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4 UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

5 KEN ARONSON,

6 Plaintiff - Appellant,

7 v.

8 DOG EAT DOG FILMS, INC.,

9  
10 Defendant- Appellee.

No. 10-35815

PLAINTIFF'S RESPONSE  
TO ORDER TO SHOW  
CAUSE REGARDING  
JURISDICTION OF  
COURT

11 A. INTRODUCTION

12 Plaintiff Ken Aronson ("Aronson") hereby responds to this Court's order to show cause why his  
13 appeal should not be dismissed for lack of jurisdiction. This Court has jurisdiction because the provision  
14 for expedited review in RCW 4.24.525 presents the "special circumstances" required under *Chacon v.*  
15 *Babcock*, 640 F.2d 221 (9<sup>th</sup> Cir. 1981).  
16

17 B. EVIDENCE RELIED ON

18 The attached declaration of Peter Lohnes.

19 C. FACTS

20 Aronson brought suit against Dog Eat Dog Films, Inc., ("DED") claiming copyright  
21 infringement, invasion of privacy, and misappropriation of likeness. DED brought a special motion to  
22 strike Aronson's state claims of invasion of privacy and misappropriation of likeness, under a recently  
23 enacted statute, the Washington Act Limiting Strategic Lawsuits Against Public Participation, now  
24

1 codified at RCW 4.24.525. Decl. of Lohnes, App. A. The District Court granted DED's motion for  
2 summary judgment and awarded DED attorney fees, costs, and a statutory award of \$10,000 pursuant to  
3 RCW 4.24.525. Aronson appealed.

4 This Court entered an order on October 19, 2010, requiring Aronson to move for voluntary  
5 dismissal of his appeal or to show cause why it should not be dismissed for lack of jurisdiction, citing  
6 Fed. R. Civ. P. 54(b) and *Chacon*.

7 D. ARGUMENT

8 Appellate jurisdiction generally arises from 28 U.S.C. § 1291. The final judgment rule, which is  
9 embodied in 28 U.S.C. § 1291, empowers the circuit courts to hear appeals from all final judgments  
10 issued by the district courts. *Dannenberg v. Software Toolworks Inc.*, 16 F.3d 1073, 1074 (9th Cir.1994).  
11 A final judgment is a decision by the District Court that ends the litigation on the merits and leaves  
12 nothing for the court to do but execute the judgment. *Id.* Absent special circumstances, orders granting  
13 partial summary judgment are not appealable final orders under § 1291 because partial summary  
14 judgment orders do not dispose of all claims and do not end the litigation on the merits. *Service*  
15 *Employees International Union, Local 102 v. County of San Diego*, 60 F.3d 1346, 1349 (9th Cir.1994).  
16

17 Under *Chacon*, orders granting summary judgment without a Rule 54(b) certification are non-  
18 final, and this Court will not have jurisdiction to hear appeals from such a judgment absent *special*  
19 *circumstances*. *Id.* at 222. Such special circumstances are present here. RCW 4.24.525 provides a right  
20 of expedited appeal from a trial court order on a special motion to strike. RCW 4.24.525(5)(d). The  
21 statute thus explicitly provides for interlocutory appeal before all issues are resolved by the trial court.  
22

23 RCW 4.24.525 allows a party to bring a special motion to strike a claim that is based on an action  
24 involving public participation and petition. RCW 4.24.525(4)(a). The court must render its decision no  
25

1 later than seven days after a hearing on the motion is held. RCW 4.24.525(5)(b). All discovery and any  
2 pending hearings or motions in the action are stayed upon the filing of the special motion to strike. RCW  
3 4.24.525(5)(c). The stay of discovery remains in effect until the entry of the order ruling on the motion.  
4 *Id.* Every party then has a right of *expedited appeal* from the trial court's order on the special motion, or  
5 from a trial court's failure to rule on the motion in a timely fashion. RCW 4.24.525(5)(d).

6 It is apparent that the Legislature included the right of expedited appeal in order to spare parties  
7 extended and expensive litigation. The Certification of Enrollment of Substitute Senate Bill 6395 states  
8 that Strategic Lawsuits Against Public Participation ("SLAPPs") are typically dismissed, but often not  
9 before the parties are put to great expense, harassment, and interruption of their productive lives. Decl.  
10 of Lohnes, App. B at 1. Consequently, expedited judicial review avoids the potential for abuse in such  
11 cases. *Id.* at 2.

13 Similarly, the House Bill Report on SSB 6395 states that a SLAPP lawsuit can result in years of  
14 litigation and substantial expense before it is dismissed, and if the trial court decision is appealed, final  
15 judgment can take even longer. Decl. of Lohnes, App. C at 2. "The bill accelerates the dismissal process  
16 of these suits so they can be dismissed before discovery." *Id.* at 3.

17 Courts look to applicable statutes for the clear statutory mandate on which appealability of  
18 judgment must rest. *Curlott v. Campbell*, 598 F.2d 1175, 1178 (9<sup>th</sup> Cir. 1979). Appellate jurisdiction  
19 over a given type of case is dependent upon authority expressly conferred by statute, and a clear statutory  
20 mandate must exist to provide jurisdiction. *Carrol v. United States*, 354 U.S. 394, 399, 77 S. Ct. 1332  
21 (1957) (analyzing the statutory grant of the right of appeal under 18 U.S.C. § 3731).

23 The plain language of RCW 4.24.525 provides for expedited appeal, and the legislative reports  
24 clearly indicate that the Washington Legislature intended interlocutory appeal as a means of short-

1 circuiting lengthy litigation of SLAPPs. This statutory right is reinforced by the provision for expedited  
2 appeal from a trial court's *failure to rule* on a motion, and by the suspension of discovery pending the  
3 ruling. RCW 4.24.525 grants the right of interlocutory appeal even where partial summary judgment has  
4 left some issues unresolved by the trial court and this Court has jurisdiction.

5 It is this statutory provision of expedited review which provides the "special circumstances"  
6 under which this Court has jurisdiction, as required under *Chacon*.

7 With 28 U.S.C. § 2072(a), congress authorized the Supreme Court to promulgate rules of  
8 procedure for the district courts, but with the limitation that those rules "shall not abridge, enlarge or  
9 modify any substantive right." *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S.Ct.  
10 1431, 1442 (U.S.,2010). This limitation means that a Rule must regulate procedure, the judicial process  
11 for enforcing rights and duties. *Id.* Though a Rule may incidentally affect a party's rights, it is valid so  
12 long as it regulates only the *process* for enforcing those rights, and not the rights themselves, the  
13 available remedies, or the rules of decision for adjudicating either. *Id.* at 1435.

14 Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal  
15 procedural law. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427, 116 S.Ct. 2211, 2219  
16 (U.S.,1996). Concerning matters covered by the Federal Rules of Civil Procedure, if the rule in point is  
17 consonant with the 28 U.S.C. § 2072, and the Constitution, the Federal Rule applies regardless of  
18 contrary state law. *Id.* at 428, fn. 7. Federal courts, however, interpret the Federal Rules with sensitivity  
19 to important state interests and regulatory policies. *Id.* The test is whether a rule really regulates  
20 procedure, - the judicial process for enforcing rights and duties recognized by substantive law and for  
21 justly administering remedy and redress for disregard or infraction of them. *Sibbach v. Wilson & Co.*,  
22 312 U.S. 1, 14, 61 S.Ct. 422, 426, 85 L.Ed. 479. Federal courts are bound in diversity cases to follow  
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24  
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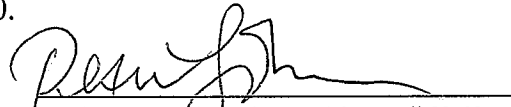
1 state rules of decision in matters which are 'substantive' rather than 'procedural'. *Prima Paint Corp. v.*  
2 *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404-405, 87 S.Ct. 1801, 1806 (1967).

3 The right of expedited appeal granted by RCW 4.24.525 is a substantive right. The statute makes  
4 no reference to the procedural mechanism by which an appeal is to be taken, nor does it impose any  
5 timeline on an appeal, beyond granting the right to expedited appeal itself. While the statute grants the  
6 substantive right of interlocutory appeal, it is silent on all matters procedural. Because RCW 4.24.525  
7 grants a substantive rather than a procedural right, this Court should apply substantive Washington law  
8 and not dismiss Aronson's appeal.

9  
10 E. CONCLUSION

11 RCW 4.24.525 provides a statutory substantive right of expedited appeal. Under *Chacon*, this  
12 Court has jurisdiction. The Court should not dismiss Aronson's appeal for lack of jurisdiction.

13 DATED this 4<sup>th</sup> day of November, 2010.

14 

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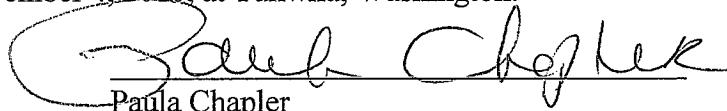
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2 CERTIFICATE OF SERVICE

3 I hereby certify that I electronically filed the Plaintiff's Response to Order to Show Cause  
4 Regarding Jurisdiction of Court and Declaration of Peter Lohnes in Support of Plaintiff's Response to  
5 Order to Show Cause with the Clerk of the Court using the CM/ECF system, which will send notification  
6 of such filing to the following:

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21 DATED: November 4, 2010, at Tukwila, Washington.

22 

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