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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PANDORA JEWELRY, LLC,

NO. CIV. S-08-3108 LKK/DAD

Plaintiff,

v.

O R D E R

BELLO PARADISO, LLC,

Defendant.

AND RELATED COUNTERCLAIM

In this action, defendant Bello Paradiso filed various counterclaims against plaintiff Pandora Jewelry, LLC. On July 1, 2009, this court issued an order granting, inter alia, Pandora Jewelry's special motion to strike Bello Paradiso's sole state-law counterclaim under California's anti-SLAPP statute, California Code of Civil Procedure section 425.16 (b) (1). The July 1, 2009 order further awarded fees to Pandora Jewelry. Pursuant to that order, Bello Paradiso filed objections to Pandora Jewelry's statement of fees. Bello Paradiso objects to this court's decision to award

1 fees at all, to the award of more than nominal fees, and to the
2 particular hourly rates and numbers of hours claimed by Pandora
3 Jewelry's counsel. Insofar as Bello Paradiso challenges this
4 decision to award fees, this court treats this objection as a
5 timely motion for reconsideration under Fed. R. Civ. P. 59(e).

6 **I. BACKGROUND**

7 Pandora Jewelry brings various claims centering on the
8 allegation that Bello Paradiso is selling purported Pandora Jewelry
9 products in a way that implies a connection with Pandora Jewelry
10 when no such connection exists. See, e.g., Compl. ¶ 26.

11 Bello Paradiso filed a counterclaim naming four federal causes of
12 action and a claim under California's Unfair Competition Law, Cal.
13 Bus. & Prof. Code § 17200.

14 On May 19, 2009, Pandora Jewelry filed two motions: a motion
15 to dismiss all of the counterclaims with prejudice and a motion to
16 strike the UCL claim as violative of California's Anti-SLAPP
17 statute. In the memorandum supporting the anti-SLAPP motion
18 Pandora Jewelry specifically argued that granting the motion to
19 dismiss would "not moot a fee request under the SLAPP statute."
20 Def.'s Mem. Supp. Mot. Strike 7 n.4 (quoting Moraga-Orinda Fire
21 Protection Dist. v. Weir, 115 Cal. App. 4th 477, 480 (2004)).

22 Bello Paradiso responded with a statement of non-opposition to the
23 motion to dismiss. Bello Paradiso opposed the anti-SLAPP motion,
24 asserting without argument that the non-opposition to the motion to
25 dismiss rendered the anti-SLAPP motion moot. Pandora Jewelry
26 replied with a renewed argument that a fee request was appropriate

1 notwithstanding the non-opposition to the motion to dismiss.

2 On July 1, 2009, this court issued an order granting the anti-
3 SLAPP motion. Despite Bello Paradiso's failure to offer argument
4 on the issue, the court conducted an independent examination of
5 California's anti-SLAPP law, concluding that the court was
6 compelled to interpret the statute as covering this case. Id. at
7 11. The court ordered Pandora Jewelry to provide an affidavit
8 detailing costs incurred within ten days, and permitted Bello
9 Paradiso to file an affidavit in response.

10 **II. RECONSIDERATION**

11 **A. Standard for A Motion for Reconsideration**

12 Although motions to reconsider are directed to the sound
13 discretion of the court, see Kern-Tulare Water Dist. v. City of
14 Bakersfield, 634 F.Supp. 656, 665 (E.D. Cal. 1986), aff'd in part
15 and rev'd in part on other grounds, 828 F.2d 514 (9th Cir. 1987),
16 considerations of judicial economy weigh heavily in the process.
17 Thus, Local Rule 78-230(k) requires that a party seeking
18 reconsideration of a district court's order must brief the "new or
19 different facts or circumstances which . . . were not shown upon
20 such prior motion, or what other grounds exist for the motion," as
21 well as "why the facts or circumstances were not shown at the time
22 of the prior motion." Generally speaking, before reconsideration
23 may be granted there must be a change in the controlling law or
24 facts, the need to correct a clear error, or the need to prevent
25 manifest injustice. See Alexander, 106 F.3d at 876; see also Sch.
26 Dist. No. 1J, Multnomah County, Oregon v. AC&S, Inc., 5 F.3d 1255,

1 1263 (9th Cir. 1993); Nunes v. Ashcroft, 375 F.3d 805, 807 (9th
2 Cir. 2003). "[A]fter thoughts" or "shifting of ground" do not
3 constitute an appropriate basis for reconsideration. See Fay Corp.
4 v. BAT Holdings One, Inc., 651 F. Supp. 307, 309 (W.D. Wash. 1987),
5 aff'd, 896 F.2d 1227 (9th Cir. 1990). These relatively restrictive
6 standards "reflect [] district courts' concern for preserving
7 dwindling resources and promoting judicial efficiency." Costello,
8 765 F. Supp. at 1009.

9 **B. Analysis of Whether Pandora Jewelry Was The "Prevailing Party"**

10 Cal. Code of Civil Procedure section 425.16(c) provides that
11 "a prevailing defendant on a[n anti-SLAPP] motion to strike shall
12 be entitled to recover his or her attorney's fees and costs." This
13 court's prior order concluded that Pandora Jewelry was the
14 "prevailing party" for purposes of the anti-SLAPP motion,
15 notwithstanding Bello Paradio's non-opposition to dismissal of
16 Bello Paradiso's state law claim, pursuant to Pfeiffer Venice
17 Properties v. Bernard, 101 Cal. App. 4th 211, 218 (2002) and
18 Coltrain v. Shewalter, 66 Cal. App. 4th 94, 107 (1998). In
19 objecting to the fee award, Bello Paradiso asks that this court re-
20 evaluate this decision in consideration of Moran v. Endres, 135
21 Cal. App. 4th 952 (2006).

22 In Moran, defendants brought an anti-SLAPP motion as to eleven
23 different causes of action. The motion was granted only as to a
24 civil conspiracy claim, which was struck on the ground that under
25 California law, "conspiracy is not a cause of action." Id. at 954.
26 Defendants then sought an award of fees, which the trial court

1 denied. Id. The California Court of Appeal affirmed the denial of
2 fees. The court noted that although the anti-SLAPP motion was
3 granted in part,

4 the possible recovery against defendants . . .
5 the factual allegations which defendants had
6 to defend . . . the work involved in trying
7 the case . . . [and] Defendants' burden
8 concerning their jurisdictional defense [all]
9 did not change. The results of the motion
10 were minimal and insignificant, fully
11 justifying the court's finding that defendants
12 should not recover fees.

13 Id. "[W]hen a defendant cannot in any realistic sense be said to
14 have been successful, fees need not be awarded. Defendants here
15 sought to dismiss the case against them, but instead obtained a
16 ruling which in every practical sense meant nothing." Id. at 956.
17 Justice Mosk, concurring, reiterated that the California Supreme
18 Court has stated that when an anti-SLAPP motion "was successful,
19 attorney fees were mandatory under Code of Civil Procedure section
20 425.16, subdivision (c)." Id. (quoting Ketchum v. Moses, 24 Cal.
21 4th 1122, 1141-42 (2001)). However, Justice Mosk analogized to the
22 U.S. Supreme Court's interpretation of 42 U.S.C. section 1988,
23 which provides that a party prevails if it "succeeds on any
24 significant issue in litigation which achieves some of the benefit
25 the parties sought in bringing suit." Id. (quoting Hensley v.
26 Eckerhart, 461 U.S. 424, 433 (1983)) (emphasis in Moran).

27 Bello Paradiso argues that the anti-SLAPP motion here, like
28 that in Moran, had no significant effects, because the same result
29 was achieved by the Fed. R. Civ. P. 12(b)(6) motion. At the
30 outset, the court notes that the standard for evaluating an anti-

1 SLAPP motion differs from the 12(b)(6) standard, primarily in that
2 the anti-SLAPP motion requires production of evidence to support
3 the claims.¹ See Hilton v. Hallmark Cards, No. 8-55443, ___ F.3d
4 ___, Slip. Op. at 12120-21 (9th Cir. Aug. 31, 2009) (noting that "a
5 Rule 12(b)(6) motion to dismiss may succeed where an anti-SLAPP
6 motion to strike would not," and that "[t]he converse is also
7 true."). Because Bello Paradiso elected not to oppose the 12(b)(6)
8 motion, this court did not determine whether that motion, if
9 opposed, also would have secured the relief Pandora Jewelry sought.

10 Of course, the filing of the 12(b)(6) motion prompted Bello
11 Paradiso to file a statement of non-opposition, which effectively
12 voluntarily withdrew Bello Paradiso's counterclaims. Under Bello
13 Pardiso's interpretation of Moran, voluntary dismissal of a claim
14 after an anti-SLAPP motion was filed would automatically preclude
15 an award of attorneys fees under the anti-SLAPP statute, because in
16 all such cases, the motion would no longer have any significant
17 effects. The California Court of Appeals decisions in Bernard and
18 Coltrain, which this court discussed in its prior order, both

19
20 ¹ Bello Paradiso also argues that imposing the anti-SLAPP
21 standard, rather than the 12(b)(6) standard, effectively imposed
22 a heightened pleading standard on Bello Paradiso's federal
23 antitrust claims. Bello Paradiso's California Unfair Competition
24 Law claim, which was the subject of the anti-SLAPP motion, was
25 predicated on a violation of federal antitrust law. Therefore, in
26 determining whether Bello Paradiso has provided "some admissible
evidence" for the UCL counterclaim, the court inquired into whether
Bello Paradiso had provided any evidence for the federal antitrust
claim. However, Bello Paradiso wrongly assumes that the federal
claim itself could have been, or was, dismissed on anti-SLAPP
grounds. Instead, this court only applied this standard to the
state-law claim. See Verizon Del., Inc. v. Covad Communs. Co., 377
F.3d 1081, 1091 (9th Cir. 2004).

1 considered cases in which claims were withdrawn after the filing of
2 an anti-SLAPP motion, and explain why withdrawal of a claim cannot
3 provide a basis for denial of anti-SLAPP fees. Bernarnd and
4 Coltrain note that the rule Bello Paradiso advocates would allow
5 SLAPP plaintiffs to chill the exercise of First Amendment rights by
6 filing meritless claims that force the defendant to incur the costs
7 of filing an anti-SLAPP motion or other response, while plaintiff
8 would evade the statutorily-imposed penalty meant to deter this
9 chilling behavior. Bernard, 101 Cal. App. 4th. at 218, Coltrain,
10 66 Cal. App. 4th at 106-07; see also Liu v. Moore, 69 Cal. App. 4th
11 745, 752 (1999). In contrast, this danger was not present in
12 Moran, where it was determined that the underlying claims had
13 merit, and thus no award of fees was necessary to the statutory
14 purpose of deterring meritless claims brought to chill First
15 Amendment conduct.

16 As noted in this court's prior order, the purpose underlying
17 the enactment of the anti-SLAPP statute was to prevent powerful
18 interests from filing lawsuits aimed at quelling public
19 participation, and that the instant suit does not squarely fit that
20 mold. Nonetheless, the California Supreme Court has refused to
21 limit application the anti-SLAPP statute to cases that were its
22 primary objects. Jarrow Formulas, Inc. v. LaMarche, 31 Cal. 4th
23 728, 735 (2003).

24 Moreover, even if this court were inclined to disregard the
25 California Supreme Court's instruction regarding California law, it
26 is not clear that the instant counterclaim is as far outside the

1 statute's motivating scope as Bello Paridiso implies. Bello
2 Paradiso filed a state law counterclaim that argued, in part, that
3 activity potentially protected by the First Amendment was unlawful.
4 Bello Paradiso has not offered anything to indicate that the
5 purpose of this counterclaim was anything other than impermissible
6 deterrence of the potentially protected activity. Instead, Bello
7 Paradiso immediately agreed to dismissal of this claim, and has not
8 offered anything to indicate that it did so for a reason other than
9 a recognition of the fact that the claim was meritless.
10 Accordingly, while the court reiterates that California law
11 requires the anti-SLAPP statute to be broadly applied to cases
12 other than those at the core of the statute, the court notes that
13 the claim and behavior at issue, if not the parties, appears to be
14 one of the objects motivating the statute.

15 **III. CHALLENGE TO THE AMOUNT OF FEES**

16 **A. Whether Only Nominal Fees Are Appropriate**

17 Bello Paradiso separately argues that if fees are awarded, the
18 award should be nominal. Bello Paradiso provides no authority for
19 this proposition, and the court is not aware of any. Nor does it
20 appear that an award of nominal fees would comport with the
21 purposes underlying the statute any more than would a denial of
22 fees altogether.

23 **B. Whether Pandora Jewelry's Fees Are Excessive**

24 The anti-SLAPP statute provides that "a prevailing defendant
25 on a special motion to strike shall be entitled to recover his or
26 her attorney's fees and costs. If the court finds that a special

1 motion to strike is frivolous or is solely intended to cause
2 unnecessary delay, the court shall award costs and reasonable
3 attorney's fees to a plaintiff prevailing on the motion." Cal.
4 Code. Civ. Pro. § 425.16(c). Although the statute only refers to
5 the reasonableness of the non-moving party's fees, California
6 courts have held that any request for fees under this section must
7 be reasonable. Robertson v. Rodriguez, 36 Cal. App. 4th 347, 361
8 (1995); see also Ketchum v. Moses, 24 Cal. 4th 1122, 1137 (2001)
9 (quoting Serrano v. Unruh, 32 Cal. 3d 621, 635 (1982)). In
10 calculating fee awards under this statute, courts have found it
11 appropriate to use the lodestar method. Ketchum, 24 Cal. 4th at
12 1131, 1136.

13 Under this method, courts multiply the reasonable number of
14 hours worked by a reasonable hourly rate. Courts may reduce fee
15 amounts when the court concludes that either the number of hours
16 worked or the hourly rate is unreasonable. See, e.g., Maughan v.
17 Google Technology, Inc., 143 Cal. App. 4th 1242, 1249, 1253 (2006)
18 (concluding that while defendant claimed 200 hours of work on an
19 anti-SLAPP motion, only 50 hours were reasonable, and thereby
20 awarding \$21,250 in fees when \$98,120.40 was requested). Having
21 reviewed the affidavit submitted on behalf of Pandora Jewelry, the
22 court concludes that the number of hours worked is reasonable. In
23 particular, although Bello Paradiso claims that the time spent
24 preparing for the hearing was devoted at least in part to the
25 motion to dismiss, Bello Paradiso had already stated its non-
26 opposition to that motion, such that the only dispute, and thus the

1 only preparation, concerned the anti-SLAPP motion.

2 However, the court concludes that the hourly rates provided
3 counsel for Pandora Jewelry are unreasonable. Under California
4 law, as under most federal statutes, the lodestar is the "basic fee
5 for comparable legal services in the community." Ketchum, 24 Cal.
6 4th at 1132. Here, the community is Sacramento, California, and
7 nothing indicates that local counsel are incapable of performing
8 comparable anti-SLAPP services. Accordingly, the court finds that
9 reasonable hourly rates are as follows:

Attorney	Rate	Hours	Total
Schaefer, John (Partner)	\$300	4.5	\$1350
Hansen, William (Partner)	\$300	1.3	\$390
Grant, Jeffry (8 year associate)	\$225	21.9	\$4927.5
Morales, Suzanna (4 year associate)	\$225	0.4	\$90
Total:			\$6757.5


16 See Cal. Pro-Life Council, Inc. v. Randolph, No. S-00-1698, 2008 U.
17 S. Dist. LEXIS 80256 (E.D. Cal. Sept. 30, 2008), Wilson v. Haria &
18 Gogri Corp., 2007 U.S. Dist. LEXIS 47519 (E.D. Cal. June 20, 2007),
19 Calif. State Outdoor Advertising Assoc. Inc. v. State of Calif.,
20 2006 WL 662747 *11 (E.D. Cal. 2006).

21 **IV. CONCLUSION**

22 It is therefore ORDERED that plaintiff Pandora Jewelry's
23 motion for attorneys' fees is GRANTED in the total sum of \$6757.5.

24 IT IS SO ORDERED.

25 DATED: September 3, 2009.

26 
LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT