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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

LIBERTY NATURAL PRODUCTS, INC.,)
)
Plaintiff,) 03:11-cv-00264-HU
)
vs.) **OPINION AND**
) **ORDER**
)
VALERIE HAWK HOFFMAN, SUNRISE)
HERBAL REMEDIES, INC., Dissolved,)
and SAGE ADVICE OF PALM BEACH,)
INC., Dissolved,)
)
Defendants.)

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Attorney for Defendants

1 HUBEL, Magistrate Judge:

2 This matter comes before the court on plaintiff Liberty
3 Natural Products, Inc.'s (hereinafter, "Plaintiff") motion for
4 partial summary judgment; defendants Valerie Hoffman ("Hoffman"),
5 Sunrise Herbal Remedies, Inc. ("Sunrise"), and Sage Advice of Palm
6 Beach Inc.'s ("Sage Advice") (collectively, "Defendants") cross-
7 motion for summary judgment; Defendants' motion for leave to file
8 a first amended answer; and Defendants' motion to strike various
9 portions of James Dierking's ("Dierking") supplemental declaration
10 and Plaintiff's reply memorandum. The parties have given full
11 consent to adjudication of the case by a magistrate judge pursuant
12 to 28 U.S.C. § 636(c). For the reasons set forth below,
13 Plaintiff's motion (dkt. #33) for partial summary judgment is
14 **GRANTED** in part and **DENIED** in part; Defendants' cross-motion (dkt.
15 #51) for summary judgment is **DENIED**; Defendants' motion (dkt. #72)
16 for leave is **GRANTED**; and Defendants' motion (dkt. #77) to strike
17 is **GRANTED** in part and **DENIED** in part.

18 **I. FACTUAL AND PROCEDURAL BACKGROUND**

19 As a preliminary matter, Plaintiff has requested that I take
20 judicial notice of the Complaint, Answer, General Judgment, and
21 Supplemental Judgement from the Clackamas County proceeding. It is
22 well settled that courts "may take judicial notice of court filings
23 and other matters of public record" because they are "readily
24 verifiable and, therefore, the proper subject of judicial notice."
25 *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6
26 (9th Cir. 2006). Accordingly, with respect to the aforementioned
27 court filings, Plaintiff's request for judicial notice is granted.

28

1 Plaintiff has also presented the court with hearing
2 transcripts from the Clackamas County proceeding. It is not
3 entirely clear whether Plaintiff is requesting that I take judicial
4 notice of the hearing transcripts. To the extent Plaintiff is
5 making such a request, it is denied.

6 On November 6, 2008, Defendant prosecuted two counterclaims
7 against Plaintiff in a case filed in Clackamas County Circuit
8 Court. (Schuster Decl. Ex. 2.) Both counterclaims were for breach
9 of contract. (Schuster Decl. Ex. 2.) Under the first counterclaim,
10 Defendants sought \$76,400 for allegedly damaged and expired
11 product, and \$300,000 for the alleged resulting loss of business.
12 (Schuster Decl. Ex. 2.) The second counterclaim sought \$100,000
13 based on Plaintiff's alleged sale of Defendants' product known as
14 "Chill Out." (Schuster Decl. Ex. 2.)

15 On April 13, 2009, Plaintiff obtained a general judgment
16 against Defendants, which provided, in pertinent part, that:

17 Following closing argument, the court pronounced its
18 judgment in favor of the Plaintiff against the Defendants
19 Valerie Hawk Hoffman, Sunrise Herbal Remedies, Inc. and
20 Sage Advice, Inc., jointly and severally, on its first
21 claim, in the sum of \$67,466.90, with pre-judgment
22 interest thereon as set forth hereafter, together with
23 further judgment in favor of the Plaintiff against the
24 Defendants Valerie Hawk Hoffman, Sunrise Herbal Remedies,
25 Inc. and Sage Advice, Inc., jointly and severally, on its
26 second claim, in the sum \$69,198.20[.]

27 (Schuster Decl. Ex. 3.)

28 On August 11, 2009, a Supplemental Judgment was entered in
29 favor of Plaintiff, which stated:

30 Plaintiff is entitled to an enhanced prevailing
31 party fee in the sum of \$5,500, per ORS 20.190. **The**
32 **court finds that Defendants against whom judgment was**
33 **granted herein filed counterclaims and/or defenses that**
34 **were not objectively reasonable** and were filed in an
35 effort to gain leverage in settlement negotiations.

1 **The court finds that the same Defendants, through**
2 **Valerie Hoffman, repeatedly offered false testimony and**
3 **exhibits in trial of this matter.** The court also finds
4 that the Defendants did not act with diligence in trying
5 to settle Plaintiff's claims.

6 **The court, in awarding attorney fees to the**
7 **Plaintiff under ORS 20.105, finds that the Defendant**
8 **against whom judgment was entered had no objectively**
9 **reasonable basis to counterclaim against Plaintiff for an**
10 **alleged overpayment of Plaintiff's account.** The
11 Defendants did not raise the alleged overpayment in a
12 series of emails between the parties months before trial
13 when Plaintiff's account was being discussed. []
14 **Defendant Hoffman at trial fabricated an exhibit to**
15 **support the claim of overpayment and testified falsely**
16 **regarding it.**

17 (Schuster Decl. Ex. 4) (emphasis added). Based on the court's
18 findings, judgment was entered against Hoffman, Sunrise, and Sage
19 Advice, but the court denied Plaintiff's demand that the judgment
20 be entered against Defendants' counsel under ORS 105.160. (Schuster
21 Decl. Ex. 4.)

22 On January 20, 2011, Plaintiff filed the present action
23 against Defendants in Clackamas County Circuit Court.¹ Plaintiff
24 set forth a single claim for wrongful use of civil proceedings in
25 violation of ORS 31.230(1)² and sought \$7,058 in damages. On
26 February 7, 2011, Plaintiff sought leave to amend its complaint.
27 The Amended Complaint requested consequential damages of \$9,367.69

28 ¹ The following facts are taken from this court's September
29 2, 2011 Findings and Recommendation. (Dkt. #16.)

30 ² "[A] claim for damages for wrongful use of a civil proceeding
31 shall be brought in an original action *after* the proceeding which
32 is the subject matter of the claim is concluded." OR. REV. STAT.
33 31.230(3) (2009) (emphasis added).

1 and punitive damages of \$200,000 based on the counterclaims that
2 Plaintiff argues were wrongfully prosecuted against them.³

3 Defendants timely filed their notice of removal in this court
4 on March 2, 2011. Plaintiff subsequently moved to remand the
5 proceeding to Clackamas County Circuit Court; however, on September
6 2, 2011, that motion was denied.

7 **II. LEGAL STANDARD**

8 **A. Motion for Summary Judgment**

9 Summary judgment is appropriate "if pleadings, the discovery
10 and disclosure materials on file, and any affidavits show that
11 there is no genuine issue as to any material fact and that the
12 movant is entitled to judgment as a matter of law." FED. R. CIV.
13 P. 56(c). Summary judgment is not proper if factual issues exist
14 for trial. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.
15 1995).

16 The moving party has the burden of establishing the absence of
17 a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477
18 U.S. 317, 323 (1986). If the moving party shows the absence of a
19 genuine issue of material fact, the nonmoving party must go beyond
20 the pleadings and identify facts which show a genuine issue for
21 trial. *Id.* at 324. A nonmoving party cannot defeat summary
22 judgment by relying on the allegations in the complaint, or with
23 unsupported conjecture or conclusory statements. *Hernandez v.*
24 *Spacelabs Medical, Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003). Thus,
25 summary judgment should be entered against "a party who fails to

26
27 ³ Plaintiff's motion for partial summary judgment indicates
28 that they are now requesting "a reduced amount of \$5,432.66 as
consequential damages." (Pl.'s Mem. Supp. Mot. Summ. J. at 4 n.3.)

1 make a showing sufficient to establish the existence of an element
2 essential to that party's case, and on which that party will bear
3 the burden of proof at trial." *Celotex*, 477 U.S. at 322.

4 The court must view the evidence in the light most favorable
5 to the nonmoving party. *Bell v. Cameron Meadows Land Co.*, 669 F.2d
6 1278, 1284 (9th Cir. 1982). All reasonable doubt as to the
7 existence of a genuine issue of fact should be resolved against the
8 moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976).
9 Where different ultimate inferences may be drawn, summary judgment
10 is inappropriate. *Sankovick v. Life Ins. Co. of N. Am.*, 638 F.2d
11 136, 140 (9th Cir. 1981).

12 However, deference to the nonmoving party has limits. The
13 nonmoving party must set forth "specific facts showing a genuine
14 issue for trial." FED. R. CIV. P. 56(e). The "mere existence of
15 a scintilla of evidence in support of plaintiff's positions [is]
16 insufficient." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252
17 (1986). Therefore, where "the record taken as a whole could not
18 lead a rational trier of fact to find for the nonmoving party,
19 there is no genuine issue for trial." *Matsushita Elec. Indus. Co.,
20 Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal
21 quotation marks omitted).

22 **B. Motion to Strike**

23 Rule 12(f) provides that "[t]he court may strike from a
24 pleading an insufficient defense or any redundant, immaterial,
25 impertinent or scandalous matter" on their own initiative or
26 pursuant to a party's motion. FED. R. CIV. P. 12(f). Granting a
27 motion to strike is within the discretion of the district court.
28 See *Fed. Sav. & Loan Ins. Corp. v. Gemini Mgmt.*, 921 F.2d 241, 244

1 (9th Cir. 1990). Motions to strike are disfavored and should not
2 be granted unless it "can be shown that no evidence in support of
3 the allegation would be admissible." *Pease & Curren Ref., Inc. v.*
4 *Spectrolab, Inc.*, 744 F. Supp. 945, 947 (C.D. Cal. 1990) (internal
5 quotation marks omitted), *abrogated on other grounds by Stanton Rd.*
6 *Ass'n v. Lohrey Enters.*, 984 F.2d 1015 (9th Cir. 1993).

7 **III. PRELIMINARY PROCEDURAL MATTERS**

8 **A. Leave to Amend**

9 Pursuant to Rule 15(a), Defendants seek leave to amend their
10 answer to add an affirmative defense of advice of counsel. "Advice
11 of counsel, if sought in good faith and if given after full
12 disclosure of information in the possession of the accuser
13 establishes probable cause as a matter of law," *Hartley v. Water*
14 *Res. Dept.*, 77 Or. App. 517, 520 (1986), which, in turn, negates an
15 essential element of a claim for misuse of civil proceedings. See
16 *Pereira v. Thompson*, 230 Or. App. 640, 674 (2009) (recognizing one
17 element of a claim for wrongful initiation of a civil proceeding as
18 the "absence of probable cause to prosecute the action.") But to
19 utilize that defense, a defendant must plead it. *Id.* at 675.

20 In determining whether to grant a motion to amend, the court
21 should consider (1) bad faith, (2) undue delay, (3) prejudice to
22 the opposing party, (4) futility of amendment, and (5) prior
23 amendments to the pleading. *Sisseton-Wahpeton Sioux Tribe v.*
24 *United States*, 90 F.3d 351, 355-56 (9th Cir. 1996).

25 Plaintiff opposes Defendants' motion for leave to amend,
26 arguing that the doctrine of issue preclusion renders amendment
27 futile. It well established that futility alone *can* justify the
28 denial of a motion for leave to amend, but the Ninth Circuit has

1 also repeatedly stressed that the court must remain guided by the
2 underlying purpose of Rule 15, e.g., to facilitate decision on the
3 merits, as opposed to procedural technicalities. *Nunes v. Ashcroft*,
4 375 F.3d 805, 808 (9th Cir. 2004).

5 As discussed further below, neither party in this case has
6 cited an Oregon appellate court decision that addresses whether
7 findings that arise out of a proceeding under ORS 20.105 should be
8 given preclusive effect.⁴ With respect to the probable cause
9 element, I am hesitant to conclude Defendants should be deprived of
10 their right to a jury trial without the guidance of an Oregon Court
11 of Appeals or Supreme Court decision. Nor do I believe that such
12 a determination is necessary at this time, considering (1)
13 Plaintiff's motion for partial summary judgment is denied on other
14 grounds and (2) the record before me regarding the Clackamas County
15 proceeding is quite limited.

16 That said, because amendments should be granted with "extreme
17 liberality" in order to facilitate decision on the merits, *United*
18 *States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981), Defendants'
19 motion for leave to file a first amended answer and affirmative
20 defense is **GRANTED**.

21 **B. Evidentiary Objections**

22 Pursuant to Rule 12(f), Defendants have moved to strike
23 various paragraphs in Dierking's supplemental declaration, exhibits
24

25 ⁴ ORS 20.105 provides that a prevailing party against whom a
26 claim is brought is entitled to reasonable attorney fees "to be
27 paid by the party asserting the claim, defense or ground, upon a
28 finding by the court that the party willfully disobeyed a court
order or that there was no objectively reasonable basis for
asserting the claim defense or ground for appeal." OR. REV. STAT.
§ 20.105(1) (2009).

1 attached thereto, and portions of Plaintiff's reply memorandum.
2 During oral argument, it was alleged that Defendants' counsel
3 failed to confer with opposing counsel prior to filing his motion
4 to strike. Because Plaintiff's counsel was willing to make certain
5 concessions, the parties were able to agree to rulings with respect
6 to the following motions:

7 • Motion No. 4: Defendants moved to strike Paragraph 12 of
8 Dierking's supplemental declaration, which pertains to an
9 itemization of proceedings involving the parties in Oregon,
10 Maine, Connecticut, and Florida. To the extent Paragraph 12
11 of Dierking's supplemental declaration concerns litigation
12 other than that which took place in Clackamas County before
13 Judge Maurer, Plaintiff has conceded this motion.

14 • Motion No. 5: Defendants moved to strike Paragraph 13 of
15 Dierking's supplemental declaration, which pertains to fees
16 expended by Plaintiff in an attempt to execute and collect its
17 judgments entered against Defendants and attorney's fees
18 incurred by Plaintiff in this case. Plaintiff has conceded
19 this motion to the extent it relates to litigation taking
20 place in Florida or Maine.

21 • Motion No. 7: Defendants moved to strike a portion of page 6
22 of Plaintiff's reply memorandum, which references Defendants'
23 "long history of abusive practices" and the proceedings
24 involving the parties in Oregon, Maine, Connecticut, and
25 Florida. To the extent Plaintiff's reply memorandum
26 references matters other than that which took place in
27 Clackamas County or the Connecticut investigation into
28

1 consumer complaints of unfair trade practices, Plaintiff has
2 conceded this motion.

3 • Motion No. 8: Defendants moved to strike portions of page 22
4 and 23 of Plaintiff's reply memorandum, wherein Plaintiff
5 discusses the dismissal of Hoffman's husband from the
6 Clackamas County litigation and alleges that Hoffman has
7 transferred assets in order to prevent Plaintiff from
8 collecting on its judgments. Plaintiff has conceded this
9 motion, with exception of any reference to expenses incurred
10 in the Clackamas County proceeding or this case.

11 • Motion No. 9: Defendants moved to strike portions of page 36
12 and 37 of Plaintiff's reply memorandum, wherein Plaintiff
13 references legal expenses incurred by Plaintiff and alleges
14 that Defendants have attempted to shield themselves from
15 execution on the lien and collection of the Clackamas County
16 judgments. Plaintiff has conceded this motion, with exception
17 of any reference to expenses incurred in the Clackamas County
18 proceeding or this case.

19 • Motion No. 10: Defendants moved to strike footnote 19 of
20 Plaintiff's reply memorandum, which references the itemization
21 of proceedings involving the parties in Oregon, Maine,
22 Connecticut, and Florida. Plaintiff has conceded this motion,
23 with exception of any reference to expenses incurred in the
24 Clackamas County proceeding or this case.

25 I turn now to Defendants' remaining evidentiary objections.
26 Defendants moved to strike two exhibits attached to Dierking's
27 supplemental declaration, *i.e.*, an appraisal of Plaintiff's
28 business (Exhibit 3) and information regarding its financial

1 history (Exhibit 4); and paragraphs 6, 7, and 14 of Dierking's
2 supplemental declaration. The objectionable material relates to
3 Hoffman's husband and the fact that Plaintiff claims its business's
4 financial growth was stunted as a result of the counterclaims being
5 filed in the Clackamas County proceeding.

6 In short, Defendants' remaining evidentiary objections are
7 denied as moot because I either found it unnecessary to rely on the
8 objectionable material or the objections raised were duplicative of
9 the summary judgment standard itself. *See Ross v. Indep. Living*
10 *Res. of Contra Costa*, No. C08-00854 TEH, 2010 WL 2898773, at *2 n.1
11 (N.D. Cal. July 21, 2010) (denying evidentiary objections as moot
12 because the court did not rely on the evidence to which the
13 objections were lodged); *see also Burch v. Regents of the Univ. of*
14 *Cal.*, 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006) ("A court can
15 award summary judgment only when there is no genuine dispute of
16 material fact. It cannot rely on irrelevant facts, and thus
17 relevance objections are redundant.")

18 Plaintiff has also objected to exhibits attached to Felstiner
19 and Hoffman's declarations on the ground that they "are not, nor
20 can they be, presented in a form that would be admissible in
21 evidence." (Pl.'s Reply at 17.) Because these exhibits had no
22 bearing on my analysis, Plaintiff's objections are overruled as
23 well.

24 **IV. DISCUSSION**

25 Under Oregon law, the elements of a claim for wrongful
26 initiation of a civil proceeding are as follows:

27 (1) The commencement and prosecution by the defendant of
28 a judicial proceeding against the plaintiff;

1 (2) The termination of the proceeding in the plaintiff's
favor;

2 (3) The absence of probable cause to prosecute the
3 action;

4 (4) The existence of malice, or as is sometimes stated,
5 the existence of a primary purpose other than that of
securing an adjudication of the claim; and

6 (5) Damages.

7 *Roop v. Parker Nw. Paving, Co.*, 194 Or. App. 219, 237-38 (2004),
8 *rev. den.*, 338 Or. 374, 110 P.3d 113 (2005).

9 The commencement and prosecution element pertains to the
10 person "who is the primary catalyst for the proceeding and is not
11 limited to the party who formally initiates it." *Checkley v. Boyd*,
12 170 Or. App. 721, 737 (2002). Such an understanding "prevents one
13 who wrongfully uses a civil proceeding . . . from being shielded
14 from liability merely because that person was not the party who
15 formally filed the action." *Id.* In the state court proceeding,
16 the counterclaims were formally commenced on behalf of Sunrise and
17 Sage Advice. Nevertheless, I agree with Plaintiff that, even
18 though Hoffman did not formally initiate the proceeding, she was an
19 active participant which, according to *Checkley*, satisfies the
20 initiation element. See also Restatement (Second) of Torts § 674
21 (noting that an active participant is one who "sets the machinery
22 of the law in motion, whether he acts in his own name or in that of
23 a third person, or whether the proceedings are brought to enforce
24 a claim of his own or that of a third person.")

25 Defendants do not contest this assertion. (See Defs.'Mem.
26 Supp. at 3) ("The uncontradicted evidence in this case is that
27 defendant Hoffman and her attorneys subjectively believed that
28 there was a good chance of prevailing on the counterclaims at the

1 time the pleading was filed[.]") Instead, Defendants claim they
2 have seen no authority establishing that the assertion of a
3 counterclaim constitutes the commencement and prosecution of a
4 judicial proceeding. (Defs.' Opp'n at 3.) This argument lacks
5 merit. According to section 674 of the Restatement Second of
6 Torts, "one who files a counterclaim to a cause of action initiates
7 a civil proceeding." Restatement (Second) of Torts § 674 cmt. a
8 (1977). Because Oregon courts consider the Restatement, "along
9 with its comments, to be an instructive authority in this area,"
10 *Roop*, 194 Or. App. at 238 n.12, I conclude that the initiation
11 element is met. See also ORCP 18 (indicating that asserting a
12 claim for relief includes asserting an original claim or
13 counterclaim).

14 The second element is whether the proceeding terminated in
15 Plaintiff's favor. It appears evident that this element is met
16 here and Defendants do not argue otherwise.

17 As to the third element, the Oregon Court of Appeals has
18 stated, "[p]robable cause means that the person initiating the
19 civil action reasonably believes that he or she has a good chance
20 of prevailing—that is, he or she has a subjective belief, and that
21 belief is objectively reasonable." *Pereira*, 230 Or. App. at 674
22 (internal quotation marks omitted).⁵

23 Plaintiff contends that the doctrine of issue preclusion bars
24 Defendants from asserting they had probable cause to prosecute
25

26 ⁵ "Whether a defendant had probable cause to initiate a
27 proceeding is a question of law for the court if the facts or
28 inferences are undisputed; if the facts are disputed, then a jury
must decide the facts and the court must instruct the jury what
facts constitute probable cause." *Id.* at 675.

1 their first counterclaim. The preclusive effect of an Oregon
2 judgment is described in *Dodd v. Hood River County*, 136 F.3d 1219,
3 1225 (9th Cir. 1998). Under Oregon law, issue preclusion applies
4 when:

- 5 (1) The issue in the two proceedings is identical;
- 6 (2) The issue was actually litigated and was essential to
7 a final decision on the merits in the prior proceeding;
- 8 (3) Defendants had a full and fair opportunity to be
9 heard on that issue;
- 10 (4) Defendants were parties in or were in privity with a
11 party to the prior proceeding; and
- 12 (5) The prior proceeding was the type of proceeding to
13 which Oregon courts will give preclusive effect.

14 See *Nelson v. Emerald People's Util. Dist.*, 318 Or. 99, 104, 862
15 P.2d 1293 (1994) (citations omitted).

16 ORS 43.160 codifies the common law, *Tarlow v. Landye Bennett*
17 *Blumstein LLP*, 209 Or. App. 171, 174 (2006), and "[b]y the
18 statute's plain terms, when the face of a judgment or order in a
19 prior proceeding demonstrates that a matter was actually
20 determined, the determination is preclusive." *Westwood Construction*
21 *Co. v. Hallmark Inns*, 192 Or. App. 624, 636 (2002).

22 Here, Plaintiff has not identified, nor has research revealed,
23 any decision in which an Oregon appellate court decided whether
24 findings that arise out of a proceeding under ORS 20.105 are to be
25 given preclusive effect. *Tarlow* provides little guidance here.

26 In *Tarlow*, the defendants moved for summary judgment, arguing
27 that the doctrine of issue preclusion barred a wrongful initiation
28 claim because the plaintiff's request for an enhanced prevailing

1 party was denied in a prior ORS 20.190(3) proceeding.⁶ *Tarlow*, 209
2 Or. App. at 173. The trial court granted summary judgment, ruling
3 in a letter opinion as follows:

4 1) Plaintiff's claim of wrongful initiation of civil
5 proceedings requires that malice be proven on the part of
the defendants.

6 2) That in the prior proceeding . . . [, the court]
7 determined that neither plaintiff Oldroyd [n]or her
8 attorneys (defendants in this action) acted in a
reckless, wilful or malicious manner. This conclusion was
9 reached pursuant to [plaintiff's] request for enhanced
prevailing attorney fees.

10 3) The court has examined the Oldroyd case file and
11 determined that the issues raised by [plaintiff] in the
prior proceedings are the same issues that are the basis
of this wrongful initiation of civil proceedings case.

12 4) Consequently, this court concludes that the issues in
13 the two proceedings are identical; that the [malice]
14 issue was actually litigated and essential to a final
15 decision on the merits in the prior proceedings; that
[plaintiff] had a full and fair opportunity to be heard;
and that [plaintiff] was a party in the prior case.

16 5) This court also concludes [that] the prior proceeding
17 requesting enhanced prevailing party fees is the type to
which the Oregon courts will give preclusive effect.

18 *Id.* at 174 (alterations in the original).

19 On appeal, the plaintiff argued that the trial court erred in
20 applying the doctrine of issue preclusion because the issues of bad
21 faith and malice (the fourth element of a wrongful initiation
22 claim) were not actually litigated. *Id.* The plaintiff argued, in
23 effect, that he did not have a full and fair opportunity to be

24 ⁶ ORS 20.190(3) provides: "[I]n any civil action or proceeding
25 in a circuit court in which recovery of money or damages is sought,
26 the court may award to the prevailing party up to an additional
27 \$5,000 as a prevailing party fee." Or. Rev. Stat. § 20.190(3)
28 (2009). In making this determination, Oregon courts consider,
inter alia, "the conduct of the parties . . . , including any
conduct of a party that was reckless, willful, malicious, in bad
faith or illegal." *Id.* § 20.190(3)(a).

1 heard on that issue because of the ancillary nature of the ORS
2 20.190 proceeding, which did not involve the examination of live
3 witnesses. *Id.* at 175. Because the trial court's grant of summary
4 judgment was correct on different grounds, the Court of Appeals in
5 *Tarlow* declined to decide whether findings that arise out of a
6 proceeding under ORS 20.190 should be given preclusive effect. *Id.*

7 In short, I am not inclined to express an opinion whether
8 findings that arise out of a proceeding under ORS 20.105 should be
9 given preclusive effect. This is not an issue which has been
10 squarely addressed by the Oregon appellate courts, nor has the
11 record been adequately developed regarding the Clackamas County
12 proceeding in order to make such a determination. I would rather
13 reserve the substantive treatment of this issue for a later date
14 when the record of the court proceedings before Judge Maurer are
15 better developed in this court.

16 The fourth element of Plaintiff's claim for wrongful
17 initiation of civil proceedings is "malice, or as is sometimes
18 stated, the existence of a primary purpose other than that of
19 securing adjudication of the claim." *Roop*, 194 Or. App. at 238. It
20 is true "that the law will permit the jury to draw an inference of
21 malice in most cases where a want of probable cause is found."
22 *Alvarez v. Retail Credit Ass'n of Portland, Or., Inc.*, 234 Or. 255,
23 264 (1963). However, "malice, unlike probable cause, is a question
24 for the jury." *Gustafson v. Payless Drug Store*, 269 Or. 354, 366
25 (1974); *Erlandson v. Pullen*, 45 Or. App. 467, 478 (1980).

26 Plaintiff argues that the court should find that issue
27 preclusion bars Defendants from revisiting the issue of malice or
28 improper purpose. Plaintiff claims "Hoffman's malice or []

1 improper purpose in presenting the wrongful counterclaims, is
2 identical to the issue confronting the trial court when it awarded
3 attorney fees pursuant to ORS 20.105(1)." (Pl.'s Mem. Supp. at
4 19.) I disagree. ORS 20.105 provides that a prevailing party
5 against whom a claim is brought is entitled to reasonable attorney
6 fees "to be paid by the party asserting the claim, defense or
7 ground, upon a finding by the court that the party willfully
8 disobeyed a court order or that there was no objectively reasonable
9 basis for asserting the claim defense or ground for appeal." OR.
10 REV. STAT. § 20.105(1) (2009). ORS 20.105 makes no mention of
11 malice. Accordingly, Plaintiff's motion for partial summary
12 judgment is denied on this ground.

13 The last element is that of damage. The legislature adopted
14 ORS 30.230(1), which provides, "[i]n order to bring a claim for
15 wrongful use of a civil proceeding against another, a person shall
16 not be required to plead or prove special injury beyond the expense
17 and any other consequences normally associated with defending
18 against unfounded legal claims." OR. REV. STAT. § 30.230(1) (2009).
19 When the essential elements of a cause of action for wrongful civil
20 proceedings have been established, the plaintiff is entitled to
21 recover, *inter alia*, reasonable attorney fees; costs incurred in
22 defending against the proceedings; and "any other loss of a
23 pecuniary character that [the plaintiff can prove] resulted from
24 the initiation of the civil proceedings." Restatement (Second) of
25 Torts § 681 cmt. d and e; *Pereira*, 230 Or. App. 640 at 675 n.9.

26 Here, Plaintiff "does not seek damages for attorney fees and
27 costs that were previously awarded . . . by virtue of the [state]
28 court's Supplemental Judgment." (Pl.'s Mem. at 22.) Instead,

1 Plaintiff "prays for other consequential damages . . . that were a
2 consequence of and 'normally associated with' [Plaintiff] defending
3 against Defendants' unfounded legal counterclaims." (*Id.*)
4 Specifically, Plaintiff claims they "lost time and productivity of
5 its CEO in the reasonable and necessary sum of \$4,895.09"; "lost
6 staff time in the reasonable and necessary sum of \$182.24"; and
7 "expended reasonable and necessary costs for materials in the sum
8 of \$355.33." (*Id.*) Plaintiff also seeks \$200,000 in punitive
9 damages.

10 Defendants' arguments regarding damages are two-fold. First,
11 Defendants argue that Plaintiff's claim for damages fails because
12 Plaintiff "has presented no evidence of any legally compensable or
13 judicially recognizable loss which [P]laintiff sustained." (Defs.'
14 Opp'n at 12.) Second, Defendants argue that Plaintiff was
15 adequately compensated for costs incurred as a result of the filing
16 of the counterclaims via the enhanced prevailing party fee of
17 \$5,500 awarded by the Clackamas County Circuit Court. (*Id.* at 13.)

18 In Oregon, enhanced prevailing party fees are based on the
19 consideration of the following factors:

20 (a) The conduct of the parties in the transactions or
21 occurrences that gave rise to the litigation, including
22 any conduct of a party that was reckless, willful,
malicious, in bad faith or illegal.

23 (b) The objective reasonableness of the claims and
defenses asserted by the parties.

24 (c) The extent to which an award of a larger prevailing
25 party fee in the case would deter others from asserting
good faith claims or defenses in similar cases.

26 (d) The extent to which an award of a larger prevailing
27 party fee in the case would deter others from asserting
meritless claims and defenses.

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1 (e) The objective reasonableness of the parties and the
2 diligence of the parties and their attorneys during the
proceedings.

3 (f) The objective reasonableness of the parties and the
4 diligence of the parties in pursuing settlement of the
dispute.

5 (g) Any award of attorney fees made to the prevailing
6 party as part of the judgment.

7 (h) Such other factors as the court may consider
appropriate under the circumstances of the case.

8 OR. REV. STAT. § 20.190 (2009).

9 Absent a specific finding under subsection (h), the foregoing
10 factors do not suggest that parties are compensated for costs
11 incurred as a result of the filing of claim which lacks probable
12 cause. That said, although it is a rather trivial amount,
13 Defendants' own damage expert has stated, "I have reviewed the
14 declaration that says that Liberty Natural expended \$281.00 in
15 reasonable and necessary printing costs and \$74.33 in reasonable
16 and necessary discovery expenses for a total of \$355.33 in material
17 expenses allocated to the defense of the counterclaims. It is my
18 opinion that to the extent the corporation can establish the
19 \$355.33, that would represent a legitimate expense of the
20 corporation." (Phillips Decl. at 3.) Because these costs would
21 almost certainly qualify as costs incurred in defending against, or
22 "other loss of a pecuniary character" that resulted from, Hoffman's
23 initiation of the civil proceeding, Defendants' cross-motion for
24 summary judgment is denied on this ground.

25 Although Plaintiff's exhibits demonstrate that they incurred
26 \$355.33 in costs, Plaintiff has not definitively established that
27 these costs were incurred as a result of Defendants' filing of
28 counterclaims, as opposed to the pursuit of Plaintiff's own claims

1 in state court. The parties have also presented conflicting
2 testimony regarding the legitimacy of the damages Plaintiff
3 attributes to lost CEO and staff time.

4 In short, there are questions of fact regarding entitlement to
5 some types of damages and the amount of all claimed damages.

6 **VI. CONCLUSION**

7 For the reasons stated above, Plaintiff's motion (dkt. #33)
8 for partial summary judgment is **GRANTED** in part and **DENIED** in part;
9 Defendants' cross-motion (dkt. #51) for summary judgment is **DENIED**;
10 Defendants' motion (dkt. #72) for leave is **GRANTED**; and Defendants'
11 motion (dkt. #77) to strike is **GRANTED** in part and **DENIED** in part.

12 IT IS SO ORDERED.

13 Dated this 11th day of April, 2012.

14 /s/ Dennis J. Hubel

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16 Dennis James Hubel
17 Unites States Magistrate Judge
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