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The Honorable Karen L. Strombom

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KEN ARONSON,

Plaintiff,

v.

DOG EAT DOG FILMS, INC.,

Defendant.

) No. 3:10-CV-05293-KLS
)

) DEFENDANT'S SPECIAL
) MOTION TO STRIKE

) PLAINTIFF'S CLAIMS OF
) MISAPPROPRIATION OF
) LIKENESS AND INVASION OF
) PRIVACY

) **NOTE ON MOTION**
) **CALENDAR: JULY 9, 2010**

) **ORAL ARGUMENT**
) **REQUESTED**
)

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DEFENDANT'S SPECIAL MOTION TO STRIKE

(3:10-cv-05293 KLS) — iii

DWT 14813567v3 0092022-000001

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1 I. OVERVIEW OF ARGUMENT

2 Plaintiff's state law claims for invasion of privacy and misappropriation of likeness
3 against Defendant Dog Eat Dog Films, Inc.¹, arise from Defendant's actions in furtherance
4 of its constitutional right of free speech in connection with an issue of public concern.
5 Specifically, the claims arise from Defendant's production and the subsequent distribution
6 and display of a documentary film about the shortcomings of the American healthcare
7 system. As such, Plaintiff's state law claims are subject to a special motion to strike under
8 the new Washington Act Limiting Strategic Lawsuits Against Public Participation
9 ("Washington's Anti-SLAPP Act").²

10 Consequently, the burden shifts to Plaintiff to "establish by clear and convincing
11 evidence a probability of prevailing on the claim," a burden Plaintiff cannot meet. Wash.
12 Anti-SLAPP Act § 2(4)(b). For the reasons set forth below, Defendant respectfully
13 requests the Court grant this motion,³ strike Plaintiff's state law claims, and award
14 Defendant its reasonable attorneys' fees and costs incurred in defending these meritless
15 claims, as well as the statutorily prescribed amount of \$10,000. Wash. Anti-SLAPP Act
16 § 2(6)(a).

17 _____
18 ¹ Dog Eat Dog Films, Inc., a loan-out company owned by Michael Moore and his wife
19 Kathleen Glynn, is incorrectly designated as the defendant in this case. The company that
20 produced *Sicko* is Goldflat Productions, LLC (hereinafter "Goldflat" or "Defendant"),
21 owned by Michael Moore.

22 ² Washington's Anti-SLAPP Act was effective June 10, 2010, adding sections to
23 RCW 4.24. Because citations to the statute were not available as of the filing of this
motion, citations herein refer to the new sections of the statute as numbered in Senate Bill
6395. An engrossed copy of Senate Bill 6395 is attached as Exhibit A, and is also
available at <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Session%20Law%202010/6395-S.SL.pdf>.

³ Defendant respectfully requests the Court alternatively consider this Motion to Strike as a
Motion for Judgment on the Pleadings under Fed. R. Civ. P. 12(c), because, on their face,
the state law allegations asserted against *Sicko* fail to state a claim.

1 correct copy of the Standard Materials Release is attached as Exhibit B to the Declaration
2 of Eric Turnbow. Mr. Turnbow subsequently sent an email to Christine Fall on
3 October 27, 2006, describing the specific materials he had granted Goldflat permission to
4 use by signing the Standard Materials Release. Turnbow Decl. ¶ 2. A true and correct
5 copy of that email is attached as Exhibit C to the Declaration of Eric Turnbow.

6 Just over a minute of footage from the video Mr. Turnbow released to Goldflat
7 appears in *Sicko*. *Sicko*, Ex. D to Answer, at 00:52:57-53:09, 00:53:14-00:54:11. *Sicko*
8 shows Mr. Turnbow injuring his shoulder while attempting to walk across London's
9 Abbey Road on his hands. *Sicko*, Ex. D to Answer, at 00:53:20-53:50. Fifty-two of those
10 seconds show Mr. Turnbow's injury and treatment of the injury, while the remaining
11 nineteen seconds provide context for Mr. Turnbow's visit to the U.K. *Sicko*, Ex. D to
12 Answer, at 00:52:57-53:09, 00:53:14-19, 00:53:20-:54:11. Within the seventy-one seconds
13 of Mr. Turnbow's footage used in *Sicko*, sixteen seconds incidentally contain Plaintiff's
14 voice and photograph in three separate clips. *Sicko*, Ex. D to Answer, at 00:53:00-53:03,
15 00:53:24-28, 00:53:37, 00:53:47-49, 00:54:04-06. For four seconds in *Sicko* Plaintiff is
16 shown singing a song together with Mr. Turnbow. Ex. D. to Answer, at 00:53:00-53:03.
17 Plaintiff's voice is heard in *Sicko* without his photograph for a total of twelve seconds in
18 two clips, both of which clips record conversations Plaintiff held in public. *Sicko* at
19 00:53:24-28, 00:53:37, 00:53:47-49, 00:54:04-06. Plaintiff's voice is heard in *Sicko* saying
20 only the following:

- 21 • "Oh England, here we go." (*Sicko*, Ex. D to Answer, at 00:53:00-03);
- 22 • "Here's Eric, about to walk on his hands across Abbey Road." (*Sicko*,
23 Ex. D to Answer, at 00:53:24-28);

- 1 • “Try it again!” (*Sicko*, Ex. D to Answer, at 00:53:37);
- 2 • “Are you in pain?” (*Sicko*, Ex. D to Answer, at 00:53:47-49);
- 3 • “You’re all slung up, as Elvis would say.” (*Sicko*, Ex. D to Answer, at
- 4 00:54:04-06).

5 III. ARGUMENT

6 A. Plaintiff’s State Law Claims Arise From Conduct Protected Under

7 Washington’s Anti-SLAPP Law.

8 The Washington legislature has provided a remedy to defendants, like Goldflat,
9 who face meritless claims that target their conduct in connection with the exercise of free
10 speech protected by the First Amendment. Under Washington’s Anti-SLAPP Act,⁵ the
11 moving party has the initial burden of showing by a preponderance of the evidence that the
12 claim is based on an action involving public participation and petition. Wash. Anti-SLAPP
13 Act § 2(4)(b). Defendant’s film fits squarely within the statute’s purview, as shown below.
14 Once the moving party meets its initial burden, “the burden shifts to the responding party
15 to establish by clear and convincing evidence a probability of prevailing on the claim.”
16 Wash. Anti-SLAPP Act § 2(4)(b). Plaintiff is unable to meet this high burden.

17 Given the recent enactment of Washington’s Anti-SLAPP Act, there is no case law
18 explicating the statute. However, the statute states on its face that “This act shall be
19 applied and construed liberally to effectuate its general purpose of protecting participants
20 in public controversies from an abusive use of the courts.” Wash. Anti-SLAPP Act § 3.

21 ⁵ Washington’s Anti-SLAPP Act applies in this case because the statute provides for
22 additional substantive and procedural remedies that are not in “direct collision” with the
23 Federal Rules of Civil Procedure. *See United States ex rel. Newsham v. Lockheed Missiles
& Space Co., Inc.*, 190 F.3d 963, 970-73 (9th Cir. 1999) (allowing action under
California’s Anti-SLAPP statute’s provisions for a motion to strike and an award of
attorneys’ fees and costs).

1 The well-developed case law on California’s anti-SLAPP statute, Cal. Civ. Pro. § 425.16,
2 is instructive given the two statutes’ similarity. California courts interpreting Section
3 425.16 have uniformly held that the anti-SLAPP statute applies to claims such as
4 misappropriation of likeness and invasion of privacy that arise from the content of a
5 program about a matter of public interest. *See, e.g., Taus v. Loftus*, 40 Cal. 4th 683, 712
6 (Cal. 2007) (invasion of privacy); *Stewart v. Rolling Stone*, 181 Cal. App. 4th 664, 679
7 (Cal. Ct. App. 2010) (misappropriation of likeness).

8 **1. *Sicko* is an exercise of Defendant’s constitutional right of free
9 speech in connection with an issue of public concern.**

10 As with the entire Washington Anti-SLAPP Act, whether *Sicko* constitutes “lawful
11 conduct in furtherance of the exercise of the constitutional right of free speech in
12 connection with an issue of public concern” is to be applied and construed liberally to
13 “effectuate its general purpose of protecting participants in public controversies from an
14 abusive use of the courts.” Wash. Anti-SLAPP Act §§ 2(2), 3. In applying California’s
15 Anti-SLAPP statute—which like Washington’s Anti-SLAPP Act includes an express
16 provision that it be construed broadly—a California court has held that an “issue of public
17 interest” is “*any issue in which the public is interested.*” *Nygaard, Inc. v. Uusi-Kerttula*,
18 159 Cal. App. 4th 1027, 1042 (Cal. Ct. App. 2008). “In other words, the issue need not be
19 ‘significant’ to be protected by the anti-SLAPP statute – *it is enough that it is one in which*
20 *the public takes an interest.*” *Id.* (emphasis added).

21 As such, the type of communication that has been found to qualify as “speech”
22 under an Anti-SLAPP statute is expansive. Federal courts have applied California’s Anti-
23 SLAPP statute to a commentary about a book (*Thomas v. Los Angeles Times*, 189 F. Supp.
2d 1005, 1010 (C.D. Cal. 2002), *aff’d*, 45 Fed. Appx. 801 (9th Cir. 2002)); an email

1 message (*Troy Group v. Tilson*, 364 F. Supp. 2d 1149, 1155 (C.D. Cal. 2005)); and even a
2 greeting card (*Hilton v. Hallmark Cards*, 2010 U.S. App. LEXIS 6104, *15-16 (9th Cir.
3 2010)).

4 Specific to this case, courts have previously found films like *Sicko* to be
5 communications upon which it is appropriate to base an Anti-SLAPP motion to strike.
6 See, e.g., *Dyer v. Childress*, 147 Cal. App. 4th 1273, 1279 (Cal. App. 2007) (film *Reality*
7 *Bites*, which included the issues facing Generation X at the start of the 1990s); *Doe v. One*
8 *America Prods.*, Los Angeles County Superior Court Case No. SC091723 (2007) (satirical
9 film *Borat: Cultural Learnings of America for Make Benefit Glorious Nation of*
10 *Kazakhstan*). This comports with the United States Supreme Court's observation that

11 It cannot be doubted that motion pictures are a significant
12 medium for the communication of ideas. They may affect
13 public attitudes and behavior in a variety of ways, ranging
14 from direct espousal of a political or social doctrine to the
15 subtle shaping of thought which characterizes all artistic
16 expression. The importance of motion pictures as an organ
17 of public opinion is not lessened by the fact that they are
18 designed to entertain as well as to inform.

19 *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

20 It cannot be seriously argued that *Sicko* does not address issues of public concern.
21 *Sicko* is a feature-length documentary film examining the healthcare crisis in America, an
22 issue at the forefront of American social policy. Among other issues, *Sicko* addresses
23 patients aggrieved by the healthcare coverage they received or were denied by their health
insurance companies, former health insurance administrators who disagree with how health
insurance is administrated, and statistical information about politicians involved with the
health care lobby. Healthcare in the United States, and information about health insurance

1 in particular, is of great interest to the American public at large, and clearly qualifies as an
2 issue of public concern within the meaning of Washington’s Anti-SLAPP Act.

3 **B. Plaintiff Cannot Show a Probability of Prevailing on His Claims By**
4 **Clear and Convincing Evidence.**

5 Where, as here, the moving party’s conduct falls within the scope of Washington’s
6 Anti-SLAPP Act, the burden shifts to the plaintiff to establish by clear and convincing
7 evidence a probability of prevailing on his claims. Wash. Anti-SLAPP Act § 2(4)(b).
8 Under Washington case law, the clear and convincing standard denotes a quantum of proof
9 greater than “a mere preponderance of the evidence” but less than “beyond a reasonable
10 doubt.” *Bland v. Mentor*, 63 Wn.2d 150, 154 (Wash. 1963) (assessing the “clear, cogent
11 and convincing” standard in a civil case). This standard has been equated to being “highly
12 probable.” *In re Sego*, 82 Wn.2d 736, 739 (Wash. 1973). Plaintiff cannot meet this
13 burden.

14 **1. Plaintiff’s state law claims are preempted by the Copyright Act.**

15 Section 301 of the Copyright Act preempts legal or equitable rights granted by state
16 common law or statute that are equivalent to copyright. 17 U.S.C. § 301. Congress
17 explained “the intention of section 301 is to preempt and abolish any rights under the
18 common law or statutes of a State that are equivalent to copyright and that extend to
19 works, within the scope of the Federal copyright law.” H. R. Rep. No. 94-1476, at 130
20 (1976). The Ninth Circuit applies a two-part test to determine whether a state law claim is
21 preempted by Section 301. *Laws v. Sony Music Entm’t, Inc.*, 448 F.3d 1134, 1137-38 (9th
22 Cir. 2006). First, the court determines whether the “subject matter” of a state law claim
23 falls within the subject matter of copyright as described in Sections 102 and 103 of the
Copyright Act. *Id.* Second, if it does, the court determines whether the rights asserted

1 under state law are equivalent to the rights contained in Section 106 of the Copyright Act.

2 *Id.*

3 When a state law claim arises entirely from the use of a copyrighted work, the
4 Ninth Circuit has found Section 301 to preempt it. *See id.* at 1139-41 (finding “[a]lthough
5 California law recognizes an assertable interest in the publicity associated with one’s
6 voice, we think it clear that federal copyright law preempts a claim alleging
7 misappropriation of one’s voice when the entirety of the allegedly misappropriated vocal
8 performance is contained within a copyrighted medium”); accord *Daboub v. Gibbons*, 42
9 F.3d 285, 289-90 (5th Cir. Tex. 1995) (Plaintiffs’ state law claims were preempted where
10 the claims all stemmed from the wrongful copying, distribution, and performance of the
11 lyrics of a copyrighted song).⁶ That is precisely the case here: Plaintiff’s state law claims
12 all stem from Defendant’s use of a video and song in which Plaintiff claims the copyright
13 (or co-ownership of the copyright), with no showing that his likeness, name, voice or
14 image were misappropriated in any way separate from the use of the copyrighted work. As
15 such, Plaintiff’s state law claims for misappropriation and invasion of privacy are properly
16 preempted by Section 301.

17
18 ⁶ In cases where Section 301 has not preempted state law claims, typically the underlying
19 claim did not arise directly from defendant’s use of copyrighted material to which the
20 plaintiff claimed a copyright. In *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir.
21 2001), plaintiffs’ state law claims were not preempted where the defendant published a
22 copyrighted work with the plaintiffs’ likeness, as the court found it was the use of
23 plaintiffs’ likenesses and their names pictured in a published photograph, rather than the
publication of the photograph itself, as a creative work of authorship, that was the basis for
the claims. *Id.* at 1003. Moreover, in *Downing*, the Ninth Circuit distinguished the
situation where plaintiffs’ claims were based on the use of their images in a dramatic work
fixed in a tangible medium of expression, much as Plaintiff claims here, from a situation
where a claim was based in the use of a plaintiff’s name and/or likeness, each of which is
not copyrightable. *Id.* at 1005 n.4.

1 **2. Plaintiff's state law claims are barred by the applicable statutes**
2 **of limitations.**

3 “Under Washington law, a claim for invasion of privacy is subject to a two-year
4 statute of limitations.” *Lee v. AFT-Yakima*, 2010 WL 2243992, *3 (E.D. Wash. 2010). The
5 statute of limitations begins to run from the time of “publicity,” which Washington courts
6 have found means “that the matter is made public, by communicating it to the public at
7 large, or to so many persons that the matter must be regarded as substantially certain to
8 become one of public knowledge.” *Jane Doe I v. Dep't of Soc. & Health Servs.*, 2007
9 Wash. App. LEXIS 1188, *27 (Wash. Ct. App. 2007) (unpublished opinion) (quoting the
10 Restatement (Second) of Torts § 652D cmt. a, at 384). The Complaint asserts that *Sicko*
11 had its debut in the United States in June 2007, more than two years before Plaintiff filed
12 the Complaint on April 27, 2010. As such, his invasion of privacy claim is barred by the
13 statute of limitations. Plaintiff's misappropriation claim is also properly subject to a two-
14 year statute of limitations, as he alleges reputational harm akin to the harm redressed by
15 defamation, rather than harm to any business expectancies or property interests. *See, e.g.*,
16 *Eastwood v. Cascade Broad.*, 106 Wn.2d 466, 469-74 (Wash. 1986).

17 **3. Plaintiff's misappropriation claim is barred by the First**
18 **Amendment and RCW 63.60.070.**

19 Plaintiff's claim for misappropriation must be stricken because any use of
20 Plaintiff's photograph and voice in *Sicko* was in connection with a First Amendment-
21 protected documentary film that shares news and information with the public. It is well
22 established that the First Amendment protects against misappropriation claims arising from
23 disseminating information to the public. *See, e.g., New Kids on the Block v. News America*
Pub'g, Inc., 745 F. Supp. 1540, 1546-47 (C.D. Cal. 1990), *aff'd*, 971 F.2d 302 (9th Cir.

1 1992) (the First Amendment grants the media “immun[ity]” from misappropriation claims
2 where an individual’s likeness is used in connection with an “informative or cultural”
3 purpose). The First Amendment sets a high bar for a misappropriation claim based on the
4 use of a plaintiff’s name or likeness in an expressive work such as a documentary film.
5 *See, e.g., Daly v. Viacom, Inc.*, 238 F. Supp. 2d 1118, 1123 (N.D. Cal. 2002) (in dismissing
6 Plaintiff’s misappropriation claims arising from Plaintiff’s appearance in a television
7 program, “[w]hether the publication involved was factual and biographical or fictional,
8 privacy rights have not been held to outweigh the value of free expression”). Additionally,
9 courts have previously found documentary films to be protected speech under the First
10 Amendment and disallowed misappropriation claims. *See, e.g., Dora v. Frontline Video,*
11 *Inc.*, 15 Cal App. 4th 536, 545-46 (Cal. App. 1993) (Plaintiff’s misappropriation claims
12 from the use of his image and likeness in a documentary film about surfing were barred by
13 California’s right to publicity under the statute’s exceptions for use of a person’s image in
14 connection with public affairs, an exception similar to Washington’s public interest
15 exception).

16 Plaintiff’s claim for misappropriation must be independently stricken because
17 RCW 63.60.070(1) provides an express exemption for uses of an individual’s photograph
18 or voice “in connection with matters of cultural, . . . political, . . . newsworthy or public
19 interests, including, without limitation, comment [and] criticism.” Likewise, RCW
20 63.60.070(2) exempts the use of an individual’s photograph or voice in “film . . . when the
21 use does not inaccurately claim or state an endorsement by the individual.” Finally, RCW
22 63.60.070(6) states that chapter RCW 63.60.050 does not apply to the use of an
23 individual’s voice that is “insignificant, de minimis, or incidental.” Here, Defendant’s use

1 of Plaintiff's voice and photograph in *Sicko* falls within all of the statutorily exempted uses
2 listed above for which consent is not required under RCW 63.60.050. *Sicko* is a
3 documentary film expressing important social commentary about America's healthcare
4 crisis, a topic very much of the public interest, with content that is newsworthy, political,
5 and cultural. Additionally, the sixteen-second use (in the aggregate) of Plaintiff's voice
6 and/or photograph constitutes a de minimis and incidental use. Plaintiff does not contend
7 that *Sicko* inaccurately claimed or stated his endorsement of *Sicko*. Consequently,
8 Plaintiff's misappropriation claim is barred by the First Amendment and RCW 63.60.070
9 and should be stricken.

10 **4. Plaintiff's invasion of privacy claim must fail because Plaintiff**
11 **cannot show any private facts disclosed by Defendant that would**
12 **be highly offensive to a reasonable person.**

13 Washington has adopted the standard of the Restatement (Second) of Torts § 652
14 for invasion of privacy. *Reid v. Pierce County*, 136 Wn.2d 195, 205 (Wash. 1998). The
15 tort requires that the defendant gave publicity to a matter concerning the private life of
16 another that would be highly offensive to a reasonable person, and which is not of
17 legitimate concern to the public. *Id.* In *Cowles Publ'g Co. v. State Patrol*, 109 Wn.2d 712
(Wash. 1988), the Court identified the nature of "private facts":

18 Every individual has some phases of his life and his
19 activities and some facts about himself that he does not
20 expose to the public eye, but keeps entirely to himself or at
21 most reveals only to his family or to close personal friends.
22 Sexual relations, for example, are normally entirely private
23 matters, as are family quarrels, many unpleasant or
disgraceful or humiliating illnesses, most intimate personal
letters, most details of a man's life in his home, and some of
his past history that he would rather forget.

Id. at 721 (quoting Restatement (Second) of Torts § 652D).

1 Plaintiff has shown neither that the facts disclosed in *Sicko* rise to the level of
2 “private facts” nor that their disclosure was “highly offensive to a reasonable person.”
3 There is nothing embarrassing or offensive about the sixteen seconds of clips used in *Sicko*
4 that contain Plaintiff’s voice and/or photograph, let alone anything that would be “highly
5 offensive to a reasonable person.” Moreover, as is apparent from watching *Sicko*,
6 Plaintiff’s voice or photograph was originally recorded in public. Additionally, Plaintiff
7 has testified under oath in his deposition in *Aronson v. Turnbow*, Thurston County
8 Superior Court, Cause No. 08-2-02542-7, that he viewed the underlying video from which
9 the clips at issue in *Sicko* were culled with other people present, negating any assertion the
10 facts shown in *Sicko* about him are “private.” Kvasnosky Decl. ¶ 2.

11 Regardless, the footage used in *Sicko* that contains Plaintiff’s voice and photograph
12 concerns facts of legitimate public concern, and as such their publication is privileged as
13 newsworthy. *Moloney v. Tribune Pub’g Co.*, 26 Wn. App. 357, 360-61 (Wash. 1980),
14 *overruled on other grounds by Bender v. City of Seattle*, 99 Wn.2d 582 (Wash. 1983). The
15 defense of newsworthiness is based in the First Amendment, and the Ninth Circuit has
16 stated it “was satisfied” that the newsworthiness defense “is one of constitutional
17 dimension delimiting the scope of the tort [invasion of privacy] and that the extent of the
18 privilege thus is controlled by federal rather than state law.” *Virgil v. Time, Inc.*, 527 F.2d
19 1122, 1129 (9th Cir. 1975). Here, the disclosed facts at issue are newsworthy as a matter
20 of law: Plaintiff’s photograph and voice are used as components of *Sicko*’s dissemination
21 of information about contemporary American healthcare and alternatives to that system,
22 which are issues of legitimate public concern.

1 (1) Grant this Special Motion to Strike Plaintiff's claims of misappropriation of
2 likeness and invasion of privacy;

3 (2) Award to Defendant under the Washington Anti-SLAPP Act § 2(6)(a)(i) the
4 reasonable attorneys' fees and costs that it has incurred in defending against these meritless
5 claims; and

6 (3) Award to Defendant under the Washington Anti-SLAPP Act § 2(6)(a)(ii)
7 the statutorily prescribed amount of ten thousand dollars.

8 DATED this 11th day of June, 2010.

9 By DAVIS WRIGHT TREMAINE LLP
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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of June, 2010, I caused to be filed electronically the above and foregoing document with the court, using the CM/ECF system, which will send email notification of such filing to the below addressees, and I served a true and correct copy of the following documents by the method indicated below and addressed as follows:

Attorneys for Plaintiff:

Thomas Brian Vertetis
Brian D. Doran
Pfau Cochran Vertetis Kosnoff PLLC
911 Pacific Avenue
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Tacoma, WA 98402

_____ U.S. Mail
_____ Hand Delivery
_____ Overnight Mail
_____ Facsimile
 X CM/ECF Notification via email
service to: tom@pcvklaw.com and
bryan@pcvklaw.com

Declared under penalty of perjury dated at Seattle, Washington this 11th day of June, 2010.

/s/ Noelle H. Kvasnosky
Noelle H. Kvasnosky

EXHIBIT A

CERTIFICATION OF ENROLLMENT

SUBSTITUTE SENATE BILL 6395

Chapter 118, Laws of 2010

61st Legislature
2010 Regular Session

PUBLIC PARTICIPATION LAWSUITS--SPECIAL MOTION TO STRIKE CLAIM

EFFECTIVE DATE: 06/10/10

Passed by the Senate February 16, 2010
YEAS 46 NAYS 0

BRAD OWEN

President of the Senate

Passed by the House February 28, 2010
YEAS 96 NAYS 0

FRANK CHOPP

Speaker of the House of Representatives

Approved March 18, 2010, 2:51 p.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SUBSTITUTE SENATE BILL 6395** as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

Secretary

FILED

March 18, 2010

**Secretary of State
State of Washington**

SUBSTITUTE SENATE BILL 6395

Passed Legislature - 2010 Regular Session

State of Washington 61st Legislature 2010 Regular Session

By Senate Judiciary (originally sponsored by Senators Kline, Kauffman, and Kohl-Welles)

READ FIRST TIME 01/25/10.

1 AN ACT Relating to lawsuits aimed at chilling the valid exercise of
2 the constitutional rights of speech and petition; adding a new section
3 to chapter 4.24 RCW; creating new sections; and prescribing penalties.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 NEW SECTION. **Sec. 1.** (1) The legislature finds and declares that:

6 (a) It is concerned about lawsuits brought primarily to chill the
7 valid exercise of the constitutional rights of freedom of speech and
8 petition for the redress of grievances;

9 (b) Such lawsuits, called "Strategic Lawsuits Against Public
10 Participation" or "SLAPPs," are typically dismissed as groundless or
11 unconstitutional, but often not before the defendants are put to great
12 expense, harassment, and interruption of their productive activities;

13 (c) The costs associated with defending such suits can deter
14 individuals and entities from fully exercising their constitutional
15 rights to petition the government and to speak out on public issues;

16 (d) It is in the public interest for citizens to participate in
17 matters of public concern and provide information to public entities
18 and other citizens on public issues that affect them without fear of
19 reprisal through abuse of the judicial process; and

1 (e) An expedited judicial review would avoid the potential for
2 abuse in these cases.

3 (2) The purposes of this act are to:

4 (a) Strike a balance between the rights of persons to file lawsuits
5 and to trial by jury and the rights of persons to participate in
6 matters of public concern;

7 (b) Establish an efficient, uniform, and comprehensive method for
8 speedy adjudication of strategic lawsuits against public participation;
9 and

10 (c) Provide for attorneys' fees, costs, and additional relief where
11 appropriate.

12 NEW SECTION. **Sec. 2.** A new section is added to chapter 4.24 RCW
13 to read as follows:

14 (1) As used in this section:

15 (a) "Claim" includes any lawsuit, cause of action, claim, cross-
16 claim, counterclaim, or other judicial pleading or filing requesting
17 relief;

18 (b) "Government" includes a branch, department, agency,
19 instrumentality, official, employee, agent, or other person acting
20 under color of law of the United States, a state, or subdivision of a
21 state or other public authority;

22 (c) "Moving party" means a person on whose behalf the motion
23 described in subsection (4) of this section is filed seeking dismissal
24 of a claim;

25 (d) "Other governmental proceeding authorized by law" means a
26 proceeding conducted by any board, commission, agency, or other entity
27 created by state, county, or local statute or rule, including any self-
28 regulatory organization that regulates persons involved in the
29 securities or futures business and that has been delegated authority by
30 a federal, state, or local government agency and is subject to
31 oversight by the delegating agency.

32 (e) "Person" means an individual, corporation, business trust,
33 estate, trust, partnership, limited liability company, association,
34 joint venture, or any other legal or commercial entity;

35 (f) "Responding party" means a person against whom the motion
36 described in subsection (4) of this section is filed.

1 (2) This section applies to any claim, however characterized, that
2 is based on an action involving public participation and petition. As
3 used in this section, an "action involving public participation and
4 petition" includes:

5 (a) Any oral statement made, or written statement or other document
6 submitted, in a legislative, executive, or judicial proceeding or other
7 governmental proceeding authorized by law;

8 (b) Any oral statement made, or written statement or other document
9 submitted, in connection with an issue under consideration or review by
10 a legislative, executive, or judicial proceeding or other governmental
11 proceeding authorized by law;

12 (c) Any oral statement made, or written statement or other document
13 submitted, that is reasonably likely to encourage or to enlist public
14 participation in an effort to effect consideration or review of an
15 issue in a legislative, executive, or judicial proceeding or other
16 governmental proceeding authorized by law;

17 (d) Any oral statement made, or written statement or other document
18 submitted, in a place open to the public or a public forum in
19 connection with an issue of public concern; or

20 (e) Any other lawful conduct in furtherance of the exercise of the
21 constitutional right of free speech in connection with an issue of
22 public concern, or in furtherance of the exercise of the constitutional
23 right of petition.

24 (3) This section does not apply to any action brought by the
25 attorney general, prosecuting attorney, or city attorney, acting as a
26 public prosecutor, to enforce laws aimed at public protection.

27 (4) (a) A party may bring a special motion to strike any claim that
28 is based on an action involving public participation and petition, as
29 defined in subsection (2) of this section.

30 (b) A moving party bringing a special motion to strike a claim
31 under this subsection has the initial burden of showing by a
32 preponderance of the evidence that the claim is based on an action
33 involving public participation and petition. If the moving party meets
34 this burden, the burden shifts to the responding party to establish by
35 clear and convincing evidence a probability of prevailing on the claim.
36 If the responding party meets this burden, the court shall deny the
37 motion.

1 (c) In making a determination under (b) of this subsection, the
2 court shall consider pleadings and supporting and opposing affidavits
3 stating the facts upon which the liability or defense is based.

4 (d) If the court determines that the responding party has
5 established a probability of prevailing on the claim:

6 (i) The fact that the determination has been made and the substance
7 of the determination may not be admitted into evidence at any later
8 stage of the case; and

9 (ii) The determination does not affect the burden of proof or
10 standard of proof that is applied in the underlying proceeding.

11 (e) The attorney general's office or any government body to which
12 the moving party's acts were directed may intervene to defend or
13 otherwise support the moving party.

14 (5) (a) The special motion to strike may be filed within sixty days
15 of the service of the most recent complaint or, in the court's
16 discretion, at any later time upon terms it deems proper. A hearing
17 shall be held on the motion not later than thirty days after the
18 service of the motion unless the docket conditions of the court require
19 a later hearing. Notwithstanding this subsection, the court is
20 directed to hold a hearing with all due speed and such hearings should
21 receive priority.

22 (b) The court shall render its decision as soon as possible but no
23 later than seven days after the hearing is held.

24 (c) All discovery and any pending hearings or motions in the action
25 shall be stayed upon the filing of a special motion to strike under
26 subsection (4) of this section. The stay of discovery shall remain in
27 effect until the entry of the order ruling on the motion.
28 Notwithstanding the stay imposed by this subsection, the court, on
29 motion and for good cause shown, may order that specified discovery or
30 other hearings or motions be conducted.

31 (d) Every party has a right of expedited appeal from a trial court
32 order on the special motion or from a trial court's failure to rule on
33 the motion in a timely fashion.

34 (6) (a) The court shall award to a moving party who prevails, in
35 part or in whole, on a special motion to strike made under subsection
36 (4) of this section, without regard to any limits under state law:

37 (i) Costs of litigation and any reasonable attorneys' fees incurred
38 in connection with each motion on which the moving party prevailed;

1 (ii) An amount of ten thousand dollars, not including the costs of
2 litigation and attorney fees; and

3 (iii) Such additional relief, including sanctions upon the
4 responding party and its attorneys or law firms, as the court
5 determines to be necessary to deter repetition of the conduct and
6 comparable conduct by others similarly situated.

7 (b) If the court finds that the special motion to strike is
8 frivolous or is solely intended to cause unnecessary delay, the court
9 shall award to a responding party who prevails, in part or in whole,
10 without regard to any limits under state law:

11 (i) Costs of litigation and any reasonable attorneys' fees incurred
12 in connection with each motion on which the responding party prevailed;

13 (ii) An amount of ten thousand dollars, not including the costs of
14 litigation and attorneys' fees; and

15 (iii) Such additional relief, including sanctions upon the moving
16 party and its attorneys or law firms, as the court determines to be
17 necessary to deter repetition of the conduct and comparable conduct by
18 others similarly situated.

19 (7) Nothing in this section limits or precludes any rights the
20 moving party may have under any other constitutional, statutory, case
21 or common law, or rule provisions.

22 NEW SECTION. **Sec. 3.** This act shall be applied and construed
23 liberally to effectuate its general purpose of protecting participants
24 in public controversies from an abusive use of the courts.

25 NEW SECTION. **Sec. 4.** This act may be cited as the Washington Act
26 Limiting Strategic Lawsuits Against Public Participation.

27 NEW SECTION. **Sec. 5.** If any provision of this act or its
28 application to any person or circumstance is held invalid, the
29 remainder of the act or the application of the provision to other
30 persons or circumstances is not affected.

Passed by the Senate February 16, 2010.

Passed by the House February 28, 2010.

Approved by the Governor March 18, 2010.

Filed in Office of Secretary of State March 18, 2010.