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 REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR ATTORNEYS' FEES AND COSTS UNDER RCW 4.24.525

I. INTRODUCTION

Plaintiff offers three unpersuasive arguments to oppose Defendant's Anti-SLAPP fee motion. Two of these—whether Defendant's counsel fraudulently misrepresented his honeymoon to opposing counsel (an odd allegation unsupported by evidence), and whether the new Anti-SLAPP Act applies retroactively—have no bearing on the matter at hand: namely, the Court's determination of this fee award. The third argument baldly asserts, also without evidentiary support, that Defendant has shown insufficient evidence to support the reasonableness of its fee. As explained below and in the declarations offered in support of this motion, Defendant seeks reimbursement only for fees incurred in

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connection with its motion to strike under the Anti-SLAPP Act.

Plaintiff is simply wrong when he contends that Defendant "impermissibly" seeks fees for research and briefing of the state law claims at issue on this motion (which Plaintiff attempts to characterize as "underlying claims"), when in fact the exposition of those state law claims was paramount to showing Plaintiff could not (and did not) meet his burden of establishing by clear and convincing evidence the likelihood of prevailing on those claims. Defendant's right to relief under the Anti-SLAPP Law, in fact, turned on the patent invalidity of those claims that Plaintiff now stylizes as "unrelated."

II. ARGUMENT

Plaintiff now contends—for the first time—that the Anti-SLAPP Act seeks to impose unfair retroactive penalties. Setting aside that this is an argument that goes to the applicability of the Anti-SLAPP Act (the subject of the motion to strike on which Defendant has already prevailed[1]), and not to the amount of the attorneys' fees to be awarded by virtue of this Court's order on that motion (the subject of the current motion), Plaintiff highlights this as a major legal argument. But Plaintiff fails to mention that Judge Settle of this Court has already ruled to the contrary, holding that the Anti-SLAPP Act is remedial in nature and does apply retroactively. *Nguyen v. County of Clark*, 2010 U.S. Dist LEXIS 86722, *8 (W.D. Wash. 2010). This Court's ruling is fully consistent with *Nguyen*.

Furthermore, there is no basis to Plaintiff's argument that Defendant's fee request is unreasonable, or that Defendant's counsel devoted too much time to the Anti-SLAPP motion. Defendant seeks reimbursement **only** for fees incurred in connection with its

[1] In effect, this novel retroactivity argument amounts to Plaintiff's second motion for reconsideration of the Court's August 31, 2010 order.

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motion, as supported by two declarations and 25 pages of billing statements detailing the time billed—to the tenth of an hour—for each task for which reimbursement is sought.

Plaintiff's seems to believe the Anti-SLAPP Act does not reimburse a defendant for fees relating to work on the claims which are the subject of the motion to strike, attempting to characterize such claims as "unrelated", and as claims which Defendant "would have had to research and brief regardless of any motion to strike." Opp'n at 3. Plaintiff's argument misses the rationale behind the Anti-SLAPP Act: to provide a procedural vehicle for the early and prompt dismissal of meritless claims. If a defendant prevails on an early motion to strike (as here), it can avoid incurring the additional costs of research or discovery on, or briefing of, the dismissed claims. Analyzing the underlying claims of this lawsuit showed Plaintiff could not (and indeed, this Court found, as a matter of law, he did not) meet the requisite burden under the Anti-SLAPP Act to defeat a motion to strike. RCW 4.24.535(4)(a). Plaintiff's request to stay this fee award contravenes the purpose of the Anti-SLAPP Act's fee-shifting provision, which is to provide timely, full relief to defendants forced to spend resources and time in defense of meritless SLAPP claims.

Likewise, the Court should give no weight to Plaintiff's representations that the fees sought are greater than the hours expended by Plaintiff's counsel[2], and that Plaintiff is not in a financial position to pay the fees and fines that the Anti-SLAPP Act mandates. Opp'n at 10-11. Defendant was forced to incur these fees to defend itself against the meritless claims that Plaintiff brought against it, and the Anti-SLAPP Act is designed to

[2] Indeed, this discrepancy is not surprising if, as the untimely arguments Plaintiff raised in his motion to reconsider and in his opposition to this motion suggest his lawyers undertook substantive research on the Anti-SLAPP Act only after this Court's August 31, 2010 decision. But that delay does not justify Plaintiff's argument that Defendant therefore should not be wholly uncompensated simply because Defendant's research was both timely and appropriate.

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promptly compensate the prevailing party for its actual expenses while deterring plaintiffs with trumped up claims from prospecting for deep pockets. Mr. Gorder's and Mr. Johnson's declarations show the reasonableness of Defendant's fees in light of Defendant's counsel's experience and the Seattle marketplace. While the activities Defendant's counsel undertook in relation to this motion, if billed at Defendant's counsel's standard hourly rates rather than at the agreed upon blended rate, would have cost Defendant $1521 less, this fact does not make the blended rate inherently unreasonable.

Defendant merely requests that this Court order the reimbursement of the actual reasonable costs that Defendant incurred, as detailed in the actual billing statements Defendant received, to fulfill the Anti-SLAPP Act's mandate in RCW 4.24.525(6)(a)(i). In the alternative, Defendant requests this Court calculate its fee award using a lodestar of its attorneys' customary billing rates, for the number of hours devoted to this motion, for a total attorneys' fee award of $45,444. Moreover, Plaintiff cannot—and does not—dispute that courts routinely grant anti-SLAPP fee awards far in excess of what Defendant seeks, and have approved reimbursement for significantly more hours of attorney time (and higher hourly rates) than Defendant seeks in this motion. *See, e.g., Metabolife Int'l v. Wornick*, 213 F. Supp. 2d 1220, 1228 (S.D. Cal. 2002) (awarding defendants $318,687.99).

Finally, Plaintiff's conspiracy theory that Defendant's counsel somehow "obtained a continuance [on the answer deadline] through fraud" in a "calculated" attempt to "abus[e] the legislative and judicial process"—and that this purported misrepresentation somehow harmed Plaintiff in unknown ways—is entirely without any factual basis. Opp'n at 2. This is a smoke-screen aimed at obfuscating the matter at hand—the reasonableness of Defendant's request for the attorneys' fees to which it is entitled—with irrelevant and

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baseless allegations.

Defendant's lead counsel, Mr. Johnson, was in fact married on May 22, 2010 and left the country on May 23, 2010 for an extended honeymoon in New Zealand. Johnson Decl. in Support of Reply in Support of Def.'s Mot. for Att'ys' Fees ("Second Johnson Decl.") at ¶2. Mr. Johnson and his wife then went to New York beginning on June 2 (because she had to return to her job there). *Id.* at ¶2. He did not return to the office until June 7, 2010. *Id.* at ¶3. While she worked in New York, he had some time to catch up on various client matters. *Id.*

Much to Mr. Johnson's annoyance (and perhaps that of his new bride as well), he was occasionally asked to respond to various client issues that arose while on his honeymoon. *Id.* at ¶4. Mr. Johnson did not intend to work while half-way around the world on his honeymoon, and even if he had wished to work, the 19-hour time difference between Seattle and New Zealand and the lack of regular access to office facilities were not conducive to regular legal work and would have made it impracticable to efficiently and effectively collaborate with his client and with his co-counsel. *Id.* at ¶5. In short, Mr. Johnson's letter to Plaintiff's counsel discussing his planned honeymoon accurately stated the reason for his expected unavailability. *See id.* at ¶6; Vertitis Decl. at Ex. 3. Plaintiff's assertion that the honeymoon was fraudulent is without any factual support.

Regardless, the parties' stipulation to extend the answer date has no bearing on the amount of fees to which Defendant is entitled for prevailing on its Anti-SLAPP Act motion. The Anti-SLAPP Act allows for a special motion to strike to be filed as of right "within 60 days of the service of the most recent complaint", with no reference to the timing of the answer date. RCW 4.24.525(5)(a). Indeed, Defendant could have filed its

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anti-SLAPP motion before filing an answer—neither the statute nor the rules grant Plaintiff the strategic advantage of forewarning of any motion Defendant plans to file—or Defendant could have filed its motion as late as July 3, 2010.

III. CONCLUSION

Defendant has shown that it seeks reasonable fees and costs for prevailing on its Special Motion to Strike under Washington's Anti-SLAPP Act. Accordingly, Defendant respectfully requests that this court award it $46,965 in attorneys' fees, $697.80 in costs, and the statutorily prescribed amount of $10,000. Alternatively, Defendant respectfully requests this Court award it $45,444 in attorneys' fees, $697.80 in costs, and the statutorily prescribed amount of $10,000.

DATED this 8th day of October, 2010.

By DAVIS WRIGHT TREMAINE LLP
Attorneys for Defendant Dog Eat Dog Films, Inc.

s/ Bruce E. H. Johnson

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CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of October, 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:	_____ U.S. Mail
Thomas Brian Vertetis	_____ Hand Delivery
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Declared under penalty of perjury dated at Seattle, Washington this 8th day of October, 2010.

s/ Noelle H. Kvasnosky
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