a Rule 12 motion would have ultimately wrung a settlement from
20 CAIR. Perhaps ... but this is not how Savage or his counsel proceeded. There were honest and
21 direct with the Court at all times, just as this brief very openly makes statements regarding
22 CAIR's conduct in this litigation and in their fee application.

23 **SIGNIFICANT ISSUES OF LAW WERE DECIDED BY THIS COURT**

24 As argued in the introduction, this case raised important issues of law and fact that this
25 Court decided. These were substantial issues of law. Analogizing to the type that would justify
26 bail on appeal plaintiff cites *United States v. Handy*, 761 F.2d 1279 (9th Cir. 1985), the Ninth
27

1 Circuit addressed the "substantial question" issue raised by 18 U.S.C. §3143(b)(2). In *Handy*, the
2 district court denied appellant's motion for release pending an appeal challenging the district
3 court's pre-trial denial of appellant's suppression motion. The Ninth Circuit remanded the matter
4 for reconsideration, defining a "substantial question" as a "fairly debatable question that calls into
5 question the validity of the judgment." Id. at 1282-83. [P]roperly interpreted [under § 3143]
6 "substantial" defines the *level* of merit required in the question presented and 'likely to
7 result in reversal or an order for a new trial' defines the *type of question* that must be presented.
8 *Handy*, 761 F.2d at 1281.

9 Savage has strong precedent to allow him to argue that that speech which is designed to
10 intimidate through threat, is not protected speech. In *Virginia v. Black*, , 538 U.S. 343 (2003) the
11 Supreme Court held that a statutory prohibition of cross-burning with the intent to intimidate did
12 not violate cross burner's right to freedom of speech, since the statute banned intentional
13 intimidating conduct rather than expression.

14 This is the thesis in Michael Savage's lawsuit and despite the claims by CAIR that this is
15 frivolous and is not a good faith position to take, it was and is, an important legal issue. Cross
16 burning is an obvious attempt an intimidation with the implicit threat of violence. Savage knew
17 that CAIR was more clever than southern cross burners.

18 He alleged that CAIR deliberately disguised their threat so that they could threaten and
19 then invoke the First Amendment when it was not a justified defense. There is state law
20 precedent as well. In *Flatley v. Mauro*, 39 Cal. 4th 299, 313 (Cal. 2006) the California Supreme
21 Court held that settlement demands of an attorney were not protected by California's SLAPP
22 statute, when the statements were part of an extortion.

23 As a necessary corollary to this statement, because not all speech or petition
24 activity is constitutionally protected, not all speech or petition activity is protected
25 by section 425.16. (See, e.g., *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 851 [111
26 Cal. Rptr. 2d 582] [violence and other criminal acts are not protected by the First
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Amendment even if committed out of political motives at a political demonstration; nor would Doe defendants who engaged in such activity be protected by the anti-SLAPP statute].) The “scope of [section 425.16] is not without limits, as demonstrated in ... cases finding lawsuits were not within its protection. [Citations.]” (Paul v. Friedman (2002) 95 Cal.App.4th 853, 864 [117 Cal. Rptr. 2d 82].) The case most often cited in support of this proposition is Paul for Council v. Hanyecz (2001) 85 Cal.App.4th 1356 [102 Cal. Rptr. 2d 864] (Paul), disapproved on other grounds in Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 68, footnote 5 [124 Cal. Rptr. 2d 507, 52 P.3d 685] (Flatley v. Mauro, 39 Cal. 4th 299, 313 (Cal. 2006))

While this Court found that the facts as pled did not state an exception such as those elucidated in Flatley, Savage made a good faith attempt to do so and such a good faith attempt is not frivolous.

Defendant has called into question whether Savage ever truly believed that CAIR and Hamas were partner groups. Plaintiff contends that Savage’s RICO claim was simply a rehashing of the Copyright claim and nothing more. Both allegations are completely untrue. Exhibit 1 is the lawsuit that Savage was prepared to file on the Amended RICO. Exhibit 2 are the Exhibits. This pleading very carefully details the fact that CAIR was formed by Hamas to be the American face of Hamas. The goal was to advance the interests of Palestine and to serve Palestine. The civil rights persona was chosen to mimic the real civil rights group formed by prominent Arab American pollster, James Zogby. The civil rights persona of CAIR was deemed a necessary evil in order to fool American Muslims who the CAIR founders knew would reject the radical message of Hamas.

Exhibit 3 is a copy of the initial funding that CAIR received by wire transfer from the Hamas based Holy Land Foundation. The RICO lawsuit contains a screen shot where CAIR solicited money for the victims of 9/11. The second page shows that the recipient of money was

1 the Holy Land Foundation. The Holy Land Foundation is a terrorist group. This is the type of
2 proof that Savage had to show that CAIR funded terrorist supporting groups.

3 As the Court can see from the complaint, the Noerr-Pennington issues, the First
4 Amendment issues and the RICO pleading questions are fully addressed in the amended
5 complaint. The amended RICO complaint did not need this court to reverse itself on the
6 copyright cause of action. (Although plaintiff does admit that he hoped the Court would have
7 second thoughts on that ruling upon reading the amended RICO cause of action). Even without
8 the Noerr-Pennington section, without the First Amendment section, the RICO could have
9 survived. However, by directly addressing the Court's concerns, the RICO was stronger because
10 it incorporated broad range of conduct of CAIR. The Court's decision in the copyright case did
11 eliminate RICO.

12 As commercial use is presumptively unfair, the Court had to make factual findings to
13 support the position that CAIR's use was in fact fair use.² Plaintiff respectfully disagrees with
14 those factual findings but accepts them as the law of the case. Had the findings been to the
15 contrary, plaintiff would have been outside the dictates of the Hustler case. Plaintiff respectfully
16 submits that this finding was unfair to plaintiff. A factual finding of this magnitude shouldIf the
17 Court were to make factual findings of this magnitude, a full Summary Judgment motion should
18 have been the venue or leave to amend to add more detailed facts should have been allowed.

19 The court dealt with the factual issues in part by citing defendant's assertion that:
20 Plaintiff tries to conflate "motive" with the purpose and character of the use,
21 which is not permitted by the case law. Rather, even assuming the truth of
22 plaintiff's allegations about motive, it is the manner of use, not the motivation
23 behind it, which must be analyzed: "what use was made," rather than "who is the
24 user." Defendants' Reply at 3.

25
26 ²[T]he Court finds that defendants used plaintiff's material in order to
27 criticize and comment on plaintiff's statements and views. These facts are uncontested, and the
Court finds that this factor weighs heavily in favor of defendants. (Order 8:13-15)

1 This quite a narrow view of the law in this area and it is not fair to say that the Court's
2 view is the only reasonable interpretation of the case law. This grey area has not been elucidated
3 and Michael Savage's view is very reasonable. For Savage, "motive" is not off the table in terms
4 of determining the actual nature of the use. If motive were not to be considered, cross burning
5 would always be protected because the "motive" of intimidation could not be considered.

6 The court notes at 3:4-8 that it is Savage's position that:

7 ... defendants work to raise funds for terrorist groups, aim to silence voices that
8 oppose their views, and have board members who are tied to alleged terrorist
9 organizations³. He further alleges that defendants are the domestic branch of a
10 foreign terror organization posing as a civil rights organization ...

11 Obviously the Court understands Savage's position but disagrees with it. The Court's
12 position is written out in detail in the Order and anyone with an interest in this area of law would
13 find the analysis very interesting and very powerfully written. However CAIR mistakes the
14 strength of the Court's argument and the power of its logic with the assumption that the Court
15 finds no rational basis for Savage's arguments. That is not what this writer takes from the
16 Court's opinion. To the contrary, it appears that the Court sees both sides but has strongly
17 favored its position for the reasons stated. This is how law is made and how cases are
18 intelligently evaluated. It is wrong for CAIR to jump up and down like a child at Christmas
19 thinking that it just got a big money present in the form of punishment under the guise of
20 attorney's fees. This was a decision that the Court obviously considered very carefully and
21 which was based upon an assessment of facts and law. This is the proper approach to this type
22 of legal "problem". In fact, the court in *Hustler* cites the Congressional Record for the point that
23 many of these cases are fact driven, not law driven. The court cites the Report of the Committee
24 on the Judiciary of the House which states:

25 _____
26 ³There is no claim of "alleged". Hamas is a terror organization and CAIR and its
27 founders are Hamas members.

1 Although the courts have considered and ruled upon the fair use doctrine over and
2 over again, no real definition of the concept has ever emerged. Indeed, since the
3 doctrine is an equitable rule of reason, no generally applicable definition is
4 possible, and each case raising the question must be decided on its own facts. . . .
5 Beyond a very broad statutory explanation of what fair use is and some of the
6 criteria applicable to it, the courts must be free to adapt the doctrine to particular
7 situations on a case-by-case basis.

8 H.R. Rep. No. 94-1476, 94th Cong., 2nd Sess. 65-66 reprinted in 1976 U.S. Code Cong.
9 & Ad. News 5659, 5679-80 [hereinafter cited as "House Report"].
10 (*Hustler* at fn. 4)

11 The factual findings made by this Court show that Savage made a good faith and serious
12 attempt to plead this case within a genuine exception. At 3:2-3 this Court recognizes that Savage
13 is asserting that “this misappropriation was part of a criminal and political agenda to silence
14 those speaking out against various facets of Islam. This type of speech is not protected speech
15 just as cross burning although expressive is not protected because it is meant to intimidate. See
16 *Virginia v. Black*, , 538 U.S. 343 (2003).

17 This Court made factual findings that the use of the statement was for fair comment to
18 rebut derogatory statements.

19 As discussed in the Court’s analysis of the first fair use factor, defendants used the
20 audio excerpts to comment on and rebut derogatory statements regarding their
21 organization and their religious affiliations, and the amount used in reference to
22 plaintiff’s statements was reasonably necessary to convey the extent of plaintiff’s
23 comments. (Order 10:21-11:2)

24 Plaintiff respectfully disagrees with this factual finding and believes that it was not
25 warranted under Rule 12 since this was a matter reasonably in dispute. The Court disagreed and
26 plaintiff has accepted that position as the law of the case. However, it unfair for CAIR to pretend
27

1 that this was evident from the pleadings.

2 At 12:5-11 the Court determines that the loss of advertising revenue affected only new
3 shows by Michael Savage and did not effect the resale or reuse of his old shows.

4 Further, he does not allege any attempts or plans to sell or license the material or
5 derivatives thereof. Plaintiff instead alleges that defendants caused him financial
6 loss in advertising revenue. Assuming the truth of this allegation, it relates only to
7 the economic impact on future shows, and has no impact on the market for the
8 original, copyrighted show on October 29, 2007. Because this factor limits the
9 evaluation of market impact to the original work at issue, not other works by the
10 creator, the loss of advertising revenue for future shows, unrelated to the original
11 work, does not give rise to a legal cognizable infringement claim. Campbell, 510
12 U.S. at 590.

13 This is a rejection of the assertion by Michael Savage that CAIR's conduct was "designed
14 to cause harm to the value of the copyright material in the long and short term." (Paragraph 24 of
15 Complaint) and the allegations in paragraph 31 that "CAIR repackaging damaged the work and
16 damaged the public image of the work because it was taken out of context ... [and] the
17 introductory remarks were omitted and the context of "The Savage Nation" were removed." The
18 Court is finding that Michael Savage had no intention to remarket the original show and that he
19 had no intention to market the original show. None of this can be drawn from the pleading. It is
20 based upon factual assessments by the Court. This was critical because the Court noted that
21 Therefore, the scope of fair use includes "copying by others which does not materially impair
22 the marketability of the work which is copied." Id. This last factor is the most important factor of
23 the fair use defense. Id. (Order 11:21-23).

24 The issue of "material impairment" is a question of fact and once Savage claimed that the
25 work was damaged by CAIR's use, a finding of a lack of material impairment would usually be
26 left the jury. The Court found that these facts were established but plaintiff respectfully
27

1 disagreed. Again however, absent a factual finding, a key component of the Court's decision
2 would not exist.

3 At 12:16-18 the Court makes a factual finding that:

4 The audience that might donate and listen to the audio segment on defendants'
5 website is separate from the audience that plaintiff possibly could stand to profit
6 from in using his website to sell the audio content at issue.

7 The Court then reasons that the CAIR use is not a substitute in the market for the
8 purchase of the original product. What Savage alleged is that if people gave credence to the
9 material on the CAIR site they would not purchase or listen to his product. The contention is that
10 by listening to the taken piece they will not longer wish to listen to the original. Instead they will
11 donate to CAIR. The Court rejects this and holds that the people who might donate and listen to
12 the audio segment on defendants' website is separate from the audience that plaintiff possibly
13 could stand to profit from" This draws conclusions about the audience that would go to the
14 CAIR website and it rejects Savage's contention that CAIR "damaged the public image of the
15 work because it was taken out of context". The Court's ruling assumes that CAIR did not take
16 the material out of context. If it was misportrayed (out of context), then a group that might be
17 attracted to the material would reject the material because it was portrayed wrongly. The Court
18 however, is finding that the material was as CAIR stated it was and therefore those who support
19 CAIR in its "civil rights" agenda would necessarily never purchase the material from Savage.

20 Plaintiff again respectfully disagrees with this finding but understands that the Court
21 listened to the entire Savage Nation broadcast as well as the four minute excerpt. Where
22 plaintiff disagrees most strenuously with the Court is in the assessment that a repackaging is a
23 type of comment and does not supplant the original. In claiming that the four minutes
24 misportrayed the original, Savage is arguing that people believe that they are hearing the original
25 in the sense that they are gaining the overall gist of the piece. In that way, they do not listen to
26 the original and instead donate to CAIR. It may be that the law is not clear on this distinction.

1 Plaintiff is not arrogant in arguing his position. Plaintiff understands the Courts' reasoning and
2 respects it. However, the above distinction is a factual one and perhaps one of first impression in
3 terms of the law as well.

4 **SAVAGE'S RICO CLAIM WOULD HAVE SUCCEEDED**

5 Savage's RICO claim alleged far more than a simple use of his

6 This case by case analysis would necessarily include a consideration as to the genuine use
7 of the piece. Plaintiff has actual transcripts of FBI recorded meeting of Hamas where CAIR was
8 established. They specifically discuss setting up an American organization that has the Hamas
9 goals in its heart but they will not write those goals down.

10 This is the point. As an American organization, we cannot adopt this stuff or add
11 it to our goals. This stuff. ..., in the eighties, we at the [Islamic] Association for
12 Palestine] wrote that ... UI. I mean ..., we cannot include this kind of stuff
13 officially in our papers.

14 and

15 ..., I'm telling you about things in the heart ..., the goals you're talking about are in
16 the heart but, can I write them down or can I support our brothers. We cannot
17 write them down.

18 (Exhibit to Amended RICO 22)

19 The founders even use the phrase "front group" to describe the group that they are
20 establishing.

21 It will be made up of some of our people, our beloved ones,

22 and let's not hoist a large Islamic flag and let's not be barbaric-talking. We will
23 remain a front so that if the thing happens, we will benefit from the new
24 happenings instead of having all of our organizations classified and exposed".

25 (Exhibit to Amended RICO 23)

26 These CAIR founders are aware that their work as Hamas would be illegal.

1 Samah⁴ ..., Samah is classified as a terrorist [organization]. By constitution, by
2 law, if I wanted to adopt its work, they kick me out, they kick me out of this
3 country, my brother. By God, they would take away my U.S. citizenship and tell
4 me
5 "Go away". I'm telling you ...
6 (Exhibit to Amended RICO 25)

7
8 The group scoffs at charity work and talks about how it is a waste of their efforts.
9 As far as charity work, money comes mainly from the Islamic
10 community. It won't give you much of anything, to you in particular because it is
11 true you could deceive it with an assumed name but then it will recognize you.
12 And the Jewish media now focuses on these things. (Exhibit 27)
13 As shown above, CAIR fears that the "Jewish media" will expose the real nature of
14 CAIR.
15 They also recognize that charity work in America does not benefit Hamas.
16 "Even children's daycare centers...we discover that their Dawa'a⁵ value is close to
17 zero...What have we benefitted from that? The same thing applies to orphans
18 sponsorships; we spend hundreds of thousands of dollars over this program but,
19 there is no Dawa'a⁶ use for it..."
20 Plaintiff should have been allowed to make this point to show that CAIR sought to gain
21

22 ⁴The conspirators agreed to refer to Hamas as "Samah" or "Sister Samah" to make it
23 more difficult for people overhearing their conversations to understand that they are Hamas.

24 ⁵Dawa'a means issuing a summons or making an invitation; to summon, to invite.

25 ⁶Dawa'a may be considered, preaching, the way to preach, use of logic, what quran says
26 about preaching or in the context above, propaganda for the benefit of Hamas.
27

1 from the use of Savage's performance for a gain that is other than "fair use".

2 "The crux of the profit/nonprofit distinction is not whether the sole motive of the
3 use is monetary gain but whether the user stands to profit from exploitation of the
4 copyrighted material without paying the customary price." Harper & Row
5 Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 105 S. Ct. 2218, 2231-32, 85
6 L. Ed. 2d 588 (1985); see also Iowa State University Research Foundation, Inc. v.
7 American Broadcasting Companies, Inc., 621 F.2d 57, 61 (2d Cir. 1980)
8 (Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1152
9 (9th Cir. Cal. 1986))

10 The dispute between CAIR and Savage is very much like the factual dispute between
11 Falwell and Hustler. Plaintiff submits that the amended RICO pleading gives much stronger
12 support for Savage's copyright claims than the original pleading. Plaintiff points out that neither
13 he nor his attorney were experts in CAIR or Hamas prior to this lawsuit. The lawsuit was filed
14 after attempts to negotiate with CAIR were ignored and the lawsuit had to be filed quickly
15 because CAIR was causing Savage significant financial damage.

16 The Court defines the dispute as to the "purpose and character of use" more narrowly
17 than Savage and this is an issue which has not been extensively addressed by the Courts. Under
18 Savage's view, the strength of the amended RICO proves the validity of his approach to the
19 copyright action. The Hustler/Falwell case does not decide whether Savage should win or lose
20 on this issue. The case frames the battleground.

21 The parties disagree about the purpose and character of the use. Falwell contends
22 that he sent the parody to his followers to give them information to rebut the
23 statements it contained, and that the appeal for money was ancillary. Hustler
24 contends, however, that the advertisement was clearly a parody so there was
25 nothing to rebut and thus the letters were purely fundraisers.

26 (*Hustler* at 1152)

1 For any party to this litigation to claim that Savage had no good faith belief, ignores the
2 core dispute in *Hustler*. It was a legal dispute with new law being outlined but the ultimate
3 decision was fact based.

4 At 5:3-5 of this Court's order, the factual underpinning of the *Hustler* case is cited:

5 It found that Moral Majority had not sold the copyrighted work as its own, but had
6 used it for political comment about the plaintiff and to rebut the plaintiff's
7 personal attack. *Id.* at 1153.

8 (Order 5:3-5)

9 The Order at 5:8-9 noted that "[t]he Ninth Circuit concluded that Moral Majority's
10 copying of the entire parody was reasonably necessary to provide such comment ..." Again, this
11 is a fact based determination.

12 The above is one ground where plaintiff respectfully submits *fact finding* was necessary
13 to resolve this case. And again, plaintiff submits that this fact finding should have been done at a
14 summary judgment stage.

15 In addition, the Court evaluated *Harper & Row* in terms of how plaintiff's allegations
16 differ from those in the cited case. The Court pointed out that CAIR did not "purloin" the tapes
17 and that Savage was the first to broadcast them. While in *Harper & Row* the factual issue was
18 whether the Nation stole the right to first publication, the case was not limited to that factual
19 scenario.

20 The Court and plaintiff disagree as to how broad *Harper & Row* is in terms of the inquiry.
21 There is no case defining this point and plaintiff had the right to raise this point and explore it.
22 No attorneys should be chided for exploring this point.

23 CAIR FAILED TO MEET AND CONFER

24 Federal Rule of Civil Procedure 54-6 (Motion for Attorney's Fees) requires that
25 "[c]ounsel for the respective parties must meet and confer for the purpose of resolving all
26 disputed issues relating to attorney's fees before making a motion for award of attorney's fees."
27

1 This has not taken place. As the declaration of Daniel Horowitz shows, he was contacted
2 by Matt Zimmerman to discuss fees. Horowitz indicated to Zimmerman that Michael Savage's
3 attorney, Ian Boyd would be the right person to speak with. Horowitz noted that Ian Boyd was a
4 strong proponent of the First Amendment and would share a common ground with Mr.
5 Zimmerman in this regard.

6 Within a minute of getting off the telephone with Matt Zimmerman, Horowitz called Ian
7 Boyd, discussed their settlement position. Horowitz asked Ian Boyd to initiate contact with Matt
8 Zimmerman. As shown by the declaration of Ian Boyd, Ian Boyd called Matt Zimmerman to
9 discuss settlement. This was within minutes of when Matt Zimmerman had called Horowitz. If
10 Zimmerman were seriously seeking to discuss settlement with Horowitz, he should have been
11 equally prepared to do so with Ian Boyd.

12 As shown by the Declaration of Ian Boyd, on August 26, 2008 he spoke briefly with Matt
13 Zimmerman and Zimmerman stated that he was not yet prepared to discuss settlement.
14 Zimmerman sent an e-mail saying that he was consulting with his clients and would contact Ian
15 Boyd the next day. Zimmerman failed to do this. On August 28, he again spoke with Mr.
16 Zimmerman, and Zimmerman again advised Ian Boyd that he was not yet in a position to meet and
17 confer regarding the Fees Motion. The next day, without ever meeting and conferring, CAIR
18 filed this fee motion.

19 This does not constitute a good faith effort to resolve the matter. It is just the opposite. It
20 is a bad faith effort not to resolve the matter and to create the barest modicum of contact to try to
21 get around FRCP 54-6. It seems deliberate.

22 **CAIR'S ATTORNEYS CONSISTENTLY HAVE**
23 **AVOIDED MEETING AND CONFERRING**

24 This is not the first time that CAIR has failed to meet and confer. This intransigence is a
25 pattern of CAIR's attorneys as they seem to have wanted to force this lawsuit to be filed and to
26 be litigated.

1 On November 28, 2007, Daniel Horowitz mailed and faxed a letter to CAIR in
2 Washington, D.C. (Exhibit 4). This letter gave CAIR notice that Michael Savage was asserting
3 copyright protections to his work. No response was ever received to this letter. Had there been
4 a response this lawsuit may never have been filed.

5 On December 16, 2007, Daniel Horowitz sent a letter to the attorney for CAIR-Texas,
6 Mr. Hamideh Khalid. (Exhibit 5) As the case was originally assigned to Magistrate Spero,
7 Horowitz gave notice to Hamideh Khalid of this transfer. He also attached the scheduling order
8 of this court. The letter also stated that “We need to exchange initial disclosures and meet and
9 confer regarding scheduling and discovery. I would like to do this as quickly as possible so that
10 when we appear before Judge Illston we are fully prepared too resolve any issues in dispute and
11 to create a realistic litigation/discovery schedule.” This Court’s standing orders were also
12 attached. The letter then asked Mr. Khalid to contact Horowitz. No contact was ever made.

13 On January 6, 2008 Horowitz wrote another letter to Mr. Khalid (Exhibit 6). In that letter
14 he reminds Mr. Khalid that although his client was served (Khalid is the agent for service so he
15 knew about the service), he had not responded. Horowitz noted that he could have taken CAIR-
16 Texas’ default at that time. Instead of taking the default, Horowitz informed Mr. Khalid that an
17 amended complaint had been filed and would be served. Horowitz ended stating:

18 I would like to establish a professional relationship with you and the attorneys for
19 your organization. I hope that in the future you will respond to my letters as there
20 is no benefit in attorney’s failing to communicate. Please do not hesitate to
21 contact me if you wish to discuss any matters relating to this litigation.

22 This letter was ignored (See Declaration of Daniel Horowitz). In addition, the process
23 server found it nearly impossible to serve the Amended Complaint. He had to go to Mr. Khalid’s
24 home and chase him to effect service. Rather than meet and confer and cooperate, Mr. Khalid
25 used the letter as an excuse to play cat and mouse with a process server.

26 When Tom Burke appeared for CAIR Horowitz continued in his efforts to cooperate.
27

1 On February 14, 2008 Horowitz sent a letter to Tom Burke (Exhibit 7) where he indicated that:

2 ...CAIR is still aggressively confronting advertisers who work with Michael
3 Savage. It is my understanding that they are using the disputed four minutes
4 thirteen seconds of material and the same spin that we call misrepresentation in
5 order to accomplish this.

6 The letter then discusses the fact that this “escalates the rhetoric and the real areas of
7 confrontation between the parties.” It discusses the difficulties this caused in trying to “fashion a
8 reasonable resolution” and states that “...it is my experience that a good faith attempt to resolve
9 differences is the better course.” No positive response or even a hint of desire to discuss
10 settlement came in response to this letter.

11 Despite the failure of CAIR to interact in any reasonable fashion, Horowitz continued to
12 work with Tom Burke on other matters in what at the time seemed to be a reasonable manner.
13 They discussed the problem with CAIR having many names and changing names and agreed
14 upon a stipulated amendment that named the CAIR entities in a manner that was acceptable to
15 both sides.

16 Prior to the CMC, Horowitz sent Tom Burke a preliminary list of witnesses and discovery
17 outline. He asked Tom Burke to review it and to see whether they could agree on a plan to
18 present to the Court at the CMC. This was a continuation of the attempt by Horowitz to
19 cooperate with opposing counsel. It is a continuation of what he wrote in his December 16, 2008
20 letter to Mr. Khalid where he indicated that “[w]e need to exchange initial disclosures and meet
21 and confer regarding scheduling and discovery.” A copy of the “Draft Discovery” prepared by
22 Horowitz and sent to Tom Burke is attached hereto as Exhibit 8.

23 This too was ignored except that in a subsequent telephone conversation, Tom Burke said
24 that he would go over the draft discovery with his clients. Nothing was ever said after that.

25 In a further attempt to cooperate, Daniel Horowitz sent to Tom Burke the entire transcript
26 of the criminal trial in U.S. v. Holy Land Foundation. He provided this on disk (with the
27

1 permission of the court reporter), without any request by Mr. Burke. Horowitz also asked if
2 there was anything else that he could provide. Again this was done prior to the CMC. There
3 was never a thanks for this or any reciprocity.

4 On February 14, 2008 Horowitz voluntarily sent preliminary disclosures to Mr. Burke
5 stating:

6 Here is the start of our disclosures. We agreed to a date a week after the CMC,
7 however, it may be of value for you to have these in advance so I am sending it
8 early. (Exhibit 9)

9 On February 26, 2008 the parties exchanged e-mails (Exhibit 10) agreeing to discuss the
10 joint CMC statement.

11 As the E-mail of February 28, 2008 shows, Horowitz and Burke in fact did prepare a joint
12 CMC statement without any problems between them. The time sequence is important because
13 Tom Burke has twisted what happened that day and misrepresented what happened to this Court.
14 Burke has claimed that these voluntary disclosures and requests to cooperate were some sort of
15 intimidation.

16 What really happened is as follows:

17 At 8:02 am, Horowitz sent an e-mail to Tom Burke which stated:

18 Tom: This is the broad outlines of where we want to go with our initial discovery.
19 I am attaching the Whitehead Request for Admissions as we will be using that
20 with the irrelevant sections excised. I'll have a CMC draft for you later today.

21 This e-mail and attachment is completely consistent with this Court's meet and confer
22 requirements with respect to the CMC. This Court's standing CMC order states that "[c]ounsel
23 are directed to confer in advance of the Case Management Conference with respect to all of the
24 agenda items listed below ..."

25 Item 7 of the agenda items is:

26 7. What discovery does each party intend to pursue? Can discovery be
27

1 limited in any manner? Are there any alternative methods available to obtain
2 the necessary information? Should a discovery order and conference be entered
3 pursuant to Fed.R.Civ.P 26(f)?

4 And 12:

5 12. What are the earliest reasonable dates for discovery cutoff, pretrial
6 conference and trial?

7 So Tom Burke is now telling this Court that Horowitz attempted to intimidate him with
8 discovery when what really happened was that in mid-February Horowitz voluntarily turned over
9 some of the Rule 26 material before the CMC. (This included the transcript from the Holy Land
10 Foundation trial) and complied with the Court's meet and confer order by supplying an outline of
11 his discovery plan. In the follow up e-mail about two weeks later, a more detailed discovery plan
12 and proposed questions were submitted to Mr. Burke.

13 There was no reciprocation from Tom Burke in any manner. Instead, this continued
14 attempt to cooperate was ignored and now Tom Burke has misrepresented this cooperation by
15 claiming some sort of attempt to intimidate him engineered by Horowitz. The claim by Thomas
16 Burke that this cooperation was designed to intimidate is a vicious personal attack on plaintiff's
17 counsel and it is not only not justified by the record as shown herein, it is demonstrably false by
18 looking at Horowitz' conduct in other cases in this District. Exhibit 11 are the disclosures made
19 in Cohen v. Gavin Newsom, CV-08-1443 SI. Both parties made their disclosures prior to the
20 CMC and both parties agreed to a limited deposition, limited summary judgment motion so that
21 the key disputed issue could be resolved prior to any extensive litigation.

22 Exhibit 12 is an e-mail from a case in the Eastern District, Ambrose v. Coffey, 2:08-cv-
23 01664-LKK-GGH. This is yet another example of Horowitz providing discovery to opposing
24 counsel before the CMC. Exhibit 13 is yet another e-mail referencing the voluntary providing of
25 two DVD's of discovery to opposing counsel in a Northern District case, Origel v. Northwestern,
26 C05-04633 JCS. It is just wrong to say that Daniel Horowitz tried to intimidate CAIR by being

1 cooperative. It is just how this counsel litigates.

2 Exhibit 14 is a small example of where counsel suggested that electronic copies of
3 discovery requests be exchanged to simplify the response process that requires that the question
4 be repeated along with any response. This too was ignored.

5 Exhibit 15 is yet another e-mail (March 20, 2008) seeking to discuss settlement. This too
6 was ignored.

7 Therefore it is truly a gratuitous attack for Tom Burke to say that "...Savage's counsel
8 delivered to CAIR proposed discovery that confirmed Savage's intent to use the litigation
9 process to harass CAIR and its associates." (Motion 9:9-11). Burke makes it appear that the
10 context was that this was filed before the Rule 12 motion instead of the truth, that it was sent to
11 him cooperatively in the time period when they were preparing for the CMC. He ignores all of
12 the attempts that Horowitz made to resolve the case and the attempts that Horowitz made to
13 discuss the ongoing dispute between the clients.

14 On March 6, 2008 the parties completed their joint CMC.

15 On March 20, 2008 Horowitz sent another settlement exploring e-mail (Exhibit 15) but
16 Tom Burke not only ignored yet another attempt to start a settlement process but sought to stall
17 the Court ordered process. He asked Horowitz to join in stalling the ADR but Horowitz refused
18 stating "I don't want to be in a position of actively seeking to derail a negotiation process."
19 (Exhibit 16)

20 Tom Burke then filed an *Ex Parte* motion with this court seeking to block the mediation
21 process from going forward. He succeeded in this but that does not mean that this was the proper
22 choice. If the Court had known of CAIR's refusal to even respond to settlement and/or
23 discussion requests, the Court may not have been as quick to grant the motion.

24 The truth is that CAIR's attorneys have never responded to any attempts to resolve the
25 dispute. They have ignored all attempts to sit down and talk. They have ignored all attempts to
26 narrow issues or plan discovery. The only cooperation was in writing a CMC statement. Other
27

1 than that, all attempts to meet and confer have been one way.

2 Now, with this motion, they have essentially feigned an attempt to meet and confer
3 making the filing of this motion a necessity. They have then filled this motion with personal and
4 fraudulent attacks on plaintiff's counsel and with attacks on Michael Savage which focus on the
5 content of Savage's website.

6 In particular, the attacks by CAIR focus heavily on Savage's political views under the
7 guise of CAIR making points to its motion. It appears to this writer that CAIR's attorneys are
8 arrogantly and MISTAKENLY thinking that a political appeal showing that Savage has strong
9 political views somehow has an impact on the outcome of this motion.

10 **Conclusion**

11 Plaintiff further submits that his counsel's attempts to meet and confer have gone above
12 and beyond that expected of counsel and that defendants have maligned that cooperative
13 attitude and have maliciously spun it to attempt to deceive this Court. Plaintiff submits that
14 defendant did a mock meet and confer on the fee aspect of this motion as it suited its purpose to
15 have a contentious motion with a false allegations and a political appeal for fees.

16 The bloated alleged fees are not fees they are an attempt to obtain a political sanction,
17 ironically for Savage expressing his views on his website. Defendant should receive nothing for
18 this bad faith petition. Further, if the Court agrees that CAIR and its attorneys have maliciously
19 maligned plaintiff's counsel, filed this petition with a bad faith basis for absurd fees and have
20 deliberately fudged the meet and confer, Rule 11 or other sanctions should be awarded against
21 CAIR.

22
23 Dated: October 18, 2008

24
25

Daniel Horowitz
26 Attorney for Plaintiff - Michael Savage
27