# EXHIBIT A

DANIEL A. HOROWITZ State Bar No. 92400
Attorney at Law
P.O. Box 1547
Lafayette, California 94549
(925) 283-1863

Attorney for Plaintiff

***UNITED STATES DISTRICT COURT***

***NORTHERN DISTRICT OF CALIFORNIA***

MICHAEL SAVAGE,
aka (Michael Weiner)

Plaintiff,

vs.

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

Defendants.
_____/

No. 3:07 cv 06076 SI

**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 Rule12 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.

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

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

This Court issued a lengthy and carefully documented opinion in this case. There were factual conclusions drawn from both the pleadings and from supplementary materials filed by defendant. Plaintiff recognizes that the Court acted properly in reviewing extrinsic facts. Plaintiff does believe that some of the facts that the Court relied upon in its decision *should not have been decided* without an evidentiary hearing[1].

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

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

---

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

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

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

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

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

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

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

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

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

There is really no case that says that this is the only finding the Court could make. There is a grey area here. The Court could have recognized the surface legitimacy of the use but made

a finding that the commercial or criminal use so outweighed the public benefit use that a copyright infringement should be found. The Court did not do this and plaintiff did not ask for reconsideration and did not appeal. Therefore, the Court is justified in finding that its position was reasonable and fair. However, the fact that the Court made a "reasonable and fair" judgment does not mean that Savage lacked a strong and even compelling counter argument. The decision to shift the emphasis to the RICO makes complete sense. Damages are higher. The issues are broader and the First Amendment issues are not as present. This does not mean that the copyright action was without good cause. It simply means that the Court's logic and reasoning was respected by Savage and he addressed the Court's concerns in a manner that he felt was both rational and responsive to what the Court wrote.

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

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

> Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. . . . Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.
>
> H.R. Rep. No. 94-1476, 94th Cong., 2nd Sess. 65-66 reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5679-80 [hereinafter cited as "House Report"].
>
> (*Hustler* at fn. 4)

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

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

> It found that Moral Majority had not sold the copyrighted work as its own, but had used it for political comment about the plaintiff and to rebut the plaintiff's personal attack. *Id.* at 1153.
>
> (Order 5:3-5)

The Order at 5:8-9 noted that:

> "[t]he Ninth Circuit concluded that Moral Majority's copying of the entire parody was reasonably necessary to provide such comment ..."

Again, this is a fact based determination.

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

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

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

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

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

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

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

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

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

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

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

> As a necessary corollary to this statement, because not all speech or petition activity is constitutionally protected, not all speech or petition activity is protected by section 425.16. (See, e.g., Lam v. Ngo (2001) 91 Cal.App.4th 832, 851 [111 Cal. Rptr. 2d 582] [violence and other criminal acts are not protected by the First

> 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 Flately, 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

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

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

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

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

---

[2][T]he Court finds that defendants used plaintiff's material in order to 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)

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

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

> ... defendants work to raise funds for terrorist groups, aim to silence voices that oppose their views, and have board members who are tied to alleged terrorist organizations[3]. He further alleges that defendants are the domestic branch of a foreign terror organization posing as a civil rights organization ...

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

---

[3]There is no claim of "alleged". Hamas is a terror organization and CAIR and its founders are Hamas members.

> Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. . . . Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.
>
> H.R. Rep. No. 94-1476, 94th Cong., 2nd Sess. 65-66 reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5679-80 [hereinafter cited as "House Report"].
>
> (*Hustler* at fn. 4)

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

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

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

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

that this was evident from the pleadings.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and

> ..., I'm telling you about things in the heart ..., the goals you're talking about are in the heart but, can I write them down or can I support our brothers. We cannot write them down.
>
> (Exhibit to Amended RICO 22)

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

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

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

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

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

The group scoffs at charity work and talks about how it is a waste of their efforts. As far as charity work, money comes mainly from the Islamic community. It won't give you much of anything, to you in particular because it is true you could deceive it with an assumed name but then it will recognize you. And the Jewish media now focuses on these things. (Exhibit 27)

As shown above, CAIR fears that the "Jewish media" will expose the real nature of CAIR.

They also recognize that charity work in America does not benefit Hamas. "Even children's daycare centers...we discover that their Dawa'a[5] value is close to zero...What have we benefitted from that? The same thing applies to orphans sponsorships; we spend hundreds of thousands of dollars over this program but, there is no Dawa'a[6] use for it..."

Plaintiff should have been allowed to make this point to show that CAIR sought to gain

---

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

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

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

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

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

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

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

> The parties disagree about the purpose and character of the use. Falwell contends that he sent the parody to his followers to give them information to rebut the statements it contained, and that the appeal for money was ancillary. Hustler contends, however, that the advertisement was clearly a parody so there was nothing to rebut and thus the letters were purely fundraisers.
> (*Hustler* at 1152)

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

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

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

(Order 5:3-5)

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

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

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

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

**CAIR FAILED TO MEET AND CONFER**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

What really happened is as follows:

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

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

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

Item 7 of the agenda items is:

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

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

And 12:

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

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

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

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

cooperative. It is just how this counsel litigates.

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

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

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

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

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

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

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

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

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

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

**Conclusion**

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

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

Dated: October 18, 2008

Daniel Horowitz
Attorney for Plaintiff - Michael Savage

# EXHIBIT B

DANIEL A. HOROWITZ State Bar No. 92400
Attorney at Law
P.O. Box 1547
Lafayette, California 94549
(925) 283-1863

Attorney for Plaintiff

***UNITED STATES DISTRICT COURT***

***NORTHERN DISTRICT OF CALIFORNIA***

MICHAEL SAVAGE,
aka (Michael Weiner)
No. 3:07 cv 06076

Plaintiff,

vs.

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

Defendants.
_____/

I, Daniel Horowitz declare as follows:

**Settlement Attempts**

1. Exhibit 4 is a true and correct copy of the letter that I mailed and faxed to CAIR before the lawsuit was filed. There was no response to this letter.

2. This was not the only attempt to communicate with CAIR prior to the filing of the

lawsuit. Michael Savage's syndicator sent a similar letter which was likewise ignored.

3. Before the lawsuit was filed I reviewed the legal issues with Martin Garbus who is one of the most experienced First Amendment attorneys in the United States. I also consulted with Ian Boyd who is Michael Savage's copyright and business attorney. Ian Boyd has an extraordinary background in copyright law and related matters.

4. I then researched the background of CAIR to confirm with hard evidence the fact that CAIR was not only founded by members of Hamas but continued to function as an Hamas outlet in the United States. During this case I interviewed the attorneys and investigators involved in the major United States cases involving CAIR and terror groups. I reviewed the allegations in the O'Neill case out of New York and the Boim case that (although reversed on appeal), had led to a massive award against Hamas and its related groups.

5. When the case was filed, CAIR continued to ignore me. The letters attached as Exhibits 5-6 were sent to CAIR's attorney, Mr. Khalid but ignored me. The Texas branch that Khalid represents is particularly important because it is the branch of CAIR that originally hosted and housed CAIR's computer system along with the branch in Santa Clara. This was the branch most directly tied to terror convictions. It was also a branch involved with many of the founding members of CAIR.

6. As Exhibit 6 shows, I could have taken the default against CAIR in Texas but I did not. Instead, I informed CAIR's attorney and agent for service that I was amending the complaint to name additional CAIR related entities and that I would be reserving them.

7. Mr. Khalid, despite being an attorney and having an office, was never available for the reservice. It seems that he took the knowledge that I was amending and not taking his client's default as an invitation to play hide and seek.

8. When Thomas Burke contacted me we reached agreement on which corporate entities using the name CAIR would be included in this lawsuit. He agreed to represent all these parties under the name CAIR. I broached settlement at that time and in virtually all conversations that we

had during the pendency of this case.

9. During this same time period I continued to investigate CAIR and it became obvious that they were receiving millions of dollars in funding from Saudi Arabia, Dubai and Kuwait. I informed Michael Savage that CAIR was refusing to even discuss settlement and that they likely had unlimited funding for this case.

**Legal Fees**

10. Now that the case is finished I can represent to this Court that my bills (including the billings for my paralegal) approximately $ 30,000.00. The amount might even be less as I didn't break it out that specifically. It certainly wasn't more. The real work in the case was unraveling the intricate web of CAIR. To accomplish this, I reviewed thousands of pages of documents, the entire transcript of U.S. v. Holy Land Foundation, documents from the O'Neill and Boim cases. My paralegal also reviewed thousands of pages. My investigator made a large number of FOIA requests and received hundreds of pages of documents responsive to these requests. When I compare my bills to those submitted by CAIR's "pro bono" attorneys I can only think that their bills are absurd. Absurd is the kindest word I can use for them. Being completely honest, to me it seems close to fraudulent.

**Client's Motivation Not Financial**

11. If we had prevailed on this case, it was Michael Savage's intention to use the money received to set up a foundation to fund conservative First Amendment causes. In fact he has done that with the money donated in this case. His motive was never to gain money from the lawsuit. He genuinely believed and believes that CAIR is a dangerous organization. His motivation is not that he "disagrees" with CAIR but that he fears what CAIR will do to this country. While opposing counsel may feel comfortable with his view that CAIR is a civil rights organization, Michael Savage has the right to believe and does believe, that the evidence establishes otherwise.

**There Was No Intimidation by This Attorney**

12. Exhibits 11-13 are letters and documents that I have sent in other cases in the U.S. District Court. I have a practice of giving the other side as much discovery as have at a given time even if they do not request it. My background is criminal law and most of my career was spent in Alameda County. As many people know, criminal law attorneys tend to cooperate more with each other than civil attorneys. In addition, in Alameda County the informal cooperation system was almost an institution. It arose from years of cooperation and leadership during the tenures of D. Lowell Jensen and Jim Hooley when they were District Attorney and Public Defender (respectively). The established a premise for working together that they enforced in their offices. The rule was simple. You be professional and cooperative outside of the courtroom and fight as hard as you can in the courtroom. Among the informal rules that they established is that you do not play games with discovery and that you give the other side what they are entitled to even if they don't ask. When I first started, this rule was communicated to me by judge Stanley P. Golde who said "Don't ever &$%$ with the D.A. unless it is the last case you want to do in this county." He didn't mean don't fight hard, he meant don't cheat. In all my communications with Tom Burke I attempted to meet that ethical standard. I intended to treat Tom Burke with respect and to foster an atmosphere of cooperation that would lead to a possible resolution of the dispute. I have attached the series of letters and emails that I sent to Tom Burke and in the motion itself I have explained the context.

12. I have adopted this way of practice and throughout my career I have easily and/or voluntarily provided discovery, worked with other counsel on scheduling and then fought as hard as I possibly could in the courtroom. I did this in the CAIR case as I always do. Tom Burke's characterization of my conduct and his spin to make it a type of intimidation, is insulting. Perhaps he was intimidated by something that he was unfamiliar with. Cooperation.

13. This is the same cooperation that I extended to Mr. Khalid when I sent him this Court's standing orders and did not take his client's default when I could have.

14. I presently have litigation regarding a construction defect on my own house. I have

given the other attorneys my expert's cell phone number and have invited them to call him and consult anytime they want. I have given them carte blanche to come to the house and inspect (and they have taken me up on this offer).

15. As a further exhibit I have attached a letter that I sent to opposing counsel in a Northern District case where I made an very earlier disclosure of my potential witnesses.

16. During all of my telephone calls with Tom Burke he was professional and courteous. However, he never made any effort to settle this case or to even discuss the issues. He never reciprocated with discovery production, narrowing of issues or in any substantial manner. This did not bother me as I did not extend my courtesies in the expectation of obtaining a quid pro quo.

14. I tried to call a "cease fire" so that we could get the settlement process going. He agreed to consult his clients but this offer was refused.

15. After the Rule 12 motion was filed and argued, Tom Burke tried to put a stop to the settlement process. I refused to stop it. I felt that the case would being going forward on the RICO cause of action if not both. In my experience cases settle in a process and that process should be started as soon as possible. This allows the attorneys to find the sticking points in a case and to resolve them factually or legally. It allows the clients to get to know each other and in many cases (as corny as it may seem), the getting to know process sometimes creates a grudging respect and encourages settlement.

16. Tom Burke made an ex parte application to stall the settlement process and succeeded. Perhaps he was correct legally but in the context of the refusal of CAIR to even begin discussion it seemed to me to be somewhat unreasonable. As I see it, his ex parte application (in the context in which it was filed) made it seem like we did poorly on the Rule 12 argument so now we wanted to push settlement. In fact it was not that, I was continuing a process of attempting to initiate discussion and this attempt on my part had started at the inception.

**Development of Factual Allegations in Complaints**

17. The initial lawsuit relied heavily on the O'Neill case but as the case developed I was able to prepare a fact based pleading (Exhibit 1 with Exhibit 2 being the exhibits) which details how CAIR was formed by Hamas in 1993-1994. I have documents obtained by the F.B.I. and transcripts of surveillance recordings where the concept of CAIR was discussed. The subject matter was very complex and I was not an expert in "CAIR" or the organization structure and financing of international Islamist organizations. It took time and effort to develop a highly cogent and organized theory that was fact and evidence based. This is reflected in the Amended RICO cause of action which unfortunately was not filed.

18. Since the last court appearance I have been able to establish with evidence that CAIR was formed by Hamas for the specific purpose of promoting the interests of Hamas in Palestine. This is explicit in the transcripts and documents. I also have the transcripts of an FBI surveillance where CAIR founders discuss how American Muslims will reject them if their true beliefs are known. They decide to imitate the civil rights organization of James Zogby in order to present an acceptable face to the American Muslim population. The discuss how the charitable aspects of their work in America yield few political results (as contrasted with the success of the Hamas charities in Palestine).

**The RICO Claim Has Vitality Even Absent a Copyright Claim**

19. I have included in the not filed amended RICO, which documents these allegations through a detailed history, reasoning and with evidence. It also addresses the Noerr-Pennington and First Amendment issues that had previously been raised by this Court.

20. It is my belief that CAIR functions in a manner similar to the Ku Klux Klan. I am aware that this analogy stands directly in contrast to CAIR's claim that it is the Arab American NAACP. I believe that the conduct of CAIR with respect to Michael Savage is the modern day version of a cross burning. I believe that the Amended RICO if filed would make a strong argument that the conduct of CAIR is unprotected just as the conduct of cross burners was unprotected in *Virginia v. Black*, , 538 U.S. 343 (2003). In that case, the Supreme Court held that

a statutory prohibition of cross-burning with the intent to intimidate did not violate cross burner's right to freedom of speech, since the statute banned intentional intimidating conduct rather than expression. I had hoped that this Court would reassess its ruling on the Copyright Claim in light of the more detailed pleading. I have no doubt that even without the copyright claim, the RICO action would have gone forward.

21. The case was not only filed in good faith but I believe that as the case developed, this Court would have seriously reconsidered its original view. After all, I had only several weeks to prepare my presentation. If I am correct about CAIR deliberately creating a civil rights persona to hide more sinister conduct, they have had years to perfect that persona. A few weeks of preparation is not enough to complete pierce that veil.

22. I cannot personally comment on the failure of CAIR to meet and confer on fees except to say that I was called by Matt Zimmerman on this point and I asked that he discuss settlement with Michael Savage's business attorney, Ian Boyd. As soon as my call with Matt Zimmerman ended, I called Ian Boyd and asked him to contact Matt Zimmerman. I told him that although I personally wanted the case to go forward, it was in everyone's best interests to settle. I told Mr. Boyd that the "big firm" (Tom Burke) had claimed to be working "pro bono". I suggested that the "big firm" forgo fees and that instead, we make a sizable donation to the Electronic Frontier Foundation.

23. I disagree with the position of the EFF on this case but I have supported their efforts in the past. In fact, I donated my time to this organization on the "Eric Corley" vs. Motion Picture Association case where they sued him for developing and/or distributing the code that allowed the copying of encrypted DVD's. This code was later repackaged and sold by the company (DVDxCOPY?) that argued its case before this Court.

24. Therefore, I can assure the Court that my call to Ian Boyd had a level of strength in suggesting settlement (despite my disappointment in not going forward). Ian Boyd and I discussed

What happened (or did not happen) after that is contained in the Declaration of Ian Boyd.

23. Plaintiff's decision not to go forward in this case followed the assassination Democratic Party Chairman Bill Gwatney at the party's headquarters in Little Rock, Arkansas and the discovery during our investigation of the fact that Civil Rights Coordinator of CAIR-California, Affad Shaikh had been questioned (in late 2007) about his alleged involvement in a plot to assassinate President Bush. Prior to this there had been threatening telephone calls which appeared related to this case, including one which contained only gunshots. In addition, Michael Savage's home address has been published on the internet and he has received unsolicited personal mail at these addresses.

24. Michael Savage's wife was always concerned about his safety. She was well aware of the murder of a radio talk show host in Denver, Colorado. That person was Alan Berg. Berg was known for taking a strong stand on many topics and was, at times, abrasive and combative to callers and guests who held opposing views. Berg, was assassinated in his driveway on the evening of June 18, 1984.

25. When the CAIR case was filed and the threats started, Savage had full time security not only for himself but for his wife and her employees. His wife manages a major corporation and locally they have many employees.

25. Following the assassination of Mr. Gwatney, Michael Savage's wife asked me a simple question. Can I directly connect CAIR to Hamas. Not just associate them but connect them to show that they are the same. I answered "Yes".

26. After a flurry of calls, I received the final call from Michael Savage. He told me, "Dan, I don't really care what happens to me but I can't do this to my wife. Pull the plug." I did.

27. Had we continued, I believe that we would have prevailed on the RICO claim and once the Court had the opportunity to review the new RICO filing I intended to see if there was a way to ask this Court to reconsider its ruling on the copyright claim.

**Sanctions**

28. To this writer, the request for fees is outrageous. In all honesty, it appears to me to be a blatant, **insulting** and absurd attempt to use political appeals to obtain an punitive sanction under the guise of a fee award. The deliberate attempt to feign a meet and confer underscores the desire of CAIR's attorneys to make this political appeal. If the Court agrees, I respectfully request that sanctions under Rule 11 or as otherwise appropriate, be imposed against CAIR's attorneys.

I declare the above to be true and correct under penalty of perjury. Executed this October 23, 2008 at Stockton, California.

_____

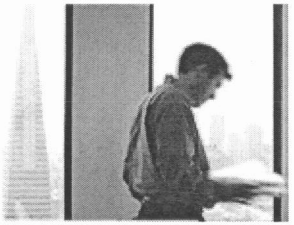
Daniel Horowitz

# EXHIBIT C

HARVEY · SISKIND LLP



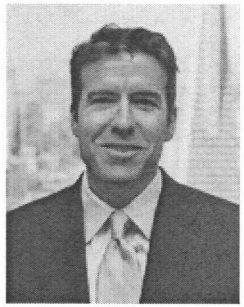
## ATTORNEYS



### Ian K. Boyd, Partner

Ian Boyd's practice emphasizes litigation and commercial transactions, with an emphasis on intellectual property prosecution and counseling, as well as trade secret, advertising, privacy, and First Amendment law. Mr. Boyd assists clients in protecting and maximizing the value of their intellectual property through clearance, enforcement, licensing and audits. He is a Past President of the San Francisco Intellectual Property Association, and serves on the Trade Dress Committee of the International Trademark Association. Mr. Boyd is also active in the Copyright Society and spoke before the Product Liability Advisory Council regarding unfair competition.

Mr. Boyd graduated with a degree in mathematics from the University of California at Santa Barbara, before he obtained his law degree at the University of San Francisco. He graduated cum laude and was Articles Editor of the University of San Francisco Law Review. Mr. Boyd was also a member of the McAulliffe Honor Society and received the American Jurisprudence Award in Evidence while at USF.



download V-card

**Ian K. Boyd**
Partner

**E-mail:**
iboyd@harveysiskind.com

**Emphasis:**

- Litigation
- Trademarks
- Copyrights
- Advertising Law

# EXHIBIT D

HARVEY · SISKIND LLP



# CONTACT US

## HARVEY SISKIND LLP

Four Embarcadero Center
39th Floor
San Francisco, CA 94111

Tel: (415) 354-0100
Fax: (415) 391-7124



> Disclaimer / Privacy Policy

# EXHIBIT E

May 28, 2009



# Update on Savage Legal Fund

Thank you again to all of you who have contributed to continue the fight for free speech. As you may know, I was forced to drop my lawsuit against CAIR for non-legal reasons.

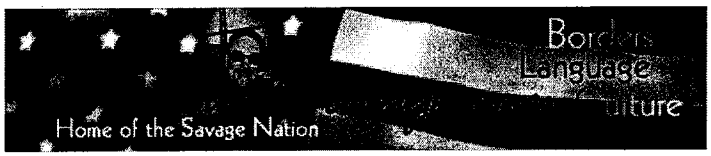
Unfortunately after spending over $250,000, I discovered the legal system is stacked against patriots and favors even those who are unindicted co-conspirators in a federal anti-terrorism trial.

Rather than spend more funds fighting both those who attack free-speech and the courts, I chose to withdraw from this battle and fight other battles, in fairer venues.

However, the battle to protect the First Amendment goes on.

With your past and future contributions, we will use the fund to ensure that free speech is preserved, to support those who fight the good fight (including those in law enforcement and the military), and to protect against the interests of Islamofascism.

Please continue to contribute in any way that you can, and we will show everyone that the Savage Nation cannot be stopped.




**Protect freedom of speech! Support the Savage Legal Fund.**

Donate

**OR Send Checks to:**
Michael Savage Legal Fund
Four Embarcadero Center, 39th Floor
San Francisco, CA 94111

***Donations Are Not Tax Deductible***

**HOME | BACK**

# EXHIBIT F

# MARIN COUNTY

## COMMUNITY DEVELOPMENT AGENCY

ALEX HINDS, DIRECTOR

**STAFF REPORT TO THE PLANNING COMMISSION**
WEINER APPEAL OF THE COMMUNITY DEVELOPMENT AGENCY'S
CONDITIONAL APPROVAL OF THE RIES MINOR DESIGN REVIEW

| | | | |
|---|---|---|---|
| Item No: | 4. | Application No: | DM 05-14 |
| Applicant: | Jared Polsky | Appellant: | Michael and Janet Weiner |
| Property Address: | 115 St. Thomas Way, Tiburon | Assessor's Parcel: | 038-215-03 |
| Hearing Date: | June 13, 2005 | Planner: | Larisa Roznowski |

| | |
|---|---|
| **RECOMMENDATION:** | **Deny the Appeal and Sustain the Ries Minor Design Review Approval** |
| **APPEAL PERIOD:** | **Ten calendar days to the Marin County Board of Supervisors** |
| **LAST DATE FOR ACTION:** | **June 30, 2005** |

### SUMMARY RECOMMENDATION

Staff recommends that the Planning Commission deny the Weiner appeal and sustain the Community Development Agency's (CDA) conditional approval of the Ries Minor Design Review allowing the proposed construction of 933 square feet of upper and lower level additions to an existing one-story 2,501 square foot single-family residence in the Paradise Cay subdivision in Tiburon. Staff finds that the basis of appeal does not provide sufficient grounds for denial of the proposal according to the County's Design Review findings.

### PROJECT DESCRIPTION

The project is a proposal to construct 933 square feet of upper and lower level additions, 52 square feet of which is a garage addition, to an existing one-story 2,501 square foot single-family residence in the Paradise Cay subdivision in Tiburon. The project involves rebuilding and expanding the existing detached garage on the north side of the property to an attached garage, adding a second story area on the north side of the residence, and making other interior wall reconfigurations. As proposed, the 3,434 square foot residence on the 11,576 square foot lot area would result in a floor area ratio (FAR) of 29.6 percent. The residence would attain a maximum height of 21 feet above grade and the addition would maintain the following setbacks from corresponding property lines: 102 feet, 6 inches from the eastern rear property line, 39 feet, 6 inches from the southern side property line, 19 feet, 10 inches from the western front property line, and 6 foot, 1 inch from the northern side property line. The addition would be finished to match the existing residence with asphalt shingle composition roofing, light blue cedar sidewall shingles, off-white wood trim, and aluminum clad windows.

Design Review is required pursuant to Marin County Code Section 22.16.030.D, Planned District General Standards.

## GENERAL INFORMATION

| | |
|---|---|
| Countywide Plan: | SF-6 (Single Family, 4 to 7 units per acre) |
| Zoning: | BFC-RSP-5.8 (Bayfront Conservation Area, Residential, Single-Family Planned District, 5.8 units per acre) |
| Lot size: | 7,427 square feet |
| Adjacent Land Uses: | Single-family residential |
| Vegetation: | introduced vegetation |
| Topography and Slope: | relatively level |

## ENVIRONMENTAL REVIEW

The Environmental Coordinator has determined that this project is Categorically Exempt from the requirements of the California Environmental Quality Act pursuant to Section 15301, Class 1 of the CEQA Guidelines because the addition to the single-family residence would not result in any potentially significant impacts to the environment.

## PUBLIC NOTICE

The Community Development Agency has provided public notice of the appeal hearing identifying the applicants and appellants, describing the project and its location, and giving the earliest possible decision date in accord with California Government Code requirements. This notice has been mailed to all property owners within 300 feet of the subject property.

## PLAN CONSISTENCY

The proposed project, as modified by conditions of approval, is consistent with the goals and policies of the Marin Countywide Plan, Title 22 (Zoning), and Title 24 (Development Standards) of the Marin County Code. Please refer to the plan consistency findings contained in the attached resolution.

## ZONING CONSISTENCY

The project is consistent with principally-permitted uses and the BFC-RSP-5.8 zoning district development standards relative to height.

## ANALYSIS OF APPEAL

Ian K. Boyd, attorney for Michael and Janet Weiner, the neighbors to the south at 111 St. Thomas Way, submitted a Petition of Appeal on April 25, 2005 identifying several bases for appeal of staff's administrative approval of the Ries Minor Design Review, including: (1) the proposed addition will substantially interfere with the use and enjoyment of the appellant's property, including light, air, privacy and views, specifically resulting from unencumbered views of the appellant's front yard and a violation of privacy; (2) the proposed addition will result in the elimination of significant sun and light exposure, views, vistas, and privacy to the appellant's property, specifically significant decrease of sunlight on the appellant's property; and (3) the proposed addition will exacerbate noise that currently emanates from the applicant's residence. Below is staff's response to the issues raised by the appellant.

1. *The proposed addition will substantially interfere with the use and enjoyment of the appellant's property, including light, air, privacy and views, specifically resulting from unencumbered views of the appellant's front yard and a violation of privacy.*

Response to Appeal:

The proposed addition would not impact light, air, privacy, and views of the appellant's property to the south because the addition is located on the north side of the subject property 39 feet, 6 inches from the shared southern side property line, and existing mature landscaping and fencing would provide adequate visual screening and privacy buffering between the proposed addition and adjoining residences. Staff conducted a site visit and made the determination that the windows that would face south towards the appellant's property (windows from proposed bedroom #4, bathroom, and office) would look only into the subject property's courtyard. The windows would be visually blocked from the appellant's property, except for the front tip of the front yard, by the existing southern wing of the residence. For these reasons, no violation of privacy would result to the appellant's residence or the majority of the front yard.

2. *The proposed addition will result in the elimination of significant sun and light exposure, views, vistas, and privacy to the appellant's property, specifically, resulting in a significant decrease of sunlight on the appellant's property.*

Response to Appeal:

For the same reasons as described in the Response to Appeal in #1 above, the proposed addition would not result in the elimination of significant sun and light exposure, views, vistas, and privacy to the appellant's property, or specifically, resulting in a significant decrease of sunlight on the appellant's property. The applicant's property is north of the appellant's property. The peak roof ridge line of the proposed addition has an elevation of 21 feet above existing grade while the existing roof ridge line of the existing southern wing of the subject residence, located approximately 18 feet closer to the appellant's property, has an elevation of 17 feet, 5 inches above grade. The area of the proposed addition at the northern wing of the residence would be only 3 feet, 7 inches taller than the intervening south wing, and would be situated 39.5 feet from the common property line at the appellant's lot. The proposed addition is adequately sited from the appellant to the south, so that no loss of sunlight to the appellant's property would occur.

3. *The proposed addition will exacerbate noise that currently emanates from the applicant's residence.*

Response to Appeal:

The project would not limit or inhibit the use or enjoyment of other properties on the vicinity because the proposed addition and use of the single-family residence is consistent with the single-family principally permitted use governed by the BFC-RSP-5.8 (Bayfront Conservation Area, Residential, Single-Family Planned District, 5.8 units per acre) zoning district.

**CONCLUSION**

The project is consistent with policies and programs in the Countywide Plan because the project involves the construction of a single-family residential addition that complies with the SF-6 (Single Family, 4 to 7 units per acre) land use designation, and is a principally-permitted use under the governing BFC-RSP-5.8 zoning district. The project would comply with all development standards applicable to the governing zoning district and would be of comparable height, size, and scale with other structures existing in the surrounding community. The project would not impact light, air, privacy, and views of surrounding residences because the addition has varying roof lines that minimize impacts to the neighbor to the north, has minimal fenestration on the northern side which maintains

privacy to the neighbor to the north, is blocked visually by the existing southern wing of the residence, maintains the privacy and views to the neighbor to the south, is adequately sited back (39 feet, 6 inches) from the southern side property line so that there are no light, air, view, or noise impacts to the neighbor to the south, and has existing mature landscaping and fencing that would provide adequate visual screening and privacy buffering between the proposed addition and adjoining residences.

The single-family residence will be situated solely on the subject property and will result in a structure of height, mass and bulk appropriate to the 7,427 square foot site and will provide adequate setbacks from property lines and other buildings on surrounding properties. The project incorporates architectural characteristics and building forms that are consistent with other development in the area and minimizes the apparent overall mass and bulk of the structure. Finally, the single-family residential addition would be constructed using materials and colors that are non-reflective and subdued in nature, to blend with the existing residence and the surrounding natural and built environment.

**RECOMMENDATION**

Staff recommends that the Planning Commission review the administrative record, conduct a public hearing, and adopt the attached resolution: (1) denying the Weiner Appeal; and (2) sustaining the Community Development Agency's conditional approval of the Ries Minor Design Review.

Attachments:

1. Proposed Resolution Denying the Weiner Appeal and Sustaining the Community Development Agency's conditional approval of the Ries Minor Design Review
2. Weiner Petition for Appeal, received 4/25/05
3. Categorical Exemption
4. Location Map
5. Assessor's Parcel Map
6. Topographic map
7. Site plan
8. Floor plans
9. Roof plan
10. Building elevations
11. Cross sections
12. Marin County Code Section 22.16.030
13. Tiburon Fire Protection District memo, dated 9/27/04
14. Marin Municipal Water District letter, dated 9/28/04
15. Paradise Cay Homeowners Association, Architectural Review Committee letter, dated 10/27/04
16. Department of Public Works memorandum, dated 1/3/05
17. Letter from Ian K. Boyd, attorney for Michael and Janet Weiner, dated 3/29/05
18. Letter from Ian K. Boyd, attorney for Michael and Janet Weiner, dated 4/6/05
19. Letter from Tom and Sue Simms, et. al., dated 5/23/05
20. Letter from Edith and Dale La Gazette, et. al., dated 5/23/05
21. Letter from Michael and Maria Ries, received 6/5/05
22. Ries Design Review 05-14 Notice of Decision, dated 4/25/05

MARIN COUNTY PLANNING COMMISSION

RESOLUTION NO._____

A RESOLUTION DENYING THE WEINER APPEAL AND SUSTAINING THE COMMUNITY DEVELOPMENT AGENCY'S APPROVAL OF THE RIES MINOR DESIGN REVIEW 05-14
115 ST. THOMAS WAY, TIBURON
ASSESSOR'S PARCEL 038-215-03

* * * * * * * * * * * * * * * * * * * * * * * * *

**SECTION I: FINDINGS**

I. WHEREAS Jared Polsky, on behalf of the property owners, Michael and Maria Ries, is requesting Minor Design Review approval to construct 933 square feet of upper and lower level additions, 52 square feet of which is a garage addition, to an existing one-story 2,501 square foot single-family residence in the Paradise Cay subdivision in Tiburon. The project proposal involves rebuilding and expanding the existing detached garage on the north side of the property to an attached garage, adding a second story area on the north side of the residence, and making other interior wall reconfigurations. As proposed, the 3,434 square foot residence on the 11,576 square foot lot area would result in a floor area ratio (FAR) of 29.6 percent. The residence would attain a maximum height of 21 feet above grade and the addition would maintain the following setbacks from corresponding property lines: 102 feet, 6 inches from the eastern rear property line, 39 feet, 6 inches from the southern side property line, 19 feet, 10 inches from the western front property line, and 6 foot, 1 inch from the northern side property line. The addition would be finished to match the existing residence with asphalt shingle composition roofing, light blue cedar sidewall shingles, off-white wood trim, and aluminum clad windows. The property is located at 115 St. Thomas Way in Tiburon, and is further identified as Assessor's Parcel 038-215-03.

II. WHEREAS on April 14, 2005, the Community Development Agency issued a conditional approval of the Ries Minor Design Review granting authorization for the construction of 933 square feet of upper and lower level additions, 52 square feet of which is a garage addition, to an existing one-story 2,501 square foot single-family residence in the Paradise Cay subdivision in Tiburon. The approval includes several standard condition, however, because the project was found to be consistent with the required findings for Design Review, no substantial modifications to the project were required.

III. WHEREAS, a timely appeal of the Community Development Agency's approval of the Ries Minor Design Review has been filed by Michael and Janet Weiner asserting the following issues: (1) the proposed addition will substantially interfere with the use and enjoyment of the appellant's property, including light, air, privacy and views, specifically resulting from unencumbered views of the appellant's front yard and a violation of privacy; (2) the proposed addition will result in the elimination of significant sun and light exposure, views, vistas, and privacy to the appellant's property, specifically resulting in a significant decrease of sunlight on the appellant's property; and (3) the proposed addition will exacerbate noise that currently emanates from the applicant's residence.

IV. WHEREAS the Marin County Planning Commission held a duly noticed public hearing on June 13, 2005, to consider the merits of the project and appeal, and hear testimony in favor of, and in opposition to, the project.

V. WHEREAS the Marin County Planning Commission finds that this project is Categorically Exempt from the requirements of the California Environmental Quality Act pursuant to Section 15301, Class 1 of the CEQA Guidelines because construction of the single-family residence would not result in any potentially significant impacts to the environment.

VI. WHEREAS the Marin County Planning Commission finds that the proposed project is consistent with the Marin Countywide Plan for the following reasons:

A. The project is consistent with the Countywide Plan and Tamalpais Community Plan's SF-6 land use designation.

B. The project is consistent with the Countywide Plan's Bayfront Conservation Area policies.

C. The project would comply with Marin County standards for flood control, geotechnical engineering, and seismic safety, and include improvements to protect lives and property from hazard.

D. The project would comply with governing development standards related to roadway construction, parking, grading, drainage, flood control and utility improvements as verified by the Department of Public Works.

E. The project would not cause significant adverse impacts on water supply, fire protection, waste disposal, schools, traffic and circulation, or other services.

F. The project would minimize soil disturbance and maximize retention of natural vegetation.

VII. WHEREAS the Marin County Planning Commission finds that the proposed project, is consistent with all of the mandatory findings to approve the Ries Minor Design Review application (Section 22.42.060 of the Marin County Code) as specified below.

**A. The proposed development will properly and adequately perform or satisfy its functional requirements without being unsightly or creating incompatibility/disharmony with its locale and surrounding neighborhood;**

The proposed addition would conform with property development standards applicable to the BFC-RSP-5.8 zoning district including principally-permitted structures, uses, and maximum building height conditions. The addition would attain a maximum height of 21 feet above grade where 30 feet is allowed for primary structures. The project would result in minimal adverse physical and visual impacts because it would be constructed of building materials and colors that match the existing residence, would compliment the surrounding natural and built environment, and would be consistent with the surrounding community character.

**B. The proposed development will not impair, or substantially interfere with the development, use, or enjoyment of other property in the vicinity, including, but not limited to, light, air, privacy and views, or the orderly development of the neighborhood as a whole, including public lands and rights-of-way;**

The project would comply with all development standards applicable to the governing zoning district and be of comparable height, size, and scale with other structures existing in the surrounding community. The project would not impact light, air, privacy, and views of surrounding

residences because the addition has varying roof lines that minimize impacts to the neighbor to the north, has minimal fenestration on the northern side which maintains privacy to the neighbor to the north, is blocked visually by the existing southern wing of the residence, which maintains the privacy and views to the neighbor to the south, is adequately sited back (39 feet, 6 inches) from the southern side property line so that there are no light, air, view, or noise impacts to the neighbor to the south, and has existing mature landscaping and fencing that would provide adequate visual screening and privacy buffering between the proposed addition and adjoining residences.

C. **The proposed development will not directly, or cumulatively, impair, inhibit, or limit further investment or improvements in the vicinity, on the same or other properties, including public lands and rights-of-way;**

The project will not limit or inhibit the use or enjoyment of other properties on the vicinity because the improvements are consistent with the uses permitted by the governing zoning district. The proposed development would not encroach into any rights-of-way, conservation easements, or public lands.

D. **The proposed development will be properly and adequately landscaped with maximum retention of trees and other natural features and will conserve non-renewable energy and natural resources;**

The project will involve no removal of trees or significant landscaping. It is primarily sited within the footprint of the existing residence and garage.

E. **The proposed development will be in compliance with the design and locational characteristics listed in Chapter 22.16 (Planned District Development Standards);**

Proposed building materials and colors match the existing residence, would compliment the surrounding natural and built environment, and would be consistent with the surrounding community character. Minimal grading would occur because most of the improvements will occur within the footprint of the existing residence and garage, and the site is flat.

F. **The proposed development will minimize or eliminate adverse physical or visual effects which might otherwise result from unplanned or inappropriate development, design, or placement. Adverse effects include those produced by the design and location characteristics of the following:**

1. **The area, heights, mass, materials, and scale of structures;**

   The size of the proposed addition is proportionately scaled to the 11,576 square foot lot area square foot lot and would result in a FAR of 29.6 percent. The addition would be articulated and would have windows that are screened from view from the adjoining neighboring residences. Building colors and materials would match the existing residence and blend with the natural and built environment. The lower plate heights and sloping roof minimize the mass of the addition. Finally, height, mass and scale would be consistent with the surrounding community character.

2. **Drainage systems and appurtenant structures;**

   The proposed addition poses no adverse physical impacts to drainage systems and appurtenant structures.

3. **Cut and fill or the reforming of the natural terrain, and appurtenant structures (e.g., retaining walls and bulkheads);**

   The proposed addition would be built primarily within footprint of existing structures and would have no potential impact on natural terrain or appurtenant structures.

4. **Areas, paths, and rights-of-way for the containment, movement or general circulation of animals, conveyances, persons, vehicles, and watercraft; and**

   The proposed addition would have no impact on movement or general circulation of animals, conveyances, persons, vehicles, and watercraft.

5. **Will not result in the elimination of significant sun and light exposure, views, vistas, and privacy to adjacent properties.**

   Please see the response to Findings A and B.

G. **The project design includes features which foster energy and natural resource conservation while maintaining the character of the community.**

As a condition of approval, the applicant shall submit a signed Statement of Conformance demonstrating that the project qualifies for a "Certified" or better rating under the Marin Green Home: Remodeling Home Green Building Residential Design Guidelines. The Building Permit shall include specifications demonstrating compliance with all construction-related measures that are used to meet the "Certified" or better rating.

H. **The design, location, size, and operating characteristics of the proposed use are consistent with the Countywide Plan and applicable zoning district regulations, are compatible with the existing and future land uses in the vicinity, and will not be detrimental to the public interest, health, safety, convenience, or welfare of the County.**

The project is consistent with the Countywide Plan and the BFC-RSP-5.8 zoning district. The structures have been designed to be compatible with the natural environment and will not be detrimental to the surrounding properties. The project has also been recommended for approval by the Paradise Cay Homeowners Association, Architectural Review Committee.

VIII. WHEREAS the Marin County Planning Commission finds that the bases for the Weiner appeal cannot be sustained and that the Community Development Agency acted appropriately in issuing the Ries Minor Design Review due to the following factors:

1. *The proposed addition will substantially interfere with the use and enjoyment of the appellant's property, including light, air, privacy and views, specifically resulting from unencumbered views of the appellant's front yard and a violation of privacy.*

Response to Appeal:

The proposed addition would not impact light, air, privacy, and views of the appellant's property to the south because the addition is located on the north side of the subject property 39 feet, 6 inches from the shared southern side property line, and existing mature landscaping and fencing would provide adequate visual screening and privacy buffering between the proposed addition and adjoining residences. Staff conducted a site visit and made the determination that the windows that would face south towards the appellant's property (windows from proposed bedroom #4, bathroom, and office)

would look only into the subject property's courtyard. The windows would be visually blocked from the appellant's property, except for the front tip of the front yard, by the existing southern wing of the residence. For these reasons, no violation of privacy would result to the appellant's residence or the majority of the front yard.

2. *The proposed addition will result in the elimination of significant sun and light exposure, views, vistas, and privacy to the appellant's property, specifically, resulting in a significant decrease of sunlight on the appellant's property.*

   Response to Appeal:

   For the same reasons as described in the Response to Appeal in #1 above, the proposed addition would not result in the elimination of significant sun and light exposure, views, vistas, and privacy to the appellant's property, or specifically, resulting in a significant decrease of sunlight on the appellant's property. The applicant's property is north of the appellant's property. The peak roof ridge line of the proposed addition has an elevation of 21 feet above existing grade while the existing roof ridge line of the existing southern wing of the subject residence, located approximately 18 feet closer to the appellant's property, has an elevation of 17 feet, 5 inches above grade. The area of the proposed addition at the northern wing of the residence would be only 3 feet, 7 inches taller than the intervening south wing, and would be situated 39.5 feet from the common property line at the appellant's lot. The proposed addition is adequately sited from the appellant to the south, so that no loss of sunlight to the appellant's property would occur.

3. *The proposed addition will exacerbate noise that currently emanates from the applicant's residence.*

   Response to Appeal:

   The project would not limit or inhibit the use or enjoyment of other properties on the vicinity because the proposed addition and use of the single-family residence is consistent with the single-family principally permitted use governed by the BFC-RSP-5.8 (Bayfront Conservation Area, Residential, Single-Family Planned District, 5.8 units per acre) zoning district.

**SECTION II: PROJECT APPROVAL**

NOW, THEREFORE, BE IT RESOLVED that the Marin County Planning Commission hereby denies the Weiner appeal and sustains the Community Development Agency's conditional approval of the Ries Minor Design Review subject to the following conditions:

Community Development Agency – Planning Division

1. Plans submitted for a Building Permit shall substantially conform to plans identified as "Exhibit A," entitled, "Ries Residence," consisting of 11 sheets prepared by Polsky Architects, received December 9, 2004, with revisions dated January 18, 2005, and on file with the Marin County Community Development Agency, except as modified by the conditions listed herein.

2. Approved exterior building materials and colors shall substantially conform to the color/materials sample board which is identified as "Exhibit B," prepared by Polsky Architects, received September 14, 2004, and on file with the Marin County Community Development Agency including:

   a. Siding: light blue cedar sidewall shingles to match existing
   b. Roof: asphalt shingle composition roofing to match existing
   c. Trim: off-white wood trim to match existing

All flashing, metal work, and trim shall be treated or painted an appropriately subdued, non-reflective color.

3. BEFORE ISSUANCE OF A BUILDING PERMIT, the applicant shall revise the site plan or other first sheet of the office and job site copies of the Building Permit plans to list these conditions of approval as notes.

4. BEFORE ISSUANCE OF A BUILDING PERMIT, the applicant shall submit a signed Statement of Conformance demonstrating that the project qualifies for a "Certified" or better rating under the Marin Green Home: Remodeling Home Green Building Residential Design Guidelines. The Building Permit shall include specifications demonstrating compliance with all construction-related measures that are used to meet the "Certified" or better rating.

5. Exterior lighting shall be located and/or shielded so as not to cast glare on nearby properties.

6. All construction activities shall comply with the following standards:

    a. Except for such non-noise generating activities, including but not limited to, painting, sanding, and sweeping, construction activity is only permitted between the hours of 7:00 a.m. and 5:00 p.m., Monday through Friday, and 9:00 a.m. and 4:00 p.m. on Saturday. No construction shall be permitted on Sundays or the following holidays (New Year's Day, Martin Luther King Day, Presidents' Day, Memorial Day, Independence Day, Labor Day, Veteran's Day, Thanksgiving, Christmas). If the holiday falls on a weekend, the prohibition on noise-generating construction activities shall apply to the ensuing weekday during which the holiday is observed. At the applicant's request, the Community Development Agency staff may administratively authorize minor modifications to these hours of construction.

    b. It shall be the responsibility of the applicant to ensure that all construction materials and equipment are stored on-site (or secured at an approved off-site location) and that all contractor vehicles are parked in such a manner as to permit safe passage for vehicular, pedestrian, and bicycle traffic at all times.

7. All utility connections and extensions (including but not limited to electric, communication, and cable television lines) serving the development shall be undergrounded from the nearest overhead pole from the property, where feasible as determined by the Community Development Agency staff.

8. The applicant/owner hereby agrees to defend, indemnify, and hold harmless the County of Marin and its agents, officers, attorneys, or employees from any claim, action, or proceeding, against the County or its agents, officers, attorneys, or employees, to attack, set aside, void, or annul an approval of (description of project being approved), for which action is brought within the applicable statute of limitations. This indemnification shall include, but not be limited to, damages, fees, and/or costs awarded against the County, if any, and the cost of suit, attorney's fees, and other costs, liabilities, and expenses incurred in connection with such proceedings, whether incurred by the applicant/owner, the County, and/or the parties initiating or bringing such proceeding.

9. Any changes or additions to the project shall be submitted to the Community Development Agency in writing for review and approval before the contemplated modifications may be initiated. Construction involving modifications that do not substantially comply with the approval, as determined by the Community Development Agency staff, may be required to be halted until proper authorization for the modifications are obtained by the applicant.

10. BEFORE FINAL INSPECTION, the applicant shall submit a signed Statement of Completion confirming that the project has been constructed in compliance with all of the measures that were used to meet the "Certified" or better rating under the Marin Green Home: New Home Green Building Residential Design Guidelines.

Marin County Department of Public Works - Land Use and Water Resources Division

11. The subject property is partially in Flood Zone V1, elevation 6'. Show and label on plans FEMA FIRM Flood Hazard Boundary, as it is shown on FEMA FIRM Map # 465.

12. Revise sheet A0.0 to correctly show location and label public utility easement on site plan.

13. Proposed fence, gate and gate control columns shall be moved back behind front property line. No structures are allowed in road right of way.

14. Provide a detailed drainage plan for the project.

15. The plans shall have foundations designed to accommodate raising and/or leveling of the structure.

16. An encroachment permit shall be required for construction within the road right-of-way and is subject to final review and approval by the Road Commissioner.

Tiburon Fire Protection District

17. The structure shall have installed throughout an automatic fire sprinkler system in accordance with NFPA std. 13-4. The system design, installation, and final testing shall be approved by the District Fire Marshall. UFC 1003.

18. Approved smoke alarms shall be installed to provide protection to all sleeping areas. UBC 310

19. Approved spark arrestors shall be installed on chimneys. UFC 1109

20. Provide a "green belt" by cutting and clearing all combustible vegetation within 30 feet of the structure. UFC 1103

Marin Municipal Water District

21. All landscape and irrigation plans must be designed in accordance with the most current District landscape requirements (Ordinance 385). Prior to providing water service for new landscape areas, or improved or modified landscape areas, the District must review and approve the project's working drawings for planting and irrigation systems.

**SECTION III: VESTING OF RIGHTS**

The applicant must vest this approval by obtaining a Building Permit for the approved work and substantially completing the improvements in accordance with the approved permits by June 13, 2007 for all entitlements, or all rights granted in this approval shall lapse unless the applicant applies for an extension at least 10 days before the expiration date above and the Community Development Agency staff approves it. An extension of up to four years may be granted for cause pursuant to Section 22.56.050.B.3 of the Marin County Code.

The Building Permit approval expires if the building or work authorized is not commenced within one year from the issuance of such permit. A Building Permit is valid for two years during which construction is required to be

completed. All permits shall expire by limitation and become null and void if the building or work authorized by such permit is not completed within two years from the date of such permit. Please be advised that if your Building Permit lapses after the vesting date stipulated in the Design Review approval (and no extensions have been granted), the Building Permit and Design Review approvals may become null and void. Should you have difficulty meeting the deadline for completing the work pursuant to a Building Permit, the applicant may apply for an extension to the Design Review at least 10 days before the expiration of the Design Review approval.

**SECTION IV: APPEAL RIGHTS**

NOW, THEREFORE BE IT FURTHER RESOLVED that this decision is final unless appealed to the Marin County Board of Supervisors. A Petition for Appeal and a $700.00 filing fee must be submitted in the Community Development Agency - Planning Division, Room 308, Civic Center, San Rafael, no later than **4:00 p.m.** on **June 23, 2005.**

**SECTION V: VOTE**

PASSED AND ADOPTED at a regular meeting of the Planning Commission of the County of Marin, State of California, on the 13th day of June, 2005, by the following vote to wit:

AYES:

NOES:

ABSENT:

STEVE C. THOMPSON, CHAIRMAN
MARIN COUNTY PLANNING COMMISSION

Attest:

Jessica Woods
Recording Secretary