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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF MARIN

10 MAGICJACK, LP,

11 Plaintiff,

12 v.

13 HAPPY MUTANTS LLC,

14 Defendant.

Case No.: CIV-091108

**PLAINTIFF MAGICJACK'S
OPPOSITION TO DEFENDANT'S
MOTION FOR ATTORNEYS' FEES AND
COSTS PURSUANT TO CODE OF CIVIL
PROCEDURE § 425.16.**

15 Date: December 1, 2009
16 Time: 9:00 a.m.
Dept: J
Judge: Hon. Verna Adams

1 **I. INTRODUCTION**

2 California’s anti-SLAPP statute does provide for mandatory awards of attorneys’ fees to the
3 prevailing party on an anti-SLAPP motion. Cal. Code Civ. P. § 425.16. But the law is equally clear
4 that fee awards may only include compensation for work done in connection with the anti-SLAPP
5 motion -- not for the entire litigation. Moreover, the requested amount must be reasonable. Despite
6 this, and despite the fact that this was, as the Court acknowledged, a close case, Happy Mutants uses
7 its Motion for Attorneys Fees and Costs (“Fee Motion”) to seek recovery of *all* of its litigation fees
8 for the *entire litigation*. Happy Mutants’ Fee Motion includes requests for compensation for all
9 time spent on this litigation from beginning to end, including its preliminary analysis of the
10 Complaint, insurance coverage issues, its Demurrer, its Motion to Strike Prayer for General &
11 Exemplary Damages (“Motion to Strike Damages”), and time spent discussing settlement. Even the
12 time Happy Mutants spent on just the anti-SLAPP motion and this fee request is excessive:
13 approximately 70 hours for the underlying motion and 40 hours for this fee motion. Defendant’s
14 Motion is not a *reasonable* request for fees, and it is not supported by the law. Accordingly, the
15 amount Defendant seeks should be reduced substantially.

16 **II. ARGUMENT**

17 **A. Fee Awards Under the Anti-SLAPP Statute Are Limited to Fees and Costs**
18 **Associated Only With the Motion to Strike -- Not the Entire Litigation.**

19 Attorneys’ fees awarded under the anti-SLAPP statute are limited to fees and costs
20 associated with the prevailing party’s anti-SLAPP motion. *Lafayette Morehouse, Inc. v. Chronicle*
21 *Publishing Co.*, 39 Cal. App. 4th 1379,1383 (“[T]he Legislature intended that a prevailing
22 defendant on a motion to strike be allowed to recover attorney fees and costs only on the motion to
23 strike, not the entire suit. We conclude the trial court erred when it awarded the Chronicle fees for
24 the entire suit.”). This proposition is unassailable. *Lafayette Morehouse* relied upon a report
25 written by the Senate Committee on the Judiciary (whose chairman drafted the anti-SLAPP statute):
26 “The [fee award] provision applies only to the motion to strike, and not to the entire action.” *Id.*,
27 citing Cal. Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1264 (1991-1992 Reg. Sess.) p. 5.
28 Just days ago, a California Court of Appeal affirmed the *Lafayette Morehouse* standard that “only

1 those attorney fees and costs related to the special motion to strike, not the entire action, may be
2 recovered under section 425.16.” *Jackson v. Yarbray*, -- Cal. App. 4th --, 2009 WL 3740807, at *10
3 (Nov. 10, 2009); *see also Christian Research Institute v. Alnor*, 165 Cal. App. 4th 1315, 1320
4 (2008).¹

5 Second, as Happy Mutants acknowledges, the fee request must be *reasonable*. *See, e.g.*, Fee
6 Motion at 5, citing *Ketchum v. Moses*, 24 Cal. 4th 1122, 1141 (2001). Happy Mutants bears the
7 burden to show that its fee request is reasonable and tailored to the time spent preparing its anti-
8 SLAPP motion, a burden which it has not met. *Christian Research Institute*, 165 Cal. App. 4th at
9 1320. Where, as here, the moving party has attempted to recover a windfall, the Court should
10 award an amount less than requested. *Id.* at 1321, 1324-25 (noting that statute does not “intend
11 recovery of fees and costs as a windfall,” and affirming reduction of fee award to \$21,300 (based on
12 71 hours of work) where “a multitude of time entries [were] devoted to matters other than the
13 motion to strike.”). Trial courts have broad discretion to adjust a fee request downward or deny an
14 unreasonable fee altogether. *Christian Research Institute*, 165 Cal. App. 4th at 1422.

15 Here, Happy Mutants seeks its fees and costs for the entire scope of this litigation. *See*
16 Declaration of Marc Mayer (“Mayer Decl.”), Ex. A-D. It seeks fees for **149.6 hours** of billable
17 time, for a total of \$65,126.00. *Id.*, Ex. A. This accounts for time spent by four attorneys staffed on
18 the case, and one paralegal. *Id.* Additionally, Happy Mutants seeks costs of \$7,010.85, and an
19 additional payment of \$5,500 based on its estimated fees and costs for replying to this Opposition,
20 for a grand total of \$77,636.85. *See* Fee Motion at 10. There is no indication that Happy Mutants
21 made any attempt to limit its fee request to time spent on the anti-SLAPP motion, as is required.

22
23 ¹ Since *Lafayette Morehouse* was decided, the anti-SLAPP statute has been amended to be
24 “construed broadly.” Cal. Code Civ. P. 425.16(a). However, *no* California court has held that this
25 amendment expanded the attorneys’ fee provision to include fees and costs not associated with the
26 motion to strike. In fact, recent decisions have affirmed the *Lafayette Morehouse* rule. *See, e.g.*,
27 *Jackson, supra*. While the two federal cases cited by Happy Mutants emphasize this amendment,
28 Happy Mutants does not argue that to be “construed broadly” means fees are now authorized for the
entire scope of litigation. *See, e.g.*, Fee Motion at 5, citing *Metabolife Int’l, Inc. v. Wornick*, 213 F.
Supp. 2d 1220 (S.D. Cal. 2002); Fee Motion at 8, citing *Kearney v. Foley & Lardner*, 2008 WL
761089 (S.D. Cal. March 18, 2008). Moreover, neither of those federal cases from the Southern
District of California is binding precedent on this Court. *Buller v. Sutter Health*, 160 Cal. App. 4th
981, 987 n.3 (2008).

1 A substantial portion of the fees Happy Mutants requests is entirely unrelated to its anti-
2 SLAPP motion. These include time spent on its preliminary analysis of the Complaint, its
3 Demurrer, its Motion to Strike Damages, insurance coverage issues, and time spent discussing
4 settlement. *See* Mayer Decl., Ex. C. None of these is associated with Happy Mutants' anti-SLAPP
5 motion.

6 Happy Mutants provides no explanation for why it seeks fees for insurance issues, its
7 Motion to Strike Damages, or its preliminary analysis of the Complaint. None of those is tied to the
8 anti-SLAPP motion. Nor has Happy Mutants provided any support for its request for
9 reimbursement of settlement discussions in the case. "Strong public policy favors the settlement of
10 disputes." *Abbott Ford, Inc. v. Superior Court* (1987) 43 Cal.3d 858, 871-873. It would defy logic
11 to punish MagicJack for attempting to settle this case, in effect forcing MagicJack to pay not just its
12 own fees and costs spent in discussing settlement, but also Happy Mutants'.

13 As for justifying its fee request for time spent on its Demurrer, Happy Mutants only drops a
14 half-hearted footnote. *See* Fee Motion at 8, n.4. (arguing that Happy Mutants only spent a "nominal
15 amount of time" preparing and filing the Demurrer, which supposedly made "essentially the same
16 arguments" as the anti-SLAPP motion). In fact, the demurrer does not make "essentially the same
17 arguments" as the anti-SLAPP motion, and is instead premised on the distinct argument that
18 MagicJack failed to state a claim per Code Civ. P. 430.10(e). *See* Notice of Demurrer and
19 Demurrer of Happy Mutants LLC to Plaintiff's Complaint; Mem. of Points and Authorities. Thus,
20 it, too, is unrelated to Happy Mutants' anti-SLAPP motion.

21 Finally, Happy Mutants' counsel did nothing to mitigate costs and fees in this case, but
22 instead filed a needless Motion to Strike Damages, for which it now seeks compensation. Happy
23 Mutants had absolutely no need to file this motion simultaneous with the anti-SLAPP motion when
24 it could have -- and should have -- waited until after a ruling on the anti-SLAPP motion. In fact,
25 that motion was scheduled for nearly a month after the hearing on the anti-SLAPP motion. Instead,
26 Happy Mutants' counsel filed it at the earliest opportunity to enhance their potential fee recovery.
27 Such a windfall should not be permitted. *Christian Research Institute*, 165 Cal. App. 4th at 1324-
28 25.

1 It is entirely unreasonable -- and improper -- for Happy Mutants to seek fees for 150+ hours
2 of time worked, much of which was entirely unrelated to its anti-SLAPP motion. Accordingly, to
3 the extent Happy Mutants' fee request seeks fees and costs for the *entire* scope of litigation -- and
4 not just for its anti-SLAPP motion -- it should be denied.

5 **B. Happy Mutants Fee Request Should Be Reduced To Eliminate Fees**
6 **Unassociated With Its Anti-SLAPP motion.**

7 The Court should only award fees and costs for Happy Mutants' anti-SLAPP motion. The
8 below table highlights the fees Happy Mutants has requested that are unassociated with its anti-
9 SLAPP motion, and which therefore may not be awarded under § 425.16. While it was Happy
10 Mutants' burden to show that its fee request is tailored to the anti-SLAPP motion, given that Happy
11 Mutants has not done so, MagicJack has undertaken an analysis of Happy Mutants' billing records.
12 See Declaration of Kevin M. Bovard ISO MagicJack's Opposition to Happy Mutants' Fee Motion
13 ("Bovard Decl.").

14 The chart below summarizes these attorneys' fees unrelated to the anti-SLAPP Motion.

15 Preliminary Analysis of Complaint	\$ 2,150.00
16 Insurance Coverage Issues	\$ 2,294.00
17 Demurrer	\$ 3,592.00
18 Motion to Strike Damages	\$ 3,852.00
Settlement Discussions	\$ 5,134.00
Total	\$17,022.00

19 *Id.* ¶ 5. And assuming just a *third* of Happy Mutants' costs in this case were unrelated to the anti-
20 SLAPP motion, that would require an additional reduction of \$2,176 from Happy Mutants' request.
21 Finally, the Court should not grant Happy Mutants' request for an additional \$5,500 based on the
22 theoretical time it *might* spend drafting its reply brief. Such a reply brief could have been avoided
23 had Happy Mutants' undertaken its burden in the first place of limiting its request to those fees and
24 costs associated with the anti-SLAPP motion. Instead, Happy Mutants improperly sought its fees
25 and costs for the *entire litigation*, burdening MagicJack and the Court with undertaking a review to
26 separate those fees that are unassociated with the anti-SLAPP motion. Happy Mutants'
27 overreaching should not be rewarded with an even larger fee award.

28

1 In short, Happy Mutants should be awarded **at most** \$52,937.85.² Even that figure is an
2 exorbitant amount to be spent on an anti-SLAPP motion and this fee request.³ A more appropriate
3 fee award would be half that amount, as numerous courts have quite typically awarded fees
4 pursuant to § 425.16 in the range of approximately \$25,000. *See, e.g., Christian Research Institute,*
5 *165 Cal. App. 4th at 1324-25 (affirming reduction of fee award to \$21,300.00); Maughan v. Google*
6 *Tech., Inc., 143 Cal. App. 4th 1242, 1249 (2006) (affirming reduction of fee award to \$23,000).*

7 **III. CONCLUSION**

8 For the foregoing reasons, MagicJack respectfully requests the Court deny Happy Mutants'
9 Fee Motion and instead award a properly calculated award pursuant to Cal. Code Civ. P. § 425.16.

10
11 Respectfully submitted,

12 Dated: November 16, 2009

ARNOLD & PORTER LLP

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16 Kevin M. Bovard
17 Attorneys for Plaintiff
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27 ² This figure represents the requested amount, subtracting \$17,022.00 in improper attorneys' fees,
\$2,176.00 in improper costs, and the \$5,500.00 requested for Happy Mutants' Reply).

28 ³ Indeed, Happy Mutants is seeking \$28,192.75 in connection with its fee request alone (\$22,692.75
for its Motion and \$5,500.00 for its anticipated Reply). *See* Fee Motion at 8.