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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MORDECHAI Y. ORIAN, an individual, and GLOBAL HORIZONS, INC.,

Plaintiffs,

vs.

FEDÉRATION INTERNATIONAL DES DROITS DE L'HOMME, corporate form unknown, EURO-MEDITERRANEAN HUMAN RIGHTS NETWORK, corporate form unknown, SIDIKI KABA, an individual, ABDELAZIZ BENNANI, an individual, and KAV LAOVED, an Israeli Corporation, form unknown,

Defendants.

Case No. CV 11-6904 PSG (FFMx)

RESPONSE TO PLAINTIFFS' VOLUNTARY DISMISSAL

Date: November 14, 2011
Time: 1:30 p.m.
Place: Courtroom of the Hon. Philip S. Gutierrez

Plaintiffs—Mordechai "Motti" Orian ("Orian") and his company, Global Horizons ("Global")— may not escape their obligation to pay Defendant Kav LaOved ("Kav") its attorneys' fees and costs by filing a voluntarily dismissal. "Under California's anti-SLAPP statute, 'a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs.'" *Manufactured Home Communities, Inc. v. County Of San Diego*, 2011 WL 3771277, *9 (9th Cir. 2011) (citing Cal. Civ. P. Code § 425.16(c)(1)). "It is well-settled that such an award of fees and costs is *mandatory* under the statute, *Ketchum v. Moses*, 24 Cal.4th 1122, 1131, 104 Cal.Rptr.2d 377, 17 P.3d 735 (2001), and applies to successful anti-SLAPP motions brought in federal court." *Shepard v. Miler*, 2011 WL 1740603, *1 (E.D. Cal. May 5, 2011) (Slip Op.) (emphasis added) (citing *Verizon Del., Inc. v. Covad Commc'ns Co.*, 377 F.3d 1081, 1091 (9th Cir.2004)).

The Ninth Circuit has made clear that a plaintiff may not avoid the anti-SLAPP statute's mandatory fee requirement by withdrawing the complaint, as plaintiffs have attempted to do here. "[A] voluntary dismissal will not automatically preclude a later award of attorney's fees under the statute. . . . 'Otherwise, SLAPP plaintiffs could achieve most of their objective with little risk—by filing a SLAPP suit, forcing the defendant to incur the effort and expense of preparing a special motion to strike, then dismissing the action without prejudice.'" *Garrison v. Baker*, 208 F.3d 221, 221 (9th Cir. 2000) (quoting *Coltrain v. Shewalter*, 66 Cal.App. 4th 94, 106, 77 Cal.Rptr. 2d 600 (1998)); *see also Fleming v. Coverstone*, 2009 WL 764940, *6 (S.D. Cal. March 18, 2009) ("Plaintiff is entitled to attorney fees because Defendant may not avoid liability for attorney fees under the anti-SLAPP statute by dismissing his claims subject to a pending anti-SLAPP special motion to strike.").

This rule applies with particular force in this case because just after they filed the dismissal, plaintiffs' attorney—I. Randolph S. Shiner—informed the defendants

that his clients intend to *refile* the complaint against defendants. *See* Attachment A ("I will be re-filing and re-serving the summons and the complaint against your clients, and we will deal with the issues you raised in your various motions in due course."). This is yet another abuse by the plaintiffs of the judicial system. They filed the dismissal just hours after Kav filed its reply memorandum in support of its motion to strike or, in the alternative, to dismiss the action. That reply memorandum explained that plaintiffs had not even bothered to file an opposition memorandum and that plaintiffs' attorney was not eligible to practice law on the day he filed the complaint.

Plaintiffs' voluntary dismissal may also be improper under Rule 41(a)(1)(A)(i) of the Federal Rule of Civil Procedure. That rule provides that a plaintiff may file a notice of dismissal without court order only if it is filed "before the opposing party serves either an answer or a motion for summary judgment." Fed. R. Civ. P. 41(a)(1)(A)(i). As a number of California courts have held, an anti-SLAPP motion is a speaking motion that is equivalent to a motion for summary judgment. *See, e.g., Taus v. Loftus*, 40 Cal.4th 683, 714, 54 Cal.Rptr.3d 775 (2007) ("past cases interpreting this provision establish that the Legislature . . . intended to establish a summary-judgment-like procedure available at an early stage of litigation that poses a potential chilling effect on speech-related activities"); *South Sutter, LLC v. LJ Sutter Partners, L.P.*, 193 Cal.App.4th 634, 655, 123 Cal.Rptr.3d 301 (2011) ("a special motion to strike a SLAPP complaint is an evidentiary motion more akin to a summary judgment motion. It is decided not only on the pleadings, but also on 'supporting and opposing affidavits stating the facts upon which the liability or defense is based.'") (citing Cal. Civ. Code § 425.16(b)(2)); *Price v. Operating Engineers Local Union No. 3*,195 Cal.App.4th 962, 969, 125 Cal.Rptr.3d 220 (2011) (same).

Because an anti-SLAPP motion is the functional equivalent of a motion for summary judgment, a litigant should not be able to voluntarily dismiss a case

without court approval once an anti-SLAPP motion has been filed. As such, plaintiffs are not permitted to file a notice of voluntary dismissal without prejudice and without the approval of the Court and may only file a motion to dismiss pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, which provides that "an action may be dismissed at the plaintiff's request only by court order, *on terms that the court considers proper*." Fed. R. Civ. P 41(a)(2) (emphasis added). In this case, given the frivolous nature of the lawsuit and plaintiffs' explicit statement that they intend to refile the exact same action, the Court should treat the notice of dismissal as a request to dismiss the action under Rule 41(a)(2) and order that the dismissal be with prejudice.

Alternatively, Kav requests that the Court enjoin the plaintiffs from refiling the same meritless and harassing claims. A district court has power under the All Writs Act, 28 U.S.C. § 1651(a), to enjoin litigants who abuse the judicial system. *Tripati v. Beaman*, 878 F.2d 351, 352 (9th Cir.1989); *see Delong v. Hennessey*, 912 F.2d 1144, 1147 (9th Cir.1990) (recognizing that "there is strong precedent establishing the inherent power of federal courts to regulate the activities of abusive litigants by imposing carefully tailored restrictions under the appropriate circumstances"). "Even onerous conditions may be imposed upon a litigant as long as they are designed to assist the district court in curbing the particular abusive behavior involved." *Tripati*, 878 F.2d at 352 (internal quotation and citation omitted).[1]

[1] Local Rule 83-8.2 further provides that "[o]n its own motion or on motion of a party, after opportunity to be heard, the Court may, at any time, order a party to give security in such amount as the Court determines to be appropriate to secure the payment of any costs, sanctions or other amounts which may be awarded against a vexatious litigant, and may make such other orders as are appropriate to control the conduct of a vexatious litigant. Such orders may include, without limitation, a directive to the Clerk not to accept further filings from the litigant without payment of normal filing fees and/or without authorization from a judge of the Court or a Magistrate Judge, issued upon such showing of the evidence supporting the claim

The Ninth Circuit has established four guidelines that a court must follow when issuing such an injunction: "(1) the litigant must be provided with notice and a chance to be heard before the court enters the order; (2) the court should establish an adequate record for review, that is, a listing of the cases and/or abusive activities undertaken by the litigant; (3) the court must make a substantive finding that the litigant's activities were frivolous and harassing; and (4) the court must narrowly tailor the order to deter the specific vice encountered." *Westine v. Norwood*, 2008 WL 4790672, *2 (C.D. Cal. October 23, 2008) (citing *Delong*, 912 F.2d at 1147-48).

Few cases are more suited for such an injunction than this one. Plaintiffs are serial abusers of the judicial process. The many cases cited in Kav's memorandum of points and authorities in support of its motion to strike describe plaintiffs' repeated flouting of court orders, destroying evidence, and presenting arguments in bad faith. *See* Docket No. 8 at 3-5. Moreover, as demonstrated in Kav's earlier memoranda, plaintiffs filed the complaint in a transparent effort to intimidate Kav, and to discourage it from exercising its right to investigate and publicize human trafficking abuses in Israel. Kav filed the motion to strike to put a quick end to that harassment. Now, having failed to respond to that motion, plaintiffs seek to continue the harassment by simply withdrawing this action and filing the same frivolous action again.

Plaintiffs' vexatious conduct must come to an end. Kav requests that the Court keep the matter on calendar for November 14, order that Kav is entitled to be compensated for its attorneys' fees and costs, and either order that the plaintiffs'

(… cont'd)

as the judge may require." Pursuant to Local Rule 83-8.3, "[a]ny order issued under L.R. 83-8.2 shall be based on a finding that the litigant to whom the order is issued has abused the Court's process and is likely to continue such abuse, unless protective measures are taken."

dismissal be with prejudice or enjoin plaintiffs from refiling these same meritless claims against the defendants.

Dated: November 2, 2011

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By: /s/ Marc M. Seltzer
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