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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ROBERT JACOBSEN,)	No. C-06-1905-JSW
)	
Plaintiff,)	OBJECTIONS TO DECLARATION OF
)	
v.)	DAVID M. ZEFF
)	
MATTHEW KATZER, et al.,)	Courtroom: 2, 17th Floor
)	Judge: Hon. Jeffrey S. White
Defendants.)	
)	
)	
)	

Plaintiff Robert Jacobsen objects to the Declaration of David M. Zeff for attorneys fees.

At the conclusion of the hearing on Aug. 11, 2006, plaintiff brought to the Court's attention that it could not both (1) rule that personal jurisdiction did not exist as to Mr. Russell, and (2) grant Mr. Russell's anti-SLAPP motion. Either jurisdiction does not exist, and thus the Court cannot rule on the anti-SLAPP motion, or jurisdiction does exist, and the Court may rule on the anti-SLAPP motion. Although Mr. Zeff, in an email attached to the declaration, stated that Plaintiff's counsel

1 had not provided a citation for this argument, it is axiomatic. Plaintiff notes the Court
2 acknowledged this principle at the hearing. Immediately after the hearing, the Court issued a
3 minute order holding that personal jurisdiction did not exist and that the anti-SLAPP motion was
4 granted. Plaintiff respectfully asks the Court to clarify this order in its pending written ruling.
5 Without that ruling, plaintiff makes arguments based on the assumption that the Court will rule that
6 either (1) personal jurisdiction does not exist, thus the grant of the anti-SLAPP motion is vacated,
7 but the Court will seek to award attorneys fees through some mechanism available to it, or (2) the
8 Court reverses itself as to personal jurisdiction, finding that it does exist, and thus the anti-SLAPP
9 motion remains granted.

10
11 Personal jurisdiction does not exist, and the anti-SLAPP motion is vacated

12 If the Court holds in its written ruling that jurisdiction does not exist, then its rulings on the
13 merits should be vacated. See Pennoyer v. Neff, 95 U.S. 714 (1877) (overruled on other grounds
14 by Shaffer v. Heitner, 433 U.S. 186 (1977)). For the record, plaintiff asks the Court to address
15 subject matter jurisdiction because, although plaintiff intentionally did not charge Mr. Russell with
16 an antitrust violation under the Sherman Act, Mr. Zeff states in his declaration that plaintiff did so
17 under Sec. 17200. But federal question jurisdiction exists “only when the plaintiff’s statement of
18 his own cause of action shows that it is based upon” federal law. Louisville & Nashville R.R. Co.
19 v. Mottley, 211 U.S. 149, 152 (1908). Thus, because plaintiff did not include a standalone antitrust
20 claim specifically against Mr. Russell, Mr. Zeff cannot claim that the Sec. 17200 claim arises under
21 federal law. If the Court finds that, as a matter of law, the libel per se argument cannot stand, and
22 thus either no libel claim or only a libel per quod (as plaintiff suggested at the hearing) can stand,
23 then the amount claimed cannot reach the jurisdictional amount, and thus a subject matter
24 jurisdiction issue arises.

25 From the statements the Court made at the Aug. 11, 2006 hearing, plaintiff believes that the
26 Court seeks to impose an award of attorneys’ fees in the absence of granting this motion, and thus
27 must turn to another mechanism to do so. See Alba Conte, Attorney Fee Awards § 1:1 (3d ed.
28 2004) (discussing exceptions to the American “no fee” rule). If the Court seeks to impose

1 sanctions under Fed. R. Civ. P. 11, then plaintiff and his counsel are entitled to a due process
2 hearing, which they will seek. Conte, Attorney Fee Awards § 7:40, Tom Growney Equipment, Inc.
3 v. Shelley Irrigation Development, Inc., 834 F.2d 833 (9th Cir. 1987). If a hearing is set, then
4 plaintiff and his counsel will brief the issues then.

5
6 Personal jurisdiction does exist, and the anti-SLAPP motion is granted with an award of attorneys
7 fees

8 If the Court rules that personal jurisdiction exists, plaintiff objects to the declaration for
9 attorneys fees because Mr. Zeff did not provide substantial evidence for his attorney fee petition.
10 Plaintiff objects to the lack of comparable fee awards. He notes that the decision awarding in
11 excess of \$300,000 that Mr. Zeff cited in his exchange with plaintiff's counsel is not comparable,
12 as it involves a defendant who hired counsel in two states, litigation that dragged on for at least
13 three years and an appeal to the Ninth Circuit. Metabolife Int'l, Inc. v. Wornick, 213 F. Supp. 2d
14 1220, 1224-26 (S.D. Cal. 2002). Aside from the court appearance, this matter involved two short
15 motions and about 2 months' time between the initial filing of the motions and the plaintiff's
16 administrative motion to amend, for which Mr. Zeff seeks in excess of \$40,000 for 140 hours.
17 Plaintiff believes this to be excessive or redundant, and thus there is a reason to review and/or
18 reduce the amount claimed. Hensley v. Eckerhart, 461 U.S. 424, 434 (1983); Alba, Attorney Fee
19 Awards § 4:25. Plaintiff also believes he is entitled to daily time billing data under the rules of
20 evidence, since the declaration is a compilation of data. Fed. R. Evid. 1006. Plaintiff also objects
21 to the comparisons that Mr. Zeff's fee to the fees of attorneys at large firms, since Mr. Zeff is a solo
22 practitioner. Courts have found it proper to define solo practitioners as their own relevant "market"
23 for determining a reasonable billing rate. See McDonald ex rel Prendergast v. Pension Plan of the
24 NYSA-ILA Pension Trust Fund, 450 F.3d 91, 97 n.6 (2d Cir. 2006).

25 As noted in Mr. Zeff's declaration, plaintiff's counsel corresponded via email with Mr. Zeff
26 regarding his declaration for attorneys' fees, but Mr. Zeff and plaintiff's counsel came to an
27 impasse over whether plaintiff was entitled to time records. (The exchanges were complicated by
28 two factors: (1) plaintiff's counsel was taking a short vacation in southern California, and thus did

1 not have legal references available to her, although she did respond to Mr. Zeff the best that she
2 could under the circumstances, and (2) Mr. Jacobsen had just left for Finland for a week-long
3 business trip a few hours before Mr. Zeff sent his draft declaration to plaintiff's counsel. Plaintiff
4 travels regularly on University business. He was sent to Switzerland in early August and Finland
5 in late August, and will be going to Copenhagen this weekend.) First, Mr. Zeff suggested that
6 plaintiff's counsel compare the amount of time that she spent on the anti-SLAPP motion to
7 determine whether the amount of hours he and Mr. Moore expended were reasonable. This is
8 incorrect measure. Plaintiff's counsel has significantly less experience than Mr. Zeff, has had no
9 experience with anti-SLAPP procedure, compiled two large declarations to overcome the anti-
10 SLAPP motions, and worked on both anti-SLAPP oppositions at the same time. Attorneys with
11 Mr. Zeff's and Mr. Moore's experience are expected to take significantly less time to perform legal
12 work. See Buffington v. Baltimore County, Md., 913 F.2d 113, 130 (4th Cir. 1990). Next, Mr.
13 Zeff appears to state that the amount was for only the anti-SLAPP motion, but later on he said it
14 was for both motions. Cf. Zeff Decl. Ex. 2, at 4 (anti-SLAPP alone) with Zeff Decl. ¶ 4 (Motion to
15 Dismiss and anti-SLAPP motion). Plaintiff finds this changing of positions troubling, and is left to
16 wonder what exactly he is paying for. Finally, Mr. Zeff stated that the amount was reasonable
17 because a party in the Metabolife case, described earlier, had to pay in excess of \$300,000. This
18 has no connection to the work done in this matter. Cf. Hensley v. Eckerhart, 461 U.S. 424, 429-30
19 n.3 (1983) (citing awards in similar cases as one factor to consider). From his email exchange, it
20 appears that Mr. Zeff's position is that unless plaintiff agrees to his fee petition, on Mr. Zeff's
21 terms, then plaintiff and his counsel are not acting in good faith. This position is untenable.

22 For these reasons, plaintiff believes that he is entitled to see more detailed evidence, or asks
23 the Court to reduce in the fee award to an amount that the Court finds just. Once the Court issues
24 its written ruling, plaintiff will seek a stay on the order to pay the fees to allow him to time to
25 review the ruling and determine his next course of action.

