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DISTRICT COURT

CLARK COUNTY, NEVADA

CHARLES "RANDY" LAZER,

Plaintiff,

vs.

DAPHNE WILLIAMS,

Defendant.

Case No. A-19-797156-C

Dept. XV

DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

Defendant Daphne Williams hereby files her reply in support of her Motion for Costs and Attorneys' Fees.

1.0 INTRODUCTION

Plaintiff Charles "Randy" Lazer's Opposition to Ms. Williams's Motion for Costs and Attorneys' Fees (the "Fee Motion") is a day late[1] and a dollar short. He argues that he should not be responsible for a large bill that he forced Ms. Williams to rack up despite being warned of the Anti-SLAPP statute and being given every opportunity to dismiss his claims before things got to this point. He chose not to, and now he acts as though he is the victim because he is on the hook

[1] This is literal. Ms. Williams filed and served the Fee Motion on December 29, 2021, making Lazer's opposition due 14 days later on January 12, 2022. EDCR 2.20(e). Lazer did not file his Opposition until January 13, however.

for a bill that wouldn't have existed if he had heeded Ms. Williams's warnings. His crocodile tears are no reason to lessen the requested fees, and he provides no authority for his position that an Anti-SLAPP movant who first prevails on appeal is not entitled to recover fees incurred on appeal. Such a position is inconsistent with the purpose and plain language of Nevada's Anti-SLAPP statute. If it ever had any possible weight, that ended with the Nevada Supreme Court's decision in *Smith v. Zilverberg*, 137 Nev. Ad. Op. 7, 481 P.3d 1222 (2021). Lazer otherwise fails to object to any attorney's hourly billing rate or any particular billing entry and does not respond to the large volume of evidence attached to the Fee Motion.

The Court should award Ms. Williams all fees incurred in connection with this litigation, with a modest 1.2x multiplier, and award her $781.20 in costs and $248,616.00 in fees.

2.0 ARGUMENT

2.1 Ms. Williams is Entitled to Recovery of All Fees Incurred

This case, and the fees sought, could have been avoided by Mr. Lazer. As explained in the Fee Motion, Ms. Williams gave Lazer the opportunity to dismiss his claims or compromise on fees a total of 5 times (August 7, 2019; August 12, 2019; September 16, 2021; September 19, 2021; and October 26, 2021). Each time, Lazer refused to back down or compromise. Due to this refusal, Ms. Williams's attorneys had to expend a significant amount of time and effort on a contingent basis to defend Ms. Williams from Lazer's frivolous claims, ultimately resulting in dismissal under the Anti-SLAPP law.

The Nevada Supreme Court has already decided that a district court must award **all** attorneys' fees incurred in connection with the case after an Anti-SLAPP motion is granted. "[A]warding all fees and costs incurred in defending oneself from a SLAPP suit – including the fees incurred in preparing the motion for fees and costs – is in accordance with the purpose of Nevada's anti-SLAPP statute, which is to make speakers 'immune from any civil action for claims based upon the communication.'" *Smith v. Zilverberg*, 2019 Nev. Dist. LEXIS 1139, *4-5 (Nev. Dist. Dec. 13, 2019) (quoting NRS 41.650), aff'd in *Smith v. Zilverberg*, 481 P.3d 1222, 1231 (Nev. 2021) ("[C]onsistent with the Legislature's goals of preventing the chilling effect of SLAPP suits

and protecting free speech, we conclude that it intended to permit a prevailing defendant to recover all reasonable fees and costs incurred from the inception of the litigation under NRS 41.670(1)(a).") It is well established that an award of Anti-SLAPP costs and fees includes fees incurred after the motion is granted. *See Wanland v. Law Offices of Mastagni, Holstedt & Chiurazzi*, 141 Cal. App. 4th 15, 21 (2006) (finding that fees recoverable under Anti-SLAPP statute include all post-motion fees, such as fees on fees, fees in connection with defending an award of fees, and fees on appeal of an order granting an Anti-SLAPP motion). The California Supreme Court has also determined that attorneys' fees incurred in attempting to collect an award of fees granted under its Anti-SLAPP statute are recoverable. *See Ketchum v. Moses*, 24 Cal. 4th 1122, 1141 n.6 (2001); *see also York v. Strong*, 234 Cal. App. 4th 1471, 1477-78 (2015).

Lazer argues that, despite the unambiguous language in *Zilverberg*, a prevailing Anti-SLAPP movant who loses at the district court is not entitled to fees incurred on appeal. The sole authority he cites is a trial court order on a fee motion in *Tarkanian v. Rosen*, No. A-16-746797-C, where the defendant's Anti-SLAPP motion was denied by the district court, but the Nevada Supreme Court reversed and remanded with instructions to grant the motion. The court there found that because there were no reported cases in Nevada granting appellate fees in such circumstances, it was not appropriate to award such fees. It reasoned that such fees are appropriate to award where it is a losing plaintiff who decides to foist the costs of appeal on a prevailing defendant, but not the inverse, because NRS 41.670(1)(a) "is ambiguous as to whether this statute mandating awarding costs and attorneys' fees includes appellate costs and attorneys' fees." (Opposition *Exhibit 2* at 5.)

First, even in the absence of contrary Nevada Supreme Court authority, Judge Earley's decision in *Tarkanian* would not be authoritative and could safely be ignored by this Court. But the decision in *Tarkanian* should also be ignored because it predates, and is inconsistent with, *Zilverberg*. The Court there directly addressed the scope of NRS 41.670(1)(a), acknowledging there was some ambiguity in its language and reviewing the legislative intent of the law. *Zilverberg*, 481 P.3d at 1230. It noted that NRS 41.670(1)(a) lacks any qualifying language as to what fees are recoverable and concluded that "the Legislature intended for prevailing defendants

to recover reasonable attorney fees and costs incurred from the inception of the litigation, rather than just those incurred in litigating the anti-SLAPP motion." *Id*. It then noted that the purpose of the Anti-SLAPP statute was to protect citizens' First Amendment rights and that NRS 41.650 provides substantive immunity from suit, which can only be effected if NRS 41.670(1)(a) allows for recovery of *all* fees incurred in dismissing a SLAPP suit. *Id*. at 1231. In resolving the ambiguity of NRS 41.670(1)(a), the Court held that the Anti-SLAPP statute "is intended to permit a prevailing defendant to recover all reasonable fees and costs incurred from the inception of the litigation under NRS 41.670(1)(a)." *Id*. The Court did not hedge on this point or qualify its holding. The state of the law in Nevada is that *all fees* incurred in defending oneself from a SLAPP suit are recoverable. Period. Judge Early's decision made no sense at the time, but *Zilverberg* put any doubt to rest.

But let us assume, *arguendo*, that *Zilverberg*'s holding does not address the issue of appellate fees. Judge Earley did not reach the correct conclusion in *Tarkanian*. The court there acknowledged that the purpose of the Anti-SLAPP statute is to provide for quick dismissal of frivolous cases targeted at the exercise of a speaker's First Amendment rights and that fees are recoverable "to compensate defendants expeditiously and fairly for defending meritless litigation." (Opposition *Exhibit 2* at 5.) But the court in *Tarkanian* fails to provide any convincing explanation for why fees incurred as a SLAPP appellant are not recoverable.

Intuitively, this position makes no sense and obviously undermines the purpose of the Anti-SLAPP statute. One of the core components of the substantive immunity guaranteed by the statute is the mandatory entitlement to attorneys' fees. What possible reason could there be to undermine this immunity just because a district court erroneously denied an Anti-SLAPP motion, particularly where an Anti-SLAPP movant has a right to an immediate interlocutory appeal? To agree with *Tarkanian* would be to conclude that the Legislature wanted to guarantee this substantive immunity from suit by allowing for an immediate appeal that could result in a case being dismissed, but not to guarantee the other half of this immunity by allowing for recovery of fees on this same appeal. A SLAPP defendant should not be burdened with the costs of a suit from which they have

substantive immunity simply because a district court decided an Anti-SLAPP motion incorrectly. In such cases, the plaintiff is still requiring the defendant to incur additional costs of defense. The fact that a SLAPP movant is the appellant does not change the fact that availing oneself of the statutorily guaranteed right to an interlocutory appeal is still the fastest and most efficient means of dismissing a SLAPP suit. Lazer's argument that "the fact that a defendant who failed at the district court and [Court] of Appeal levels continued to appeal is not the fault of a plaintiff" thus makes no sense. It absolutely is Lazer's fault that Ms. Williams had to incur fees on appeal; he chose to continue prosecuting his frivolous claims and continued to demand payment from Williams.

What's more, Judge Early's illogical, non-binding order creates a strong disincentive for a SLAPP plaintiff to continue defending herself in the event of an erroneous trial court loss. SLAPP suits are typically filed to silence a critic, with the threat of litigation costs being a very strong cudgel with which to censor a defendant. The main reason that defendants of few means are willing and able to defend against such suits is that they are guaranteed to recover their fees after prevailing on an Anti-SLAPP motion. If that certainty is taken away regarding appellate fees, then many SLAPP defendants will simply cave if they lose at the trial court level and will not bother with an appeal, undermining an essential component of the statute. Similarly, adopting *Tarkanian*'s reasoning would severely compromise the ability of SLAPP defendants with little means to retain counsel for appeals. Attorneys would no longer be willing to represent such defendants on a contingency basis in Anti-SLAPP appeals due to the inability to be paid for their time in such matters. The Nevada Legislature has chosen to expand the state's Anti-SLAPP statute significantly over the past decade. There is no reason for Nevada's courts to gut it. There is simply no support, whether in the text of the law, cases interpreting it, or in the purpose of the statute, to deny recovery of fees on appeal to a successful Anti-SLAPP movant.

Lazer tries to place significance on the fact that this Court and the Nevada Court of Appeals erroneously denied Ms. Williams's Anti-SLAPP Motion, and thus "Mr. Lazer could not have been aware that his lawsuit would eventually be found to have violated Nevada's anti-SLAPP laws."

(Opposition at 5.)[2] This does not matter. The entire purpose of an appeal is to correct errors by lower courts, particularly here where the Anti-SLAPP statute creates a right to an immediate interlocutory appeal. This cannot be a new concept to Lazer's counsel, and Ms. Williams repeatedly warned Lazer that he was going to lose this case at the Anti-SLAPP stage. Merely because dismissal took longer than expected due to errors outside of Ms. Williams's control does not warrant a reduction in a fee award.

While the Nevada Supreme Court has not issued a decision on this point, Nevada relies on California cases in interpreting its Anti-SLAPP statute. *Coker v. Sassone*, 432 P.3d 746, 749 n.3 (Nev. 2019). California courts have found that appellate fees are recoverable to a prevailing Anti-SLAPP movant, whether or not the movant prevailed at the trial court. *See Makaeff v. Trump Univ., LLC*, No. 10cv0940, 2015 U.S. Dist. LEXIS 46749, *34-36 (S.D. Cal. Apr. 9, 2015) (following reversal of trial court's denial of Anti-SLAPP motion, finding that fees incurred on appeal were compensable under Anti-SLAPP statute); *Bel Air Internet, LLC v. Morales*, 20 Cal. App. 5th 924, 946, 230 Cal. Rptr. 3d 71, 76 (2018) (finding that SLAPP defendant whose Anti-SLAPP motion was denied at trial court but prevailed on appeal was entitled to fees); *Chiu v. Collectronics, Inc.*, No. A110182, 2006 Cal. App. Unpub. LEXIS 9335, *39-40 (Oct. 19, 2006) (finding that "[h]ad the trial court properly granted Collectronics' motion to strike, respondents would have been liable for attorney fees and costs . . . We see no basis for a different result, merely because the trial court erred and the successful result was not obtained until decision on appeal"); *Chiu v. Creditors Trade Ass'n*, No. A111393 & A111509, 2007 Cal. App. Unpub. LEXIS 4206, *46-47 (May 24, 2007) (same); *Berger v. Dobias*, 2009 Cal. App. Unpub. LEXIS 7822, *2 (Sept. 29, 2009) (noting in

[2] Relatedly, Lazer argues that granting appellate fees will have the effect of punishing him "for succeeding at the district court level and the Court of Appeals level. If this Court had granted Ms. Williams's first anti-SLAPP motion to dismiss, the amount of fees incurred at that time would have been $41,212.50 . . . ." (Opposition at 8.) Lazer misses the point of a fee award under the Anti-SLAPP statute. It is intended to make a SLAPP defendant whole, meaning that dragging out a SLAPP case for longer periods of time will necessarily result in larger fee awards. Again, he has only himself to blame for continuing to prosecute his frivolous claims. He could have stopped at any time.

procedural history that, following reversal of denial of Anti-SLAPP motion on appeal, trial court properly included appellate fees in fee award to prevailing defendant).

Various courts have also found that, regarding other fee-shifting statutes, attorneys' fees incurred on appeal are available to parties who lost at the trial court but prevailed on appeal. *See Christensen v. Dir., Office of Workers Comp. Programs*, 576 F.3d 976, 978 (9th Cir. 2009) (granting appellate attorney's fees after successful challenge of trial level attorneys' fees award under 33 U.S.C. § 928(a)); *N.A.A.C.P., W. Region v. City of Richmond*, 743 F.2d 1346, 1358-59 (9th Cir. 1984) (awarding trial and appellate attorneys' fees under 42 U.S.C. § 1988 where plaintiffs succeeded on appeal after losing at trial); *Zinna v. Congrove*, 755 F.35 1177, 1179 (10th Cir. 2014) (concluding plaintiff was entitled to appellate attorneys' fees after remanding district court's improper calculation of trial level attorneys' fees); *Easley v. Collection Serv. Of Nev.*, 910 F.3d 1286, 1292 (9th Cir. 2018) (in awarding appellate fees to party that challenged trial court award of attorneys' fees, stating that "we are not aware of any authority suggesting that, although fees may be awarded under a fee-shifting statute for defending a judgment on appeal, they are not available for successfully challenging a judgment as inadequate").

Every cent Ms. Williams incurred in this matter was due to Lazer filing and maintaining this suit. Whether he feels his suit was justified, why he filed this suit, and the erroneous denial of Ms. Williams's Anti-SLAPP Motion are irrelevant. He filed a frivolous lawsuit that was dismissed under Nevada's Anti-SLAPP statute, and Ms. Williams is entitled to a mandatory award of all attorneys' fees. The only question is whether the amount requested is reasonable.

2.2 The Requested Fees are Reasonable

The Fee Motion and its exhibits contain a thorough discussion of each timekeeper, their experience, their hourly rates, and the work they performed, supported by the expert declaration of Joseph Garin. Lazer does not challenge any of this evidence. The only objection he makes to Randazza Legal Group's billing is that some of the time entries submitted are redacted, which he claims, "are frequently confusing and often indecipherable because they are redacted." (Opposition at 11.) But he provides no examples of these allegedly confusing and indecipherable entries and

provides no authority for the proposition that redacted billing entries should not be included in a fee award. Attorneys are entitled to redact billing entries, as information contained in them may consist of confidential attorney-client communications or privileged attorney work product. *See Branch Banking & Tr. Co. v. Jarrett*, 2014 U.S. Dist. LEXIS 129531, *6 (D. Nev. Sept. 16, 2014) (finding that majority of billing records attached to fee motion were permissible because "[n]ot every entry is redacted and the entries that do contain redactions present pertinent information except the specific subject of conversations, conferences, and in some instances, research").[3] Without any identification of which particular billing entries are objectionable, or even by what amount the fee request should be reduced, this is not a competent objection.

Rather than challenge the reasonableness of Randazza Legal Group's hourly rates and time worked on this case, Lazer argues that the requested fee award would be too "massive" for someone who is not a billionaire. Putting aside his protestations of good faith in filing his frivolous defamation suit, which are immaterial, he complains that the requested fee award would "subject[] Mr. Lazer to complete financial destruction,"[4] citing a statement in *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864-65 (2005) that a fee award is left to the district court's discretion, which "is tempered only by reason and fairness." (Opposition at 3-4.) Lazer fails to cite any authority suggesting that large fee awards are only appropriate against extremely wealthy SLAPP plaintiffs, or that a fee award should be reduced commensurate with the financial status of a SLAPP plaintiff. Lazer complains that it would be "absurd, unreasonable, extreme, and unduly

[3] If the Court finds that some of the redacted billing entries are unclear, Ms. Williams would be happy to provide an unredacted spreadsheet of billing entries for the Court's review *in camera*.

[4] Lazer has not actually provided any evidence as to his financial status or whether he would be able to pay the requested fee award. Ms. Williams has no desire to pry into his financials at this time, but it would come as no surprise to learn that Lazer is exaggerating the severity of his situation. After all, he has been able to afford maintaining this litigation for over two and a half years and there is no suggestion that his counsel is representing him on a contingent basis. This is hardly the behavior of an indigent litigant. Furthermore, if his claim of $13,230 in damages is to be taken seriously, resulting from having to spend 52 hours to respond to the NRED complaint (Opposition *Exhibit 3* at 1), then that would mean his time is worth roughly $254 per hour, a modest attorney billing rate. There is no evidence showing that Lazer is incapable of paying the requested fee award.

punitive" for him to be liable for all of Ms. Williams's attorneys' fees (Opposition at 6), but he has only himself to blame for the bill becoming this large. Ms. Williams gave Lazer an out at the beginning of this case, which he refused to take. Even after losing at the Nevada Supreme Court, Lazer refused to do anything that might limit his fee liability. He cannot now claim, after forcing Ms. Williams to rack up over $200,000 in attorneys' fees, that making her whole would financially ruin him.

Lazer addresses a single *Brunzell* factor, the result obtained, to argue against the reasonableness of the requested fees. This factor does not "cut both ways" here. It favors Ms. Williams. Her counsel obtained a dismissal of all claims, with prejudice, at the earliest stage possible in litigation, with a unanimous Nevada Supreme Court ruling. It took time to go through the appellate process, as all appeals do, but it is not Ms. Williams's fault that there was a need to correct lower court errors. Lazer's position of "you completely defeated me, but you could have done it quicker" is not a reason to reduce the requested fee award.

2.3 A Fee Multiplier is Warranted

Ms. Williams discusses in her fee motion why a modest 1.2x multiplier is warranted and the relevant factors to consider in determining whether to award a multiplier: (1) risk, (2) results, (3) difficulty, (4) preclusion from other work, and (5) public interest. Lazer does not address any of these arguments, instead merely citing a District of Nevada case mentioning that, in federal court, multipliers should be applied only in rare and exceptional circumstances (Opposition at 11), and that this case is similar to *IQTAXX, LLC v. Boling*, where a multiplier was not applied. Lazer claims that, because of his initial victories, "this was not a case that was so frivolous that Plaintiff needs to be made an example of." (*Id*. at 12.)

But that is not the crux of Ms. Williams's argument as to a multiplier being warranted. A multiplier is appropriate here due to the risk her counsel bore in representing her on a contingent basis. This risk only became greater as the case proceeded to the appellate stage, but Randazza Legal Group continued to zealously advocate for her and ultimately prevailed, despite receiving no money from this case for what has now been almost two and a half years. "A lawyer who both

bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions." *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 580 (2004). There is also serious access to justice issues implicated where competent attorneys are not fairly compensated for the work they perform for clients who would not normally be able to afford their services. These are the considerations that justify a multiplier here, and Lazer addresses none of them.[5]

3.0 CONCLUSION

For the foregoing reasons, the Court should grant Ms. Williams's Motion for Costs and Attorneys' Fees and award Ms. Williams $781.20 in costs and $248,616 in fees, for a total award of $249,397.20.

Dated: January 24, 2022.

Respectfully submitted:

RANDAZZA LEGAL GROUP, PLLC

/s/ Marc J. Randazza

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[5] Lazer's Opposition contains a "statement" from Lazer himself as an attachment. This "statement" is 12 pages of mostly single-spaced text that dwarfs the Opposition itself in word count. It appears primarily to rehash arguments that Lazer previously made and lost, as well as make numerous false claims regarding Ms. Williams's counsel. The Opposition makes no effort to explain how this Statement is relevant to any issues presented in the Fee Motion, and Ms. Williams will not speculate as to how it is supposed to be relevant. The Court should ignore it.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of January, 2022, I caused a true and correct copy of the foregoing document to be served via the Eighth Judicial District Court's Odyssey electronic filing system and by email.

Respectfully submitted,

/s/ Marc J. Randazza

Marc J. Randazza