UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEN ARONSON, Plaintiff - Appellant, v. DOG EAT DOG FILMS, INC., Defendant - Appellee.	No. 10-35815 PLAINTIFF'S ANSWER TO DEFENDANT'S REPLY TO ORDER TO SHOW CAUSE REGARDING JURISDICTION OF COURT

INTRODUCTION

Plaintiff Ken Aronson ("Aronson") hereby answers Defendant Dog Eat Dog Films, Inc. ("DED") reply on this Court's show cause order. DED argues this Court has no jurisdiction by creating a distinction between a grant and a denial of a motion to strike under state anti-SLAPP statutes. DED's argument is contrary to case law, and the plain language of RCW 4.24.525.

ARGUMENT

(1) The Order Is Final and Appealable

RCW 4.24.525(5)(d) provides that *every party* has a right of expedited appeal from a trial court order on a special motion to strike. It even grants every party the right to appeal from a trial court's failure to rule on the motion in a timely fashion. *Id.* In crafting the statute, the Washington Legislature made no distinction between plaintiffs' and defendants' right of appeal. DED, however, attempts to finesse this clear statutory grant of the substantive right of appeal. DED argues that because it has found no federal appellate cases deciding whether to exercise jurisdiction over an order granting a special

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motion to strike, as opposed to orders denying such a motion, this Court has no jurisdiction. Reply at 3. DED creates a distinction without a difference. DED cites a number of cases to support its argument that district court orders granting immunity do not confer appellate jurisdiction. Reply at 3, 4. None of those cases involved statutes granting the right of appeal, as does RCW 4.24.525.

DED relies principally on *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003) and *Englert v. McDonell*, 551 F.3d 1099 (9th Cir. 2009) to support its argument that the trial court's grant of its motion to strike under RCW 4.24.525 is not a final order, and that this Court lacks jurisdiction. Neither case supports DED's argument.

Like Washington, California law provides for a right of appeal of an order either granting or denying a special motion to strike. C.C.P. § 425.16 (i).[1] In *Batzel*, a web-site operator appealed the district court's denial of its anti-SLAPP motion. *Id.* at 1023. The *Batzel* court held that denial of a motion to strike under California's anti-SLAPP statute is immediately appealable in federal court as a substantive right just as such an appeal is available in California courts. *Batzel*, 333 F.3d at 1024, 1025-26. The Court specifically noted that if a motion to strike is *granted*, the suit is dismissed and the prevailing defendant is entitled to recover his or her attorney fees and costs. *Id.* The Court's holding only needed to address an order *denying* dismissal because an order granting a motion to strike is a final order which would be appealable in any event.

In *Englert,* the defendants appealed the denial of their motions to strike under Oregon's anti-SLAPP statute. *Id.* at 1101. Unlike the California and Washington statutes, the Oregon statute does not

[1] The California anti-SLAPP statute specifies that any appeal be taken under Section 904.1. Section 904.1 states in relevant part: (a) …An appeal, other than in a limited civil case, may be taken from any of the following: (1) From a judgment, except (A) an interlocutory judgment, other than as provided in paragraphs (8), (9), and (11)… (11) From an interlocutory judgment directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars ($5,000).

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explicitly provide for such an appeal. The Court declined to accept review because the Oregon legislature had not provided for an appeal from the denial of a special motion to strike in its anti-SLAPP statute. *Id.* at 1105-06. The Court relied on the *Batzel* court's holding that if a legislature provided an appeal *unique to its anti-SLAPP statute*, interlocutory appeal is appropriate. *Id.* at 1107. Indeed, the Court noted it was precisely because of the provision authorizing an interlocutory appeal from such an order that the *Batzel* court concluded that it would recognize the substantive right of appeal under California law. *Id.* It would be anomalous, the Court held, to permit an appeal from an order denying a motion to strike where the Oregon legislature was satisfied that parties' rights would be protected by review after final judgment was entered and had made no provision for interlocutory appeal. *Id.* Washington law, like California law, does not require either party to wait until final judgment to appeal, but instead provides for expedited appeal *by both parties*, thus granting this Court jurisdiction to hear Aronson's appeal.

Unlike the California anti-SLAPP statute, RCW 4.24.525 awards a $10,000 statutory penalty in addition to attorney fees and costs to a prevailing defendant. DED argues that the imposition of the penalty does not confer jurisdiction on this Court. Reply at 6, fn. 2. DED relies on *Hillery v. Rushen*, 702 F.2d 848, 849 (9th Cir. 1988) to argue that the imposition of attorney fees is not a collateral order appealable under 28 U.S.C. § 1291. But that case involved the *interim* award of attorney fees for the award of an injunction where the plaintiffs' claims for damages were still pending in the district court. *Id.* The Court held the order was not a collateral order appealable under 28 U.S.C. § 1291. *Id.* The Court relied on *Hastings v. Maine-Endwell Central School Dist., New York*, 676 F.2d 893 (C.A.N.Y., 1982) where the court held that the award of interim attorney fees was not appealable because it was entirely possible that the district court would award further interim fees during the course of the district

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court proceeding, and possibly adjust all of the fees in its final award. *Id.* at 896.

Neither *Hillery* or *Hastings* involved the imposition of a statutory penalty or dismissal of a suit. Under *Batzel*, if a motion to strike is granted, the suit is dismissed and the prevailing defendant is entitled to recover his or her attorney fees and costs. *Id.* at 1025. Here, DED's motion to strike was granted, it was awarded attorney fees and costs, and in addition, the $10,000 statutory fine was imposed on Aronson.

The order disposing of Aronson's state claims was final and appealable. The Washington Legislature provided for an immediate appeal unique to its anti-SLAPP statute, granting both plaintiffs and defendants the right of expedited appeal. Under *Batzel* and *Englert*, this Court has jurisdiction to hear Aronson's appeal.

(2) The Court Should Not Award DED Attorney Fees On Appeal Should the Court Find It Lacks Jurisdiction

DED requests attorney fees under RCW 4.24.525. DED cannot prevail on appeal so as to be awarded fees under Washington's anti-SLAPP statute – it has only argued the Court has no jurisdiction. DED cites to *Colt Indus. Operating Corp. v. Index-Weke K.G.,* 739 F.2d 622 (Fed. Cir. 1984), and *Stichting Mayflower Rec. Fonds v. City of Park City, Utah,* No. 05-4307, 2007 WL 495293 (10th Cir. Feb. 16, 2007) to argue that this Court may award attorney fees even if it lacks jurisdiction to hear the appeal. Again, neither case supports DED's argument. *Colt* upheld the award of fees imposed as a sanction for engaging in a "form of procedural and semantic gamesmanship abusive of the judicial process and wasteful of resources of the parties and the court, warranting award of attorney fees incurred by Appellee…" *Id.* at 623-24. *Stichting* likewise upheld the award of attorney fees as a sanction for filing a frivolous appeal. *Id.* at 1. Neither case stands for the proposition that a court without jurisdiction may award attorney fees.

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Unless the statute under which a party seeks attorney's fees contains an independent grant of jurisdiction, a court may not award attorney's fees if the court does not have jurisdiction over the litigation. *Greater Detroit Res. Recovery Auth. & Combustion Eng'g v. United States EPA*, 916 F.2d 317, 320 (6th Cir.1990); *see also Friends of the Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 886-87 (8th Cir.1995). If this Court concludes that RCW 4.24.525 does not have jurisdiction to hear the Appeal, it should not award DED attorney fees and costs on appeal.

Additionally, Aronson's appeal here is far from frivolous. The *statute itself* provides for an immediate appeal. Had Aronson not appealed, Aronson has no doubt DED would have argued that the district court's decision was final and Aronson waived any appellate rights just like a party failing to appeal from a F. R. Civ. Pro. 54(b) decision does. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435-36, (1956); *Pettibone v. Cupp*, 666 F.2d 333, 334 (9th Cir. 1981).

Finally, an award of fees on appeal is premature and should await the outcome of this litigation. *Johnson v. San Francisco Unified School Dist.*, 500 F.2d 349, 355 (9th Cir. 1974). This case has numerous issues yet to be resolved, including pending copyright issues. Were this Court to remand the RCW 4.24.525 issue, Aronson would likely have the opportunity to present the constitutionality of RCW 4.24.525 under the Washington Constitution in due course. That statute is plainly unconstitutional under *Putnam v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 216 P.3d 374 (2009), *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010), and the Washington Constitution, Article II, §§ 19 and 37.

CONCLUSION

The Court should not dismiss Aronson's appeal for lack of jurisdiction.

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DATED this 19th day of November, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the Plaintiff's Answer to Defendant's Reply to Order to Show Cause Regarding Jurisdiction of Court with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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DATED: November 19, 2010, at Tukwila, Washington.

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