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COUNCIL ON AMERICAN-ISLAMIC
10 RELATIONS, INC., COUNCIL ON AMERICAN-
ISLAMIC RELATIONS ACTION NETWORK, INC.,
11 AND COUNCIL ON AMERICAN-ISLAMIC
RELATIONS OF SANTA CLARA, INC.

12
13 IN THE UNITED STATES DISTRICT COURT
14 THE NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 MICHAEL SAVAGE,

17 Plaintiff,

18 v.

19 COUNCIL ON AMERICAN-ISLAMIC
20 RELATIONS, INC., COUNCIL ON
AMERICAN-ISLAMIC RELATIONS
21 ACTION NETWORK, INC., COUNCIL ON
AMERICAN-ISLAMIC RELATIONS OF
22 SANTA CLARA, INC., and DOES 3-100,

23 Defendants.
24

) Case No. CV07-06076 SI

) **REPLY IN SUPPORT OF DEFENDANTS'**
) **MOTION FOR RECONSIDERATION OF**
) **THE DENIAL OF AN AWARD OF**
) **ATTORNEYS' FEES AND COSTS**

) Date: January 30, 2009

) Time: 9:00 a.m.

) Judge: The Honorable Susan Illston

DAVIS WRIGHT TREMAINE LLP

1 In neither of his Opposition briefs does Plaintiff Michael Savage contradict the substantive
 2 arguments made by CAIR in its Motion for Reconsideration. As a result, because the Court's
 3 denial of CAIR's fee motion constituted clear error and because it would otherwise amount to a
 4 manifest injustice, CAIR's motion for reconsideration should be granted.

5 In his first Opposition, filed on November 30, 2008 (Docket No. 63), Savage simply
 6 asserts without argument (while citing Local Rule 7-9(b) which is inapplicable here) that the Order
 7 at issue did not amount to clear error. In his second Opposition, filed without leave of Court on
 8 December 16, 2008 (Docket No. 65), Savage incorrectly argues that a temporary revocation of
 9 CAIR's articles of incorporation removes CAIR's standing to proceed in the copyright lawsuit
 10 filed against it. Even assuming that such an assertion would have merit regarding corporations
 11 with revoked status, Savage's argument is moot as CAIR's corporate status – temporarily revoked
 12 due to a filing error – was reinstated in full on December 24, 2008. *See* Exhibit A to Al-Khalili
 13 Declaration of January 15, 2009, in Support of Motion for Reconsideration at ¶ 3. Pursuant to the
 14 District of Columbia Official Code, CAIR's "certificate of reinstatement ... shall have the effect
 15 of annulling the revocation proceedings theretofore taken as to such corporation and such
 16 corporation shall have such powers, rights, duties, and obligations as it had at the time of the
 17 issuance of the proclamation with the same force and effect as to such corporation as if the
 18 proclamation had not been issued." D.C. Code § 29-301.90. *See, e.g., National Paralegal*
 19 *Institute, Inc. v. Bernstein*, 498 A.2d 560, 562 (D.C. Cir. 1985) (reinstatement of corporate charter
 20 pursuant to D.C. Code § 29-301.90 applies retroactively to restore corporation's existence for the
 21 maintenance of action for breach of a lease, even though the lease was signed during the period in
 22 which the charter had been revoked).

23 In denying CAIR's fee motion, the Court plainly misinterpreted and misapplied black letter
 24 law regarding the proper identification and application of factors that inform its discretion in
 25 evaluating a fee request under 17 U.S.C. § 505. This misapplication – requiring CAIR to meet an
 26 "exceptional circumstances" standard, holding the weakness of Savage's claims and arguments
 27 against CAIR, and penalizing CAIR for Savage's buttressing of his meritless copyright claim with
 28 a fatally-flawed non-copyright claim – not only improperly penalizes CAIR but in doing so sets a

1 precedent wholly at odds with the “purposes of the Copyright Act.” *Fantasy, Inc. v. Fogerty*, 94
 2 F.3d 553, 558 (9th Cir. 1996); Order of November 12, 2008, at 2. In order to ensure that litigants
 3 such as Savage are not able to continue to use copyright law as a pretext for silencing critics,
 4 defendants should (as instructed by the Supreme Court) be encouraged to fully litigate meritorious
 5 defenses. *See, e.g., Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994) (“[D]efendants who seek
 6 to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the
 7 same extent that plaintiffs are encouraged to litigate meritorious claims of infringement.”).
 8 Denying a reasonable fee award to Defendants forced to defend (successfully) against a copyright
 9 claim that was “never strong” and “anemically litigated” plainly does not satisfy this mandate.
 10 Order of November 12, 2008, at 2.

11 In the words of the Court, this case amounts to a “dispute about the ideas expressed in a
 12 four-minute audio clip and the protections of the First Amendment, protections upon which
 13 plaintiff relies for his livelihood and the airing of his radio program.” Order of July 25, 2008, at 2.
 14 As the Court unequivocally recognized, copyright law is an inappropriate tool with which to attack
 15 the ideas of opponents. Given this fact, CAIR respectfully asks that the Court grant its Motion for
 16 Reconsideration and properly weigh its factual findings in CAIR’s favor so that Savage and others
 17 have a disincentive – as explicitly set forth in the Copyright Act – to pursue such meritless
 18 copyright litigation in the future.

19
 20 Dated: January 15, 2009

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 23
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