UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 05-80393-Civ-HURLEY/HOPKINS

STELOR PRODUCTIONS, L.L.C.,

Plaintiff,

vs.

STEVEN A. SILVERS,

Defendant.
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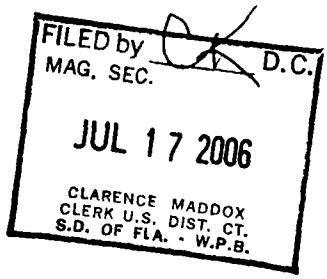

REPORT AND RECOMMENDATION AS TO DEFENDANT'S NOTICE OF FILING BILL OF COSTS AND VERIFIED MOTION FOR ATTORNEYS' FEES AND EXPENSES, AND RULE 11 SANCTIONS (DE 82 & 83)

THIS CAUSE comes before the Court upon an Order referring Defendant's Notice of Filing Bill of Costs and Defendant's Verified Motion for Attorney's Fees and Expenses, and Rule 11 Sanctions to the undersigned Magistrate Judge for Report and Recommendation. (DE 85). This matter is now ripe for review. For the reasons stated below, the undersigned **RECOMMENDS** that Defendant's Bill of Costs be **DENIED** and Defendant's Verified Motion for Attorney's Fees and Expenses, and Rule 11 Sanctions be **DENIED**.

I. BACKGROUND

A. Events Leading to the Underlying Dispute

Defendant Steven A. Silvers ("Defendant" or "Silvers") is the creator and owner of various intellectual property relating to the Googles concept. (DE 1 ¶¶ 6–8). On or about June 1, 2002, Silvers and Plaintiff Stelor Productions, L.L.C. (f/k/a Stelor Productions, Inc.) ("Plaintiff" or "Stelor") entered into a License, Distribution and Manufacturing Agreement (the "License Agreement").[1] (DE 1 ¶ 10). Under the License Agreement, Silvers granted Stelor the exclusive license to "use, reproduce, modify, create derivative works of, manufacture, have manufactured, market, advertise, sell, distribute, display, perform, and otherwise commercialize" the Googles concept and intellectual property. (DE 1 (quoting Ex. A at 1)).

The business relationship between the parties quickly deteriorated, spawning multiple lawsuits. On October 14, 2004, Stelor filed an action in this Court entitled *Stelor Productions, Inc. v. Steven A. Silvers*, Case No. 04-80954-Civ-Hurley, asserting claims for breach of contract, and declaratory and injunctive relief. (DE 1 ¶ 13). Silvers filed a counterclaim for breach of contract. (DE 1 ¶ 13).

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[1] The parties also entered into a Consulting Agreement. (DE 1 ¶ 10). The License Agreement and Consulting Agreement set forth the original terms and provisions governing the parties' relationship. However, neither agreement contained a provision which would entitle the "prevailing party" to recover their reasonable expenses, including attorney's fees and costs, incurred in any litigation, arbitration or proceeding by which one party either sought to enforce its rights under the agreements or sought a declaration of any rights or obligations under the agreements. (DE 1 (Ex. A–B)).

On January 28, 2005, the parties entered into a Confidential Settlement Agreement (the "Settlement Agreement") and agreed to dismiss their respective claims without prejudice. (DE 1 ¶¶ 14–16). The Settlement Agreement reserved "exclusive continuing" jurisdiction in the United States District Court for the Southern District of Florida (in the event of a future dispute between the parties over their respective obligations under the Settlement Agreement) and granted the "successful or prevailing party" the right to recover its attorney's fees and other costs incurred in that litigation. (DE 4 ¶ 17, at 5). The jurisdictional/attorney's fees provision states:

> Reservation of Jurisdiction: The Parties agree to submit to the exclusive continuing jurisdiction of the United States District Court, Southern District of Florida, for enforcement of all provisions of this Agreement. In the event that a **dispute** arises concerning the obligations of any Party under this Agreement, the Parties agree to submit any such **dispute** to this court for resolution. **The successful or prevailing party (as determined by the Court) shall be entitled to recover its reasonable attorneys' fees and other costs incurred in that litigation from the unsuccessful or non-prevailing party in addition to any other relief to which the prevailing party might be entitled.**

(DE 4 ¶ 17, at 5) (emphasis added). Finally, the Settlement Agreement contained the following integration clause:

> This Agreement constitutes the entire agreement between the parties and supersedes all prior and contemporaneous contracts, agreements, promises and understandings, **with the exception of the [License Agreement]** as well as the [Consulting Agreement] **previously entered into by the parties.**

(DE 4 ¶ 24, at 8–9) (emphasis added). The case was closed by order dated February 17, 2005. (DE 1 ¶ 16).

This compromise proved unsuccessful. By letter dated April 27, 2005, Silvers again notified Stelor that he was terminating their relationship. (DE 1 ¶ 18 (citing Ex. C)). As a result, Stelor initiated this lawsuit on May 5, 2005 asserting claims for breach of the License Agreement and the Settlement Agreement (Count I) and for declaratory judgment (Count II).[2] (DE 1 ¶¶ 27–37).

Stelor alleged this Court had subject matter jurisdiction over its claims based on diversity of citizenship pursuant to 28 U.S.C. § 1332(a). (DE 1 ¶ 4). Specifically, the Verified Complaint alleged that Stelor was a limited liability company organized and existing under the laws of the State of Delaware (having its principal place of business in Darnestown, Maryland) and that Silvers was a resident of Palm Beach

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[2] Silvers has filed two lawsuits of his own. On May 4, 2005, Silvers filed an action in this Court against Google, Inc. (the owner of the popular internet search engine Google.com), asserting claims for "reverse confusion" trademark infringement under 15 U.S.C. § 1114, unfair competition under 15 U.S.C. § 1125(a), unfair competition under Florida law, and "cancellation of Defendant's registration." *See Steven A. Silvers v. Google, Inc.*, Case No. 05-80393-Civ-RYSKAMP (S.D. Fla.). Silvers did not include Stelor as a party in this lawsuit notwithstanding their dispute over the ownership of the Googles concept and intellectual property. Google, Inc. asserted a counterclaim against Silvers and Stelor on August 8, 2005. Stelor filed a cross-claim against Silvers and a counterclaim against Google, Inc. on September 9, 2005 (which was subsequently amended on November 14, 2005). Stelor's cross-claim against Silvers alleges counts for declaratory judgment, breach of contract and breach of express warranty. This lawsuit is pending.

On September 6, 2005, Silvers filed a civil action in the Circuit Court of the 11th Judicial Circuit, Miami-Dade County, Florida entitled *Steven A. Silvers v. Stelor Productions*, LLC, Case No. 05-18033 CA 03. Silvers voluntarily dismissed this case on May 4, 2006.

County, Florida.[3] (DE 1 ¶¶ 2–3). Stelor alleged that the "contracts at issue in this action specifically provide that all disputes are to be resolved by this Court and that the parties consent to jurisdiction in this Court," explaining further that the Settlement Agreement reserved "exclusive continuing jurisdiction with the United States District Court for the Southern District of Florida to enforce its terms." (DE 1 ¶¶ 5, 15).

B. Procedural History

When it initiated this lawsuit, Stelor also filed an Emergency Motion for Temporary Restraining Order and/or Preliminary Injunction in an attempt to preserve the status quo between the parties until its claims for breach of contract and declaratory judgment could be resolved at trial. (DE 2 at 9). Silvers filed an opposition, arguing, among other things, that diversity jurisdiction did not exist because Stelor failed to properly allege the citizenship of each member of the limited liability company. (DE 13 at 1).

After conducting an evidentiary hearing, the undersigned recommended that the District Court grant Stelor's motion for preliminary injunction (the "Report and Recommendation"). (DE 24). On June 9, 2005, the Honorable Daniel T. K. Hurley granted Stelor's request for a temporary restraining order up to and including June 21, 2005. (DE 32 at 2–3).

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[3] Stelor converted from a corporation to a limited liability company effective on or about March 14, 2005—less than two months before filing its second lawsuit against Silvers. (DE 1 ¶ 2).

In the mean time, Silvers filed a motion to dismiss this action for lack of subject matter jurisdiction. (DE 19). Silvers also filed a motion to vacate the temporary restraining order and a written objection to the Report and Recommendation. (DE 39, 46, 50).

The District Court issued an order extending the temporary restraining order up to and including June 24, 2005. (DE 49). Then, on July 5, 2005, the District Court declined to extend the temporary restraining order any further, explaining in relevant part:

> As a threshold matter, the court observes that the preliminary injunctive relief sought by plaintiff has in large part already been satisfied by the court's temporary restraining orders partially implementing the injunction recommended by the Magistrate Judge and requiring defendant's cooperation with plaintiffs use of the Googles IP for the duration of plaintiff's product launch at the June 21–24, 2005 international trade show in New York City. [DE# 32, 49] Agreeing with the Magistrate Judge's conclusion that interruption of the unique business opportunity posed by the product launch created the prospect of "irreparable harm," this court granted the extraordinary prejudgment relief requested on a temporary basis. [DE# 32, 49]
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> However, the court does not find sufficient evidence of "irreparable harm" to justify continuation of preliminary injunctive relief beyond this point. . . .
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> . . .
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> Similarly, in this case, even if a breach of the licensing agreement or settlement agreement is ultimately found, the only cognizable injury which plaintiff has established is that it may sustain a loss of income—the difference between the income which could have been

> earned by retaining its right to use the Googles related intellectual property, including its access to the googles.com website, and the amount of income that it actually earned during the same period. This value is capable of measurement and can adequately be remedied by monetary damages if plaintiff is ultimately successful on the merits of its claim. . . . .

(DE 52 at 2–4). Stelor filed an interlocutory appeal with the Eleventh Circuit Court of Appeals after the District Court denied its motion for reconsideration. (DE 61, 64–65).

By order dated August 6, 2005, the District Court granted Silvers' motion to dismiss for lack of subject matter jurisdiction. (DE 67 at 1–2). This dismissal was without prejudice and granted Stelor leave to file an amended complaint which identified each member of the limited liability company by name and place of citizenship. On August 23 and 29, 2005, Stelor advised the Court that it "just discovered" that a sub-member of the limited liability company resides in Florida and, therefore, diversity jurisdiction did not appear to exist between the parties. (DE 74 ¶ 9; 76 ¶ 2).

The Court dismissed the case without prejudice by order dated October 4, 2005.[4] (DE 80). In so doing, the Court reserved jurisdiction to tax fees and costs in

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[4] On November 15, 2005, the Eleventh Circuit Court of Appeals issued its mandate on Stelor's interlocutory appeal, remanding the case to this Court with instructions to vacate the July 5, 2005 order denying injunctive relief and to dismiss the action for lack of subject matter jurisdiction. (DE 91). The July 5, 2005 order was vacated by this Court on January 14, 2006. (DE 102).

favor of the Defendant. (DE 80). The Defendant, in turn, timely filed a Notice of Filing Bill of Costs and a Verified Motion for Attorney's Fees and Expenses, and Rule 11 Sanctions. Both matters are currently pending before the Court and have been referred to the undersigned for a Report and Recommendation. (DE 85).

II. DISCUSSION

The Defendant is seeking two types of relief. First, he asks this Court to award him his reasonable expenses relating to the defense of this action, including attorney's fees in the amount of $230,730.00 and costs in the amount of $16,478.57. Alternatively, and in addition to attorney's fees and costs, the Defendant suggests that this Court, on its own initiative, should impose Rule 11 sanctions against Plaintiff in an amount that it deems appropriate under the circumstances.

A. The Defendant is Not Entitled to An Award of His Reasonable Expenses, Including Attorney's Fees and Costs, Incurred in Connection with this Litigation Under the Settlement Agreement or Section 57.105(1) of the Florida Statutes

1. The Settlement Agreement

The Defendant contends that he is entitled to recover his attorney's fees and costs under the Settlement Agreement because he prevailed on the significant issues litigated in this case.[5] (DE 83 at 6–9). He initially cites this Court to four state-court

[5] Paragraph 17 of the Settlement Agreement states that "[t]he successful or prevailing party (as determined by the Court) shall be entitled to recover its reasonable attorneys' fees and other costs incurred in that litigation from the unsuccessful or non-prevailing party in addition to any other relief (continued...)

decisions and argues that, when a case is dismissed—even voluntarily—a defendant is deemed the prevailing party for purposes of a prevailing party fee award.[6] (DE 83 at 6). These cases, however, can be distinguished and, therefore, may have no impact on the undersigned's analysis below. First, *Thornber* and *Dam* were decided prior to the Florida Supreme Court's decision in *Moritz v. Hoyt Enters., Inc.*, 604 So. 2d 807 (Fla. 1992) [hereinafter *Moritz II*].[7] Second, *Prescott* and *Rushing* (although decided after *Mortiz II*) support their holdings with pre-*Moritz II* "prevailing party" jurisprudence. Thus, at a minimum, the holdings in *Thornber*, *Dam*, *Prescott* and *Rushing* are called into doubt and may no longer be good law. Consequently, the undersigned declines to follow *Thornber*, *Dam*, *Prescott* and *Rushing* to the extent that they have been overruled by *Moritz II*.[8]

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[5](...continued)
to which the prevailing party might be entitled." (DE 4 ¶ 17, at 5).

[6] *See Thornber v. City of Fort Walton Beach*, 568 So. 2d 914, 919 (Fla. 1990); *Rushing v. Caribbean Food Prods.*, 870 So. 2d 953, 954–55 (Fla. Dist. Ct. App. 2004); *Prescott v. Anthony*, 803 So. 2d 835, 836 (Fla. Dist. Ct. App. 2001); *Dam v. Heart of Fla. Hosp., Inc.*, 536 So. 2d 1177, 1178 (Fla. Dist. Ct. App. 1989).

[7] *Mortiz II* is discussed *infra* at Part II.A.1.b.(2).

[8] *Cf. McCoy v. Pinellas County*, 920 So. 2d 1260, 1260–62 (Fla. Dist. Ct. App. 2006) (refusing to follow *Thornber* in a state civil rights action that was voluntarily dismissed by the plaintiff, explaining that, "[a]lthough a voluntary dismissal by the plaintiff may provide a sufficient predicate for the defendant to seek attorneys' fees, entitlement to such fees is determined by, and is dependent upon, the specific statute under which the fees are sought"); *Religious Tech. Ctr. v. Liebreich*, 98 F. App'x. 979, 986 & n.21 (5th Cir. 2004) (applying Florida law to a contractual attorney's fees provision in an action where the judgment was ultimately vacated for lack of personal jurisdiction, the Fifth Circuit rejected the defendant's argument that it was the "prevailing party"
(continued...)

The Defendant then argues that he is entitled to recover his attorney's fees and costs because he prevailed on the "injunction" and "diversity" issues when the Court declined to extend the temporary restraining order any further by order dated July 5, 2005, and dismissed the case without prejudice for lack of subject matter jurisdiction by order dated October 4, 2005. (DE 83 at 7–9). He maintains that the injunction and diversity issues were the two significant issues litigated in the case.

As set forth above, the Defendant consistently argued that this Court lacked subject matter jurisdiction because Plaintiff failed to properly allege the citizenship of each member of the limited liability company. Before this issue was resolved on the merits in Defendant's favor, Plaintiff successfully obtain injunctive relief in the form of a temporary restraining order. Thus, each party "prevailed" on at least one issue litigated in this case before it was dismissed without prejudice.

Consequently, this Court must determine whether the Defendant should be considered the prevailing party under the Settlement Agreement when Plaintiff's claims are dismissed for lack of subject matter jurisdiction under the specific facts and circumstances of this case. An answer to this question requires a review of Florida law on attorney's fees awarded pursuant to a contractual "prevailing party"

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[8](...continued)
under Florida law (including *Thornber* and *Prescott*), explaining "[t]hese cases cannot carry the day for [the defendant] for the obvious reason that [plaintiff] did not voluntarily dismiss the case: Our judgment . . . did that").

provision.

a. *Erie* Analysis

The *Erie* doctrine dictates that, when jurisdiction rests in diversity of citizenship, the substantive law of the forum state applies and procedural issues are governed by Federal law. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938). Federal courts in diversity cases apply state law rules of contract interpretation. *See, e.g., Harris v. Parker Coll. Of Chiropractic*, 286 F.3d 790, 793 (5th Cir. 2002); *Md. Cas. Co. v. Williams*, 377 F.2d 389, 392 (5th Cir. 1967);[9] *W. Am. Ins. Co. v. Band & Desenberg*, 925 F. Supp. 758, 760 (M.D. Fla. 1996). In addition, when "state law does not run counter to a valid federal statute or rule of court . . . state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 n.31 (1975); *see also Shure v. State of Vt. (In re Sure-Snap Corp.)*, 983 F.2d 1015, 1017 (11th Cir. 1993) (stating that "[f]ederal courts apply state law when ruling on the interpretation of contractual attorney fee provisions").

[9] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to the close of business on September 30, 1981.

The Settlement Agreement states that it "shall be deemed to be made under, shall be construed in accordance with, and shall be governed by the laws of the State of Florida." (DE 4 ¶ 27, at 9).

For the above reasons, the undersigned will interpret the contractual attorney's fees provision under Florida law.

b. Florida Law on Attorney's Fees and the Prevailing Party Analysis

"Generally, a court may only award attorney's fees when such fees are 'expressly provided for by statute, rule or contract.'" *Bane v. Bane*, 775 So. 2d 938, 940 (Fla. 2000) (quoting *Hubbel v. Aetna Cas. & Sur. Co.*, 758 So.2d 94, 97 (Fla. 2000)). "Determining whether to grant fees pursuant to a contractual provision is a separate and distinct inquiry from the statutory 'prevailing party' analysis that is otherwise used to disburse fee awards." *Frankenmuth Mut. Ins. Co. v. Escambia County, Fla.*, 289 F.3d 723, 733 (11th Cir. 2002) (citing *Fixel Enters., Inc. v. Theis*, 524 So. 2d 1015, 1016–17 (Fla. 1988)). "A contractual attorney's fee provision must be strictly construed." *B&H Constr. & Supply Co. v. Dist. Bd. of Trs. of Tallahassee Cmty. Coll.*, 542 So. 2d 382, 387 (Fla. Dist. Ct. App. 1989). "A trial court has the discretion to deny contractual attorney's fees if the party seeking fees is unsuccessful on the merits of its claim." *Id.*

(1) Pre-*Moritz II* – The Net Judgment Rule

Prior to 1992, the test to determine which party prevailed in cases involving multiple claims appears to have turned on whether a particular party recovered an affirmative (or net) judgment in their favor. *See, e.g.*, *Theis*, 524 So. 2d at 1016–17 (contractual attorney's fees provision);[10] *Kendall East Estates, Inc. v. Banks*, 386 So. 2d 1245, 1246–47 (Fla. Dist. Ct. App. 1980) (same);[11] *Malagon v. Solari*, 566 So. 2d 352, 353–54 (Fla. Dist. Ct. App. 1990) (per curiam) (statutory attorney's fees provision);[12] *Salisbury Constr. Corp. v. Mitchell*, 491 So. 2d 308, 308–09 (Fla. Dist.

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[10] In *Theis*, the Theises brought suit against Fixel Enterprises, Inc. ("Fixel") alleging breach of contract and negligent construction, seeking $18,000.00 in damages. *See* 524 So. 2d at 1016. Fixel filed a counterclaim seeking in excess of $15,000.00 for additions and extras performed over and above the terms of the contract. *See id.* The jury awarded the Theises $1,000.00. As a result, the Theises moved for (and were awarded) attorney's fees pursuant to the contract, which stated: "[i]n connection with any litigation arising out of this agreement, the prevailing party shall be entitled to receive all costs incurred, including reasonable attorney fees." *Id.* The supreme court upheld this award, commenting that "[t]he district court correctly concluded that, as the parties recovering judgment, the [Theises] are the 'prevailing party' entitled to an award of attorney's fees and costs under the contract." *Id.* at 1017.

[11] In *Banks*, Kendall East Estates, Inc. ("Kendall") sued the Banks for breach of a deposit receipt contract (which contained an attorney's fees provision) in the amount of $3,818.00. *See* 386 So. 2d at 1247. The Banks counterclaimed for breach of a supplementary agreement (which did not contain an attorney's fees provision). *See id.* The trial court entered summary judgment in favor of Kendall and, after a non-jury trial, found in favor of the Banks in the amount of $2,428.44 on their counterclaim. *See id.* A single final judgment was entered in favor of Kendall for the $1,389.56 difference ($3,818.00 - $2,428.44). *See id.* On appeal, the Third District Court of Appeal reversed the trial court's order denying costs and attorney's fees to Kendall, explaining that, since Kendall was the only party recovering judgment "in this action at law for money damages," it was "entitled to attorney's fees for the services involved in the prosecution of the complaint." *Id.*

[12] In *Malagon*, the tenants sued their landlord for return of their security deposit and damages. *See* 566 So. 2d at 353. The landlord counterclaimed for damages. *See id.* The final judgment, following a jury verdict, awarded the tenants the total amount of the security deposit ($3,000.00), (continued...)

Ct. App. 1986) (same).[13] Known as the "net judgment" rule, Florida courts consistently followed this test for two decades. *See Prosperi v. Code, Inc.*, 626 So. 2d 1360, 1362 (Fla. 1993) (discussing the net judgment rule). However, this bright-line standard for designating a "prevailing party" did not suit every case, especially where one party did not necessarily recover a net judgment in its favor, but ultimately received the relief requested and/or derived a great benefit as a result of the overall outcome of the case.

(2) *Moritz II* – The Significant Issues Test

In 1992, the Florida Supreme Court adopted the "significant issues" test to determine which party should be considered the prevailing party under a contract that contains an attorney's fees provision. *See Moritz II*, 604 So. 2d at 810.[14] In *Moritz*

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[12](...continued)
but also awarded the landlord a smaller amount. *See id.* The trial court denied the tenant's motion for attorney's fees pursuant to section 83.49(3)(c) of the Florida Statutes, explaining that both parties prevailed on separate issues at trial. *See id.* The Fourth District Court of Appeal held that this was clearly error, noting that "it is well settled that a plaintiff is considered the prevailing party if he recovers less than he sued for, so long as he recovers something." *Id. Malagon* has been implicitly overruled by *Moritz II* and *Prosperi*, which are discussed below. *See K&M Elec. Supply, Inc. v. Moduplex Corp.*, 686 So. 2d 717, 718 (Fla. Dist. Ct. App. 1997) (Pariente, J., concurring specially) (stating "the fact that a party obtains a net judgment, while a significant factor, is not necessarily determinative of the prevailing party").

[13] In *Mitchell*, Salisbury Construction Corporation ("Salisbury") brought an action to foreclose on a mechanics lien and ultimately recovered a net judgment of $367.00. *See* 491 So. 2d at 308. Because Salisbury recovered a net judgment, the appellate court held that it was entitled to attorney's fees as a matter of right. *See id.* at 309.

[14] The Florida Supreme Court actually adopted the "prevailing party" analysis set forth by the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). *See Moritz II*, (continued...)

II, "the Moritzes entered into a contract with Hoyt Enterprises for the purchase of a lot and the construction of a single-family home" and deposited a total of $57,877.45. *See id.* at 808. After a dispute arose regarding the quality of certain items, the Moritzes repudiated the contract and demanded the return of their deposit. *See id.* Hoyt eventually sold the home to a different buyer for $10,000.00 below the contracted price. *See id.* The Moritzes thereafter sued Hoyt, alleging that Hoyt had breached the contract by failing to construct it "in accordance with the agreement and according to their desires and specifications." *Id.* In its answer, Hoyt claimed that the Moritzes were the parties that had breached the contract, and asserted a

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[14](...continued)
604 So. 2d at 810. The United States Supreme Court elaborated on the "significant issues" test as follows:

> If the plaintiff has succeeded on "any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit," the plaintiff has crossed the threshold to a fee award of some kind. . . . Thus, at a minimum, **to be considered a prevailing party . . . the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant.** . . . Where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that even the "generous formulation" we adopted today has not been satisfied. The touchstone of the prevailing party inquiry must be the **material alteration of the legal relationship of the parties**. . . . Where such a change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, not to the availability of a fee award *vel non*.

Texas State Teachers Assoc. v. Garland Indep. Sch. Dist., 489 U.S. 782, 791–93 (1989) (citations omitted and emphasis added); *accord Lyden v. Howerton*, 731 F. Supp. 1545, 1548–49 (S.D. Fla. 1990) (concluding that plaintiffs were prevailing parties where they obtained the primary relief sought, succeeded on the central issue in the suit, and derived a great benefit by having property released from seizure). Once the prevailing party is determined, the next step is to set a reasonable fee. *See Hensley*, 461 U.S. at 433–40; *Texas State Teachers Assoc.*, 489 U.S. at 791–93.

counterclaim alleging that the repudiation caused Hoyt damages in excess of $5,000.00. *See id.* at 809.

The trial court ultimately determined that the Moritzes had breached the contract. *See Moritz II*, 604 So. 2d at 809. Notwithstanding, the court specifically ruled that Hoyt could not retain the deposit as liquidated damages, but instead could only recover general compensatory damages, which was the difference between the agreed purchase price (plus extras) and the actual value of the property at the time of the Moritzes' breach. *See id.* Even though the Moritzes had breached, the trial court directed Hoyt to pay them $45,525.90, which was the difference between Hoyt's damages and the Moritzes' deposit. *See id.* By separate order, the court granted Hoyt's motion to tax its costs and attorney's fees, and denied a similar motion by the Moritzes. *See id.*

The Fourth District Court of Appeal affirmed. *See Moritz v. Hoyt Enters., Inc.*, 576 So. 2d 351, 352 (Fla. Dist. Ct. App. 1991) (per curiam) [hereinafter *Moritz I*]. It concluded that the trial court "was correct in assessing fees for [Hoyt], even though the trial court allowed the [Moritzes] to recover the funds left over from the sale after [Hoyt's] damages were paid." *Id.* In support of this conclusion, the appellate court quoted a lengthy passage from its opinion in *Reinhart v. Miller*, 548 So. 2d 1176, 1177 (Fla. Dist. Ct. App. 1989), where it discussed in dicta "that a trial court must

find only one prevailing party for attorney's fees purposes" in breach-of-contract cases.[15] *See Moritz I*, 576 So. 2d at 352.

The Florida Supreme Court approved the decision in *Moritz I*. *See Moritz II*, 604 So. 2d at 808–10. In doing so, the Court concluded that Hoyt was the prevailing party because it prevailed on the significant issues tried before the court, noting that Hoyt "did not breach the contract and, consequently, should not be required to pay attorney's fees to the parties who did not prevail on their complaint and only partially prevailed on their defense to the counterclaim." *Id.* at 810. The Florida Supreme Court explained further that "the fairest test to determine who is the prevailing party

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[15] The passage quoted from *Reinhart* is at best dicta merely designed to guide the trial court on remand. In *Reinhart*, the jury found that the appellant breached the contract, but the trial judge directed a verdict finding that the appellees also breached the contract. *See* 548 So. 2d at 1176. The trial court later found both parties to be the prevailing party and awarded attorney's fees to each. *See id.* Both parties cross appealed, which were eventually consolidated. *See id.* In the companion appeal (which is reported at *Miller v. Reinhart*, 548 So. 2d 1174 (Fla. Dist. Ct. App. 1989)), the Fourth District in essence "negated" the attorney's fees order by reversing in part the final judgment and remanding the case for a new trial on the breach of contract count. *See Reinhart*, 548 So. 2d at 1177. Thus, there was technically nothing left for the appellate court to address in the attorney's fees appeal. Notwithstanding, the Fourth District made the following comments:

> [W]e write to address whether there can be two prevailing parties under one contract. We think not. **Unless in the same lawsuit there are separate and distinct claims which would support independent actions, there can only be one prevailing party. When alternative theories of liability are litigated, only one party can prevail.** Either appellant or appellees breached the contract. The breach by one party to a contract releases the other party from performing any further contractual obligation. Either appellant or appellees is entitled to attorney fees under the contract. If there could not be two breaches, there could not be two prevailing parties.

Id. (citations omitted and emphasis added). The Fourth District then reversed the attorney's fees order and remanded for further hearing to determine which party was entitled to fees after the new trial. *See id.*

is to allow the trial judge to determine from the record which party has in fact prevailed on the significant issues tried before the court." *Id.* "[T]he party prevailing on the significant issues in the litigation is the party that should be considered the prevailing party for attorney's fees." *Id.*

(3) Post-*Moritz II* – The Net Judgment Rule is Merely a Factor to Consider When Determining Which Party Prevailed

One year later, the Florida Supreme Court analyzed what effect, if any, *Moritz II* had on the net judgment rule. *See Prosperi*, 626 So. 2d at 1362. The Court explained:

> As we see it, the net judgment rule itself was originated as a device to do equity. For example, under most circumstances it would be unfair to require a contractor who recovers the bulk of its claim to pay attorney's fees for failure to meet the technical requirements of the mechanics lien law. In some of the later cases, however, the net judgment rule appears to have been applied mechanically without regard to the equities. **We believe that [*Moritz II*] now requires a more flexible application. The fact that a claimant obtains a net judgment is a significant factor but it need not always control the determination of who should be considered the prevailing party.**

Id. at 1363 (emphasis added). The court held that, when considering "whether to apply the net judgment rule, the trial judge must have the discretion to consider the equities and determine which party has in fact prevailed on the significant issues." *Id.*

The Court's decision in *Prosperi* illustrates that the net judgment rule continues to be a factor in prevailing party analysis; however, *Moritz II* prohibits a strict application of the rule.[16] Trial courts are free to consider the equities of a case and award attorney's fees to a party that prevails on the significant issues at trial notwithstanding the fact that the other party ultimately prevails in terms of dollars awarded. *See id.*; *accord K&M Elec. Supply, Inc. v. Moduplex Corp.*, 686 So. 2d 717, 718 (Fla. Dist. Ct. App. 1997) (Pariente, J., concurring specially); *cf. Warshall v. Price*, 629 So. 2d 905, 906–08 & n.2 (Fla. Dist. Ct. App. 1994) (discussing which claims were distinct from successful claims and, therefore, excluded from consideration of the amount of reasonable fees the court should award, and instructing the trial court to consider *Moritz II* before rendering a new final judgment for attorney's fees).

(4) Miscellaneous Issues Impacting an Attorney's Fees Determination

(i) Separate and Distinct Claims

When confronting an attorney's fees determination, one issue that can arise in a case is whether, and under what circumstances, opposing parties can both claim a right to (and ultimately recover) fees. The law is fairly clear on a few points regarding

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[16] *Prosperi* also illustrates that the significant issues test adopted in *Moritz II* applies to contractual **and** statutory provisions that provide the right to recover fees to either party—*i.e.*, a contract or statute containing a "prevailing party" provision.

this particular issue. In an action for breach of contract, only one party can prevail unless, in the same lawsuit, there are separate and distinct claims which would support an independent action. *See, e.g.*, *Anglia Jacs & Co. v. Dubin*, 830 So. 2d 169, 171 (Fla. Dist. Ct. App. 2002); *Green Companies, Inc. v. Kendall Racquetball Investment, Inc.*, 658 So. 2d 1119, 1121 (Fla. Dist. Ct. App. 1995) (per curiam); *Moritz I*, 576 So. 2d at 352. Alternate theories of liability (*e.g.*, negligence and strict liability) and alternate theories of recovery (*e.g.*, compensatory damages and declaratory or injunctive relief) for the same wrong are not separate and distinct for purposes of ascertaining the prevailing party. *See Dubin*, 830 So. 2d at 171; *Green Companies, Inc.*, 658 So. 2d at 1121.

In cases involving multiple counts, where each claim is separate and distinct and would support an independent action, the prevailing party on each distinct claim is entitled to an award of attorney's fees for those fees generated in connection with that claim. *See, e.g.*, *Folta v. Bolton*, 493 So. 2d 440, 442 (Fla. 1986) (per curiam); *Consolidated So. Security, Inc. v. Geniac & Associates, Inc.*, 619 So. 2d 1027, 1027–29 (Fla. Dist. Ct. App. 1993); *Zaremba Florida Co. v. Klinger*, 550 So. 2d 1131, 1132 (Fla. Dist. Ct. App. 1989) (per curiam) (explaining that, because plaintiffs prevailed on only one out of nine counts, they were entitled to attorney's fees generated in connection with that one count only, since the nine counts in the

complaint were all independent actions involving different alleged wrongs rather than being alternative theories of liability for the same wrong). The correct procedure where claims are separate and distinct is that each should be given separate consideration under *Patient's Compensation Trust Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985).[17] *See Geniac & Associates, Inc.*, 619 So. 2d at 1028.

(ii) Equitable Claims

With regard to equitable claims (such as specific performance), it is generally considered to be in the trial court's discretion to apportion costs and attorney's fees. *See, e.g., Schwartz v. Zaconick*, 74 So. 2d 108, 109–10 (Fla. 1954); *Wilhelm v. Adams*, 136 So. 397, 398 (Fla. 1931); *Int'l Center of the Americas, Inc. v. Dade Fashions, Inc.*, 391 So. 2d 383, 384 (Fla. Dist. Ct. App. 1980) (per curiam). Notwithstanding, the Third District Court of Appeal has held that courts do not have such discretion when the equitable claim is governed by a contract containing an attorney's fees provision. *See Brickell Bay Club Condo. Ass'n, Inc. v. Forte*, 397 So. 2d 959, 960 (Fla. Dist. Ct. App. 1981).[18]

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[17] In *Rowe*, the Florida Supreme Court adopted the federal lodestar approach for computing reasonable attorney's fees. *See* 472 So. 2d at 1146, 1149–52. The lodestar formula has since been modified. *See Standard Guaranty Ins. Co. v. Quanstrom*, 555 So. 2d 828, 830–35 (Fla. 1990).

[18] *Forte* involved an action for rescission of two agreements. *See* 397 So. 2d at 960. Judgment was entered against the condominium association, but the trial court denied attorney's fees to the prevailing parties. *See id.* The appellate court reversed. In doing so, it explained that the contract gave the prevailing parties "a clear and unequivocal right to the recovery of both attorney's (continued...)

(iii) No Party Prevails where Both Contracting Parties are Deemed to be at Fault

A trial court also has discretion to determine that no party prevails where both contracting parties are deemed to be at fault. *See Merchants Bonding. Co. v. City of Melbourne*, 832 So. 2d 184, 186–87 (Fla. Dist. Ct. App. 2002) [hereinafter *Merchants Bonding*]. In *Merchants Bonding*, the City of Melbourne (the "City") filed a two-count complaint against Continental Acreage Development Company ("Continental") for breach of contract and Merchants Bonding Company ("Merchants") for liability under a performance and payment bond. *See id.* at 185. Continental filed an answer and counterclaim, and Merchants filed an answer denying liability and asserting affirmative defenses. *See id.* After trial, the judge entered a final judgment denying relief to all parties. *See id.* "It found Continental breached its contract by failing to obtain written change orders" and also found "the City committed economic waste or failed to mitigate damages." *Id.*

Merchants filed a motion for attorney's fees, arguing that, because of its

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[18](...continued)
fees and costs" and that "courts have no discretion to decline to enforce such an undertaking, any more than any other contractual provision." *Id.* Interestingly, the appellate court further explained that, "[a]bsent the agreement, the court would have discretion to deny costs to either side in an equitable action like this." *Id.* at 960 n.2.

Thus, based on the holding in *Forte*, it would appear that Florida state courts (at least in the Third District Court of Appeal) do not have any discretion whatsoever to deny fees in an equitable action involving a contractual dispute with an attorney's fees provision.

suretyship position, it was "entitled to an award of attorney's fees as the prevailing party, pursuant to the contract between the City and Continental, and section 57.105(2)." *Id.* The trial court denied attorney's fees and Merchants appealed. *See Merchants Bonding*, 832 So. 2d at 185. The appellate court affirmed, explaining:

> This is a classic case where two parties fought to a draw; no one won and no one lost. The trial court found Continental breached its contract by failing to get written change orders, but it also found the City was "wrong" in destroying and replacing Continental's sewer system, after using it for one and one-half years, when it was not necessary to do so. Thus, logically, the City was not entitled to additional payment, and Merchants was not liable on Continental's behalf to complete the project. Both contracting parties were at fault. In these circumstances, the judge had the discretion to determine that no party prevailed.

Id. at 186–87; *cf. Miller v. Jacobs & Goodman, P.A.*, 820 So. 2d 438, 439–41 (Fla. Dist. Ct. App. 2002) (remanding attorney's fees issue, noting that, in certain "compelling" circumstances, a trial court can determine that neither party prevailed in a breach-of-contract action).

(iv) The Catalyst Test

Under the "catalyst test," a party's victory need not be obtained by a final adjudication of a lawsuit's merits; rather, it is enough that the lawsuit acted as a catalyst in prompting the party to take the desired action. *Cf.* 32 AM. JUR. 2D *Federal Courts* § 323 (West 2003) (discussing the catalyst test under the Equal Access to Justice Act). When a lawsuit acts as a catalyst in prompting a party to take action,

attorney's fees are justified despite the lack of judicial involvement in the result. *Id.*

The Florida Supreme Court has not expressly adopted the catalyst test when determining a party's prevailing party status. However, two Florida appellate courts appear to follow or adopt the catalyst standard.

In *Central Magnetic Imaging v. State Farm Mut. Auto. Ins. Co.*, 745 So. 2d 405 (Fla. Dist. Ct. App. 1999), State Farm failed to pay a medical provider within the statutory prescribed time. *See id.* at 406. The medical provider thereafter demanded arbitration pursuant to section 627.736(5) of the Florida Statutes. *See id.* "When the insurer received the arbitration demand, it paid the PIP benefits but refused to include attorneys' fees in the amount." *Id.* The medical provider then filed suit to compel payment of fees. *See id.*

The Third District Court of Appeal held that the medical provider was a "prevailing party" under section 627.736(5) and, therefore, entitled to fees. *See id.* at 407. In doing so, it stated:

> It is well settled in Florida that "[w]hen the insurance company has agreed to settle a disputed case, it has, in effect, declined to defend its position in the pending suit. Thus, the payment of the claim is, indeed, the functional equivalent of a confession of judgment or a verdict in favor of the insured." A dispute arose when the insurer failed to pay the medical bills within the statutory period and the medical provider sent an overdue bill to the insurer for these medical expenses. The medical provider's arbitration demand letter commenced this action. The insurer's subsequent payment of the PIP benefits acted as a settlement of the action. Therefore, the insured's [sic] payment is equivalent to a

> confession of judgment, and the medical provider is the prevailing party under section 627.736(5), Florida Statutes.

Id.; *cf. All-Brite Aluminum, Inc. v. Desrosiers*, 626 So. 2d 1020, 1021–22 (Fla. Dist. Ct. App. 1993) (concluding that All-Brite was the prevailing party because the Desrosiers tendered payment after All-Brite commenced litigation).

c. The Defendant Did Not Prevail on the Significant Issues Litigated in this Case

There is no bright-line test to identify the significant issues tried before the Court. The significant issues usually consist of the claims asserted by the parties (and any issue litigated under each claim). Once the significant issues have been identified, it is the result obtained that typically governs the determination of which party prevailed. *See Green Companies, Inc.*, 658 So. 2d at 1121; *see also, e.g.*, *Munao, Munao, Munao & Munao v. Homeowners Ass'n of La Buona Vita Mobile Home Park, Inc.*, 740 So. 2d 73, 74–79 (Fla. Dist. Ct. App. 1999) (concluding that the Homeowners Association prevailed on the significant issues after the trial court entered an order granting a motion to amend and determining that the unreasonable condition of the mobile home park entitled them to a reduction of rent (the relief claimed in the complaint)); *Wayne Paint Co. v. Gulfview Apartments of Marco Island, Inc.*, 739 So. 2d 1259, 1259–60 (Fla. Dist. Ct. App. 1999) (explaining that a party was entitled to attorney's fees where the significant issue was the continued viability of

an injunction and the other party failed in its attempt to modify or dissolve the injunction); *Perez v. Mem'l Sales, Inc.*, 655 So. 2d 193, 193 (Fla. Dist. Ct. App. 1995) (designating the plaintiff as the prevailing party after jury returned a verdict in his favor in the amount of $30,000.00).

Count I of Plaintiff's Verified Complaint is an action at law for breach of the License Agreement and the Settlement Agreement. Plaintiff also asserts an alternate theory of recovery for declaratory judgment under Count II. Both alternate claims for relief seek a judgment (i) enjoining the Defendant from taking any action in violation of or contrary to the terms of the License Agreement or the Settlement Agreement and (ii) declaring that Stelor has complied with its obligations under both agreements. These claims are not separate and distinct and, therefore, will be considered as one claim for purposes of ascertaining the prevailing party.

Applying Florida law to this case, it becomes clear that Plaintiff's claims for breach of contract and declaratory judgment were the significant issues to be tried before the Court. *Cf. Green Companies, Inc.*, 658 So. 2d at 1120–21(concluding that the significant issue in a suit for specific performance, injunctive relief and damages was whether the defendants breached the parking agreement). Because this case was dismissed without prejudice for lack of subject matter jurisdiction, neither party prevailed on the merits. To be considered a prevailing party, Defendant must be able

to point to a resolution of the dispute which materially alters the legal relationship between himself and the Plaintiff. *See, e.g.*, *Moritz II*, 604 So. 2d at 810. The dismissal for lack of subject matter jurisdiction was at best a technical or *de minimis* victory and, therefore, insufficient to support prevailing party status. *Cf. Laborers Local 938 Joint Health & Welfare Trust Fund v. B.R. Starnes Co.*, 827 F.2d 1454, 1458 (11th Cir. 1987) (affirming lower court's denial of prevailing party fees under sections 57.105 and 713.29 of the Florida Statutes, stating: "Given that the federal court dismissed the case for lack of subject matter jurisdiction and the merits of the state claims have yet to be tried, it would be inappropriate to award fees under either of these Florida provisions at this time.") [hereinafter *Laborers*]; *Miami Herald Publ'g Co. v. City of Hallandale*, 742 F.2d 590, 591 (11th Cir. 1984) (finding that there was no prevailing party where the district court lacked jurisdiction to hear the merits of the case); *DeShiro v. Branch*, 183 F.R.D. 281, 285–86 (M.D. Fla. 1998) (denying defendant's motion for attorney's fees where three counts were dismissed for lack of subject matter jurisdiction and two counts were voluntarily dismissed pursuant to Fed.R.Civ.P. 41(a)(1)).

Accordingly, the undersigned **RECOMMENDS** that Defendant's Verified Motion for Attorneys' Fees and Expenses, to the extent it requests an award of attorney's fees and costs under the Settlement Agreement, be **DENIED**. This

Recommendation is limited to Defendant's entitlement to an award of attorney's fees and costs.

2. Section 57.105(1) of the Florida Statues

The Defendant vehemently contends that he has a statutory entitlement to attorney's fees under section 57.105(1) of the Florida Statutes because Plaintiff knew or should have known (at the time the case was filed and until the case was dismissed) that diversity jurisdiction did not exist. (DE 83 at 9–11). Plaintiff argues, among other things, that sanctions are unwarranted under the circumstances because it has acted in good faith throughout the case and demonstrated total candor to the Court when it finally received notice that a sub-member of the limited liability company resided in Florida. (DE 88 at 2). In support of their respective arguments, the parties have submitted voluminous exhibits and multiple declarations. (DE 88–89, 94–99, 103).

a. Standard

Florida has adopted a fee-shifting system as sanctions for raising unsupported claims.[19] *See* FLA. STAT. § 57.105 (2005). Under this system, a tribunal has the authority to award attorney's fees to the prevailing party (to be paid by the losing

[19] Florida's fee-shifting system is fully applicable in federal diversity cases. *See, e.g., Trans Coastal Roofing Co. v. David Boland Inc.*, 309 F.3d 758, 760 (11th Cir. 2002) (applying substantive law of Florida where party sought attorney's fees under section 627.428 of the Florida Statutes); *Wendy's Int'l, Inc. v. Nu-Cape Constr., Inc.*, 169 F.R.D. 680, 688–89 (M.D. Fla. 1996) (analyzing defendant's motion for attorney's fees under Fla. Stat. § 57.105) [hereinafter *Nu-Cape*].

party or the losing party's attorney) on any claim in which the tribunal determines that the losing party or the losing party's attorney knew or should have known that such claim (when initially presented to the tribunal or at any time before trial) was not supported by the material facts necessary to establish the claim.[20] *See id.* § 57.105(1)(a).

Sanctions can be imposed upon "the court's initiative or motion of any party." *Id.* § 57.105(1). "A motion by a party seeking sanctions . . . must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation or denial is not withdrawn or appropriately corrected." *Id.* § 57.105(4). This 21-day notice is known as the safe harbor provision.

b. The Defendant Failed to Satisfy the Safe Harbor Provision and Was Not a Prevailing Party

The Defendant is seeking sanctions under section 57.105 by way of a motion. Thus, in order to receive an award of his attorney's fees, the Defendant must satisfy the following three elements: (1) the motion must be filed at least twenty-one days after being served on Plaintiff; (2) the Defendant must be the prevailing party (*i.e.*,

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[20] The word "claim" typically describes a "cause of action." *Cf. Olympia Mortgage Corp. v. Pugh*, 774 So. 2d 863, 866 (Fla. Dist. Ct. App. 2000) (defining the word "claim" as used in Rule 1.420(a) of the Florida Rules of Civil Procedure); *Edmondson v. Green*, 755 So. 2d 701, 704 (Fla. Dist. Ct. App. 1999) (same); BLACK'S LAW DICTIONARY 240 (7th ed. 1999) (defining the word "claim" to mean "[a]n interest or remedy recognized at law; the means by which a person can obtain a privilege, possession, or enjoyment of a right or thing; CAUSE OF ACTION . . . .").

he prevailed on the significant issues tried before the court); and (3) Plaintiff must have raised a complete lack of a justiciable issue of law or fact. *See* FLA. STAT. § 57.105; *Nu-Cape*, 169 F.R.D. at 688.

It is undisputed that the Defendant never served the motion on Plaintiff twenty-one days prior to filing it with the Court. (DE 94 at 8–9). Because he failed to satisfy the safe harbor provision, Defendant's motion should be denied on its face.

The Defendant has also failed to satisfy the second element. As set forth above, the Defendant did not prevail on the significant issues litigated in the case. *See supra* Part II.A.1.c. This case was dismissed for lack of subject matter jurisdiction and, consequently, the Defendant was not granted any relief on the merits. *See Laborers*, 827 F.2d at 1458; *Nu-Cape*, 169 F.R.D. at 688.

c. The Record Fails to Demonstrate that Plaintiff's Lawsuit Was Frivolous at its Inception

Assuming *arguendo* that the Defendant satisfied the first two elements, the undersigned cannot conclude that Plaintiff's lawsuit was frivolous at its inception. In *Langford v. Ferrera*, 823 So. 2d 795 (Fla. Dist. Ct. App. 2001), the First District Court of Appeal summarized Florida law with respect to the third element as follows:

> As a prerequisite to an award of attorney's fees pursuant to section 57.105, the trial court must find a complete absence of a justiciable issue of law or fact raised by the losing party. The suit must be so clearly devoid of merit both on the facts and law as to be completely untenable. Even if a portion of the complaint is frivolous,

> an award of attorney's fees is not appropriate so long as the complaint alleges some justiciable issues. **Furthermore, dismissal of a suit does not necessarily justify an attorney's fee award if the suit can be considered to have been non-frivolous at its inception. If a suit can pass muster at the time it is initially presented, subsequent developments that render the claim without justiciable merit in law or fact should not subject the losing party to attorney's fees.**

Id. at 796–97 (citations omitted) (emphasis added); *accord Connelly v. Old Bridge Vill. Co-Op, Inc.*, 915 So. 2d 652, 656 (Fla. Dist. Ct. App. 2005); *Murphy v. WISU Props., Ltd.*, 895 So. 2d 1088, 1093–94 (Fla. Dist. Ct. App. 2004). A review of the entire record in this case, including all of the pleadings and evidence submitted by the parties (*e.g.*, DE 88–89, 94–99, 103), fails to demonstrate that Plaintiff knowingly advanced a frivolous position or pursued claims based on a complete absence of a justiciable issue of law or fact in order to justify sanctions under section 57.105 either by way of motion or on the Court's initiative.

First, the Verified Complaint alleged justiciable issues notwithstanding the fact that the case was ultimately dismissed for lack of subject matter jurisdiction. Indeed, the Plaintiff was initially successful in obtaining injunctive relieve in the form of a temporary restraining order and the parties continue to litigate their dispute before the District Court. *See Steven A. Silvers v. Google, Inc.*, Case No. 05-80393-Civ -RYSKAMP (S.D. Fla.).

Second, paragraph 17 of the Settlement Agreement reserved "exclusive continuing" jurisdiction in the United States District Court for the Souther District of Florida. (DE 4 ¶ 17, at 5). This fact alone appears to negate any intentional or willful misconduct by Plaintiff or Plaintiff's attorneys.

Third, the undersigned finds the declarations submitted by Plaintiff (explaining the steps taken to investigate the citizenship of each member of the limited liability company) to be credible. Moreover, Defendant failed to submit substantial competent evidence that would allow the undersigned to conclude otherwise.

Accordingly, the undersigned **RECOMMENDS** that Defendant's Verified Motion for Attorneys' Fees and Expenses, to the extent it requests an award of attorney's fees under section 57.105(1) of the Florida Statutes, be **DENIED**. This Recommendation is limited to Defendant's entitlement to an award of attorney's fees.

3. Bill of Costs Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure

In addition to the Verified Motion for Attorneys' Fees and Expenses, the Defendant has also filed a Bill of Costs under Rule 54(d) of the Federal Rules of Civil Procedure. (DE 82). Unfortunately, the Defendant fails to specify with precision whether he is merely submitting the Bill of Costs as an exhibit to his motion for attorney's fees and expenses, or whether he is submitting it as a separate application to the Court for an order directing the Clerk of Court to tax costs in his favor,

including attorney's fees. Out of an abundance of caution, and in light of the recommendations above, the undersigned assumes the latter.

The taxation of costs is a concept that finds its roots in common law and descends from the English legal system. *See generally* 10 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2665 (3d ed. 1998) (providing a brief historical background). Today, a federal court's authority to assess costs against a party can be found in either the United States Code or the rules of procedure. *See, e.g.*, 28 U.S.C. § 1332(b) (2006); *id.* §§ 1911–29; *see also* FED. R. CIV. P. 11(c)(2), 30(d) & (g), 37(a) & (c)–(d), 41(d), 45(c), 53(a), 54(d), 56(g), 68 and 71A(*l*). The facts and circumstances of each case dictate the procedural mechanism in which a party may seek an award of costs.

Where the underlying claim is dismissed for want of jurisdiction, as in this case, the award of costs is governed by 28 U.S.C. § 1919. Section 1919 states in relevant part:

> Whenever any action or suit is dismissed in any district court . . . for want of jurisdiction, such court **may** order the payment of just costs.

28 U.S.C. § 1919 (emphasis added). Thus, "[u]nlike Rule 54(d), § 1919 is permissive, allows the district court to award 'just costs,' and does not turn on which party is the 'prevailing party.'" *Miles v. State of California*, 320 F.3d 986, 988 n.2 (9th Cir. 2003). Finally, the taxation of costs rests in the sound judicial discretion of the

district court and is reviewed for an abuse of discretion. *See Wilkinson v. D.M. Weatherly Co.*, 655 F.2d 47, 48 (5th Cir. Unit A 1981).

Defendant argues that he is entitled to recover costs in the total amount of $16,478.57, including $357.40 in statutory costs and $16,121.17 in non-statutory costs ($357.40 + $16,121.17 = $16,478.57). However, Defendant fails to explain why such costs are "just" under the facts and circumstances of this case.

After a careful review of the entire record and applicable law, the undersigned finds that justice is served by the denial of costs. To the extent that Defendant's application for costs seeks an award of his attorney's fees as taxable costs, such request should also be denied. The law is clear: absent a showing of extraordinary circumstances, the term "just costs" under § 1919 does not include attorney's fees. *See, e.g.*, *Wilkinson*, 655 F.2d at 48–49 (vacating award of attorney's fees under § 1919 where the record failed to demonstrate that the plaintiff acted in bad faith, concluding that the facts did not "show any deliberate or intentional misuse of federal jurisdiction"); *Barron's Educ. Series, Inc. v. Hiltzik, N.S.*, 987 F. Supp. 224, 225–26 (E.D.N.Y. 1997) (refusing to award attorney's fees under § 1919 where there was no indication of fraud or trickery practiced upon the court); *Hylte Bruks Aktiebolag v. Babcock & Wilcox Co.*, 305 F. Supp. 803, 808–10 (S.D.N.Y. 1969) (refusing to award attorney's fees as "just costs" where, "near the outset, one of the two closely-related

plaintiffs . . . noticed and acknowledged its own lack of jurisdiction" and there was no indication of fraud or trickery practiced upon the court). The facts in this case simply do not show any deliberate or intentional misuse of federal jurisdiction.

Accordingly, the undersigned **RECOMMENDS** that Defendant's Notice of Filing Bill of Costs, to the extent it requests an order directing the Clerk of Court to tax costs in Defendant's favor pursuant to 28 U.S.C. § 1919, be **DENIED**. This Recommendation is limited to Defendant's entitlement to an award of his costs.

B. Rule 11 Sanctions Are Not Justified under the Facts and Circumstances of this Case

In a last-ditch attempt to hold Plaintiff accountable for conduct which he deems sanctionable, Defendant suggests that this Court, on its own initiative, should impose Rule 11 sanctions against Plaintiff in an amount that it deems appropriate under the circumstances. (DE 83 at 11–13). The Defendant is not seeking Rule 11 sanctions by way of motion. Therefore, the safe harbor provision does not apply.[21]

Rule 11 sanctions can be initiated either by motion or on the court's own initiative. *See* FED. R. CIV. P. 11(c)(1). If a court decides to impose sanctions on its own initiative, it must first issue a "show cause" order to provide notice and an

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[21] *Cf.* FED. R. CIV. P. 11(c)(1)(A) (explaining that, if a party chooses to move for Rule 11 sanctions, such motion shall be served, but not filed, unless "within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected"). To the extent Defendant is seeking Rule 11 sanctions by way of motion, the undersigned recommends that Defendants motion be denied for failure to satisfy the safe harbor provision.

opportunity to be heard. *See, e.g.*, *Kaplan v. DaimlerChrysler, A.G.*, 331 F.3d 1251, 1255 (11th Cir. 2003). Moreover, the initiating court must employ a higher standard than in the case of party-initiated sanctions. *See id.* at 1255–56. As Plaintiff points out, a party must engage in conduct "akin to contempt" before a court can impose Rule 11 sanctions on its own initiative. *See id.*

Plaintiff argues that "[t]his situation does not even approach satisfying the heightened standard of misconduct 'akin to contempt' required for imposition of sanctions on the Court's own initiative." (DE 88 at 16). The undersigned adopts the previous discussion on Defendant's motion for sanctions under section 57.105(1) of the Florida Statutes. *See supra* Part II.A.2.c. Accordingly, the undersigned **RECOMMENDS** that Defendant's Verified Motion for Attorneys' Fees and Expenses, to the extent it requests the Court to impose Rule 11 sanctions against Plaintiff on its own initiative, be **DENIED**.

III. RECOMMENDATION TO THE DISTRICT COURT

In summary, the undersigned **RECOMMENDS** that Defendant's Bill of Costs (DE 82) be **DENIED** and Defendant's Verified Motion for Attorney's Fees and Expenses, and Rule 11 Sanctions (DE 83) be **DENIED**. This Report and Recommendation is limited to Defendant's entitlement to an award of his reasonable expenses, including attorney's fees and costs.

NOTICE OF RIGHT TO OBJECT

A party shall serve and file written objections, if any, to this Report and Recommendation with the Honorable Daniel T. K. Hurley, United States District Judge for the Southern District of Florida, within ten (10) days of being served with a copy of this Report and Recommendation. *See* 28 U.S.C. § 636(b)(1)(C); *United States v. Warren*, 687 F.2d 347, 348 (11th Cir. 1982). Failure to timely file written objections shall bar the parties from attacking on appeal the factual findings contained herein. *See LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1988); *RTC v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993).

DONE AND SUBMITTED in Chambers this 17 day of July, 2006, at West Palm Beach in the Southern District of Florida.

JAMES M. HOPKINS
UNITED STATES MAGISTRATE JUDGE

Copies to:

The Hon. Daniel T. K. Hurley, United States District Judge, United States District Court for the Southern District of Florida
Kevin C. Kaplan, Esq. (counsel for Plaintiff)
Adam T. Rabin, Esq. (counsel for Defendant)
Kenneth R. Hartmann, Esq. (counsel for Defendant)