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9 **Kevin Russell**

10 **UNITED STATES DISTRICT COURT**  
11 **NORTHERN DISTRICT OF CALIFORNIA**  
12 **SAN FRANCISCO DIVISION**

13 **ROBERT JACOBSEN,**

14 **Plaintiff,**

15 **vs.**

16 **MATTHEW KATZER, KAMIND**  
17 **ASSOCIATES, INC., and KEVIN**  
18 **RUSSELL,**

19 **Defendants.**

20 **Case No. C 06 1905 JSW**

21 **DEFENDANT KEVIN RUSSELL'S**  
22 **REPLY TO PLAINTIFF'S**  
23 **OBJECTIONS TO DECLARATION**  
24 **OF DAVID M. ZEFF RE:**  
25 **ATTORNEY FEE AWARD**

26 Kevin Russell replies herewith to the plaintiff's "Objections To Declaration Of  
27 David M. Zeff"<sup>1</sup>(hereafter "Plaintiff's Objections") filed September 7, 2006, concerning  
28 Russell's request for attorneys fees upon the Court's granting of his special motion to  
strike pursuant to CCP §425.16.

For the sake of brevity, Russell refers to and incorporates the reply of defendants  
Katzer and Kamind Associates, Inc., filed September 11, 2006, to the identical objections  
plaintiff made to the declaration of Mr. Jerger in support of the application by those  
defendants for an award of attorneys fees upon the Court's granting of their CCP §425.16

<sup>1</sup> The Zeff Declaration filed August 25, 2006, is cited as "Zeff Dec. 8.25.06," to contrast it with the Zeff Declaration filed herewith, which is cited as "Zeff Dec."

1 special motion to strike.

2 A. Effect of the Ruling Finding a Lack of Subject Matter Jurisdiction

3 In addition to the objections by plaintiff which were common to the declarations of  
4 Jerger and Zeff in support of said fee applications, defendant further, and more  
5 prominently, objected to Russell's application asserting that the Court was powerless to  
6 make an attorney fee award to Russell. Plaintiff's argument, without supporting  
7 authority,<sup>2</sup> is that because the Court found that it must dismiss plaintiff's claims against  
8 Russell because it lacked personal jurisdiction, the Court was powerless to rule upon the  
9 CCP §425.16 motion, and thus is incapable of awarding the mandatory fees upon  
10 granting that motion.

11 While there appears to be no authority directly on point, there is ample authority  
12 for the following propositions which compel the conclusion that this Court has the power  
13 to rule on the special motion to strike and to award attorneys fees in granting it:

14 1. In a diversity action, as this is, to the extent the motion addresses non-  
15 federal claims, as it did, this Court sits as a trial court of the State of California. *Erie*  
16 *Railroad Co. v. Tompkins* (1938) 304 US64, 78; *Guaranty Trust Co. Of New York v. York*  
17 (1945) 326 US 99, 108.

18 2. It is appropriate for Federal Courts to hear California's Special Motion to  
19 Strike (CCP §425.16) in the context of a diversity action. *United States v. Lockheed*  
20 *Missiles and Space Company* (9<sup>th</sup> Cir., 2006) 190 F.3d 963,

21 3. The attorney fee award is *mandatory* upon the granting of the motion.  
22 CCP §425.16 ( c), *Ketchum v. Moses* (2001) 24 Cal.4th 112, 1131.

23 4. Dismissal of an action for lack of standing and because it was not timely  
24 brought does not moot a fee request under the SLAPP statute. *Moraga-Orinda Fire*  
25 *Protection Dist. v. Weir* (2004) 115 Cal.App.4th 477, 480.

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27 \_\_\_\_\_  
28 <sup>2</sup> Plaintiff claims no authority is needed because the premise is "axiomatic."  
Plaintiff's Objections, p. 1:28 to 2:1.

1           5.       A plaintiff may not avoid liability for attorney fees and costs by voluntarily  
2 dismissing a cause of action to which a SLAPP motion is directed. *Pfeiffer Venice*  
3 *Properties v. Bernard* (2002) 101 Cal.App.4th 211, 218-219. Nor is the issue of attorney  
4 fees and costs pursuant to section 425.16 rendered moot by an involuntary dismissal after  
5 a demurrer is sustained without leave to amend. *White v. Lieberman* (2002) 103  
6 Cal.App.4th 210, 220-221. Similarly, a plaintiff cannot amend a pleading to avoid a  
7 pending SLAPP motion. *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.*  
8 (2004) 122 Cal.App.4th 1049, 1054-1055.

9           6.       Lack of personal jurisdiction is an affirmative defense subject to waiver. 1  
10 William W. Schwarzer et al., *California Practice Guide: Federal Civil Procedure Before*  
11 *Trial* ¶ 3:15 at 3-3 (The Rutter Group, 2005). Unless the defense is waived, a judgment  
12 “that purports to impose personal obligations on the *defendant*” without personal  
13 jurisdiction is voidable. Schwarzer, et al., *supra*, ¶ 3:14 at 3-3(emphasis added).

14           7.       When a civil rights case is dismissed for lack of *subject matter* jurisdiction,  
15 the court may award sanctions against the plaintiff under F.R. Civ. P. rule 11, but may  
16 not award costs and attorney fees pursuant to 42 U.S.C. § 1988, on the theory the  
17 defendant is not the prevailing party. *Branson v. Nott*, 62 F.3d 287, 292-94 (9th Cir.  
18 1994). This rule also applies in cases brought under California civil rights statutes.  
19 *Hon v. Marshall* (1997) 53 Cal.App.4th 470. But costs *may* be awarded when an action  
20 is dismissed under the Eleventh Amendment because, unlike subject-matter jurisdiction,  
21 the Eleventh Amendment is an affirmative defense and may be waived. *Miles v.*  
22 *California*, 320 F.3d 986, 988-89 (9th Cir. 2003). Since lack of personal jurisdiction is  
23 likewise an affirmative defense and is subject to waiver, it appears that an award of costs  
24 and fees is also proper here. Schwarzer et al., *supra*, ¶ 3:15.

25           8.       The Court continues to have jurisdiction over the plaintiff, who is the party  
26 against whom the order is made. Even if plaintiff had been a party dismissed for lack of  
27 subject matter jurisdiction, the Court has inherent power to impose sanctions upon  
28 plaintiff or his attorney under Rule 11. See Schwarzer et al., *supra*, ¶17.35 and cases

1 cited therein.

2 B. Plaintiff’s Counsel’s Complete Failure to Meet And Confer

3 Contrary to the assertion that there was any meet and confer process engaged in  
4 prior to the filing of Mr. Zeff’s Declaration, the record shows that plaintiff’s counsel  
5 made herself unavailable until after that declaration was filed. Zeff Dec. 8.25.06, ¶ 8 and  
6 Exhibit 2; Plaintiff’s counsel also admittedly also entirely failed to meet and confer  
7 before filing Plaintiff’s Objections. In her email sent *after* said Objections were filed,  
8 Ms. Hall stated:

9 I apologize for not contacting you earlier. I had planned on following up  
10 with you on this matter before filing the objections, but I realized yesterday  
11 afternoon that since you had filed a day before the deadline, and the Court  
12 had indicated that I had 10 days after, then I probably needed to file today  
13 (this evening).

14 I hope that, by starting this discussion again, we may be able to resolve  
15 plaintiff’s objections to your declaration. I believe the Court would prefer  
16 us to handle the matter between ourselves. So I start off by writing you  
17 again, and referring you to the objections that plaintiff filed earlier this  
18 evening, so that we may begin these talks.

19 Zeff Dec., Exh. 1.

20 C. The Hours and Fees Claimed Are Well Within Approved Amounts

21 Plaintiff asserts without citation to authority that he “*believes*” that Russell’s claim  
22 for “140 hours” of work totaling \$40,000.00, <sup>3</sup> are excessive and redundant, and seeks  
23 review of daily time billing data. Plaintiff’s Objections, p. 3: 17-20. Russell notes that in  
24 the only email exchange counsel had before said declaration and the objections were  
25 filed, Russell’s counsel stated the following to plaintiff’s counsel, Ms. Hall:

26 I will call you on Monday, August 21, to discuss this application and  
27 determine if Mr. Jacobsen will oppose this application and, if so, for what  
28 reason. *If he does, I think it would be instructive for you to disclose the  
total hours you and any other attorney expended in preparing the evidence  
and papers Mr. Jacobsen submitted in opposition to the motion.* Zeff Dec.  
8.25.06, Exh.2, emphasis added.

3 The true totals are 151.9 hours and \$40,074.25. Moore = 84.55 hours + Zeff =  
67.35 hours = 151.9. Zeff Dec. 8.25.06, ¶¶ 2, 5 & 6.

1 Jacobsen’s counsel never has provided any such disclosure in response. Zeff Dec. ¶ 2.

2 The attorneys fees approved on the granting of SLAPP motions in the reported  
3 cases are squarely within range of those sought in the instant fee application (\$40,000  
4 award approved in *ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc.*  
5 (2006) 138 Cal.App.4th 1307 at 1323; \$32,032.50 approved in *Mann v. Quality Old Time*  
6 *Service, Inc.* (2006) 139 Cal.App.4th 328 at 334; \$40,000 approved in *Paulus v. Bob*  
7 *Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659 at 665). Russell’s fees are dwarfed by  
8 fees approved in other appellate decisions, such as fees of \$318,000, of which \$260,883  
9 were trial court fees, not appellate fees or costs, approved in *Metabolife Int., Inc. v.*  
10 *Wornick et al.* (S.D.Cal., 2002) 213 F. Supp.2d 1220 at 1222, 1223.

11 In this proceeding plaintiff filed a complaint of 38 pages, not including the  
12 Appendix of another 26 pages, containing 113 paragraphs of rambling, inartful  
13 allegations. Plaintiff’s papers in opposition to this motion were between 4 and 5 inches  
14 high. Plaintiff’s wholesale slaughter of the forests encumbered Mr. Russell’s counsel  
15 with the task of wading through all that paper, crystalizing it, and showing the Court why  
16 none of it amounted to a hill of beans. Not only was this job done convincingly, but it  
17 was also done with efficiency, economy and a minimal waste of paper. As stated in  
18 *Metabolife Int., Inc. v. Wornick et al.* , supra, at 1224:

19 The California Court of Appeal, Third District recently stated in the context  
20 of awarding attorney fees and costs (though in a different factual scenario)  
21 that the statute “shall be construed broadly.” *Rosenauro v. Scherer*, 88  
22 Cal.App.4th 260, 286, 105 Cal.Rptr.2d 674 (2001).

23 Based upon the foregoing, Russell should recover his previously documented  
24 attorney fees of \$40,074.25, plus the additional \$ 3,417.00 fees incurred in review of  
25 Plaintiff’s Objections and the research and preparation of this Reply (Zeff Dec. ¶ 6), for a  
26 total of \$43,491.25.

27 Dated: September 13, 2006

Law Offices of David M. Zeff

28 By /S/  
David M. Zeff, Attorneys For  
Defendant Kevin Russell