

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN**

DATE: 12/01/09 TIME: 8:30 A.M. DEPT: J CASE NO: CV091108

PRESIDING: HON. VERNA A. ADAMS

REPORTER: SUE FITZSIMMONS

CLERK: JANET MINKIEWICZ

PLAINTIFF: MAGICJACK, LP

vs.

DEFENDANT: HAPPY MUTANTS LLC

NATURE OF PROCEEDINGS: MOTION FOR ATTORNEY FEES – AND COSTS
PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 425.16 [DEFT] HAPPY
MUTANTS LLC

RULING

DEFENDANT HAPPY MUTANTS, LLC’S NOTICED MOTION FOR ATTORNEY FEES AND COSTS AS THE PREVAILING PARTY ON ITS SPECIAL MOTION TO STRIKE THE COMPLAINT (CODE CIV. PROC. § 425.16(c)), IS GRANTED AS FOLLOWS:

THE STATUTE MANDATES THE COURT TO MAKE AN AWARD OF REASONABLE ATTORNEY FEES AND COSTS TO THE PREVAILING DEFENDANT “WHICH WILL ADEQUATELY COMPENSATE THE DEFENDANT FOR THE EXPENSE OF RESPONDING TO A BASELESS LAWSUIT. [CITATION.]” (*DOVE AUDIO, INC. V. ROSENFELD, MEYER & SUSMAN* (1996) 47 CAL.APP.4TH 777, 785; *ROBERTSON V. RODRIGUEZ* (1995) 36 CAL.APP.4TH 347, 361 [COURT MAY AWARD A REASONABLE FEE WHICH MAY BE LESS THAN THE AMOUNT REQUESTED BY PREVAILING PARTY].)

IN THIS REGARD, DEFENDANT IS ENTITLED TO BE COMPENSATED FOR “ALL THE HOURS REASONABLY SPENT, INCLUDING THOSE RELATING SOLELY TO THE FEE.” (*KETCHUM V. MOSES* (2001) 24 CAL.4TH 1122, 1133.) HOWEVER, “[T]HE DEFENDANT MAY RECOVER FEES AND COSTS ONLY FOR THE MOTION TO STRIKE, NOT THE ENTIRE LITIGATION. [CITATION.]” (*CHRISTIAN RESEARCH INSTITUTE V. ALNOR* (2008) 165 CAL.APP.4TH 1315, 1320.)

1. THE BILLINGS BY CHRIS LEONARD, A PARTNER IN MS&K, AND ROB RADER, OF COUNSEL TO THE FIRM, THAT RELATE TO THE ISSUE OF INSURANCE

COVERAGE, AS WELL AS ANY CONVERSATIONS BY MR. MAYER OR MS. RUBIN WITH THESE TWO GENTLEMEN INVOLVING COVERAGE ISSUES, IS DEDUCTED FROM THE TOTAL FEE CLAIM. THIS ISSUE IS NOT REASONABLY RELATED TO THE PREPARATION AND PROSECUTION OF THE SPECIAL MOTION TO STRIKE.

PLAINTIFF HAS ANALYZED DEFENDANT'S BILLINGS AND ALLOTTED \$2,294.00 OF BILLED TIME TO THE NONCOMPENSABLE INSURANCE COVERAGE ISSUE. (OPPO. P. 5, BOVARD DECL., P. 8) DEFENDANT DOES NOT DISPUTE THIS AMOUNT.

2. THE AMOUNT BILLED FOR ATTORNEY FEES INCURRED IN THE UNSUCCESSFUL SETTLEMENT NEGOTIATIONS OF THE FEE CLAIM ARE NONCOMPENSABLE. DEFENDANT HAS NOT PERSUADED THE COURT THAT IT SHOULD RECOUP THE ATTORNEY FEES EXPENDED IN THAT UNSUCCESSFUL NEGOTIATION.

IF THE PARTIES HAD SETTLED FOR THE \$50,000 REQUESTED BY DEFENDANT, DEFENDANT WOULD NOT HAVE RECOUPED ITS ATTORNEY FEES AND COSTS INCURRED IN NEGOTIATING THAT SETTLEMENT AMOUNT. THERE IS NO REASON WHY DEFENDANT SHOULD RECOVER THAT AMOUNT HERE. TO ALLOW RECOVERY OF THOSE FEES AND COSTS IN THIS MOTION WOULD AMOUNT TO A WINDFALL.

THE FEE SETTLEMENT NEGOTIATIONS WERE NOT REASONABLY NECESSARY TO RESOLVE DEFENDANT'S FEE CLAIM. PLAINTIFF CALCULATES THE FEES ASSOCIATED WITH THAT MATTER TO BE \$5,134.00, WHICH CALCULATION DEFENDANT DOES NOT DISPUTE. (OPPO. P. 5, REPLY P. 6)

3. THE FEE REQUEST SHOULD ALSO BE REDUCED BY THE HOURS SPENT PREPARING AND DISCUSSING THE DEMURRER FOR FAILURE TO STATE A CAUSE OF ACTION, AND THE MOTION TO STRIKE THE PUNITIVE DAMAGES CLAIM.

DESPITE DEFENDANT'S REPRESENTATION THAT MUCH OF THE LAW FOR THE SPECIAL MOTION TO STRIKE ALSO APPLIED TO THE DEMURRER, DOES NOT MAKE THAT DEMURRER A PART OF THE ANTI-SLAPP MOTION TO STRIKE. DEFENDANT IS NOT ENTITLED TO RECOVER ANY FEES RELATED THERETO.

LIKewise, THE MOTION TO STRIKE THE PUNITIVE DAMAGE ALLEGATIONS IS UNRELATED TO THE ANTI-SLAPP MOTION, DESPITE DEFENDANT'S ASSERTION THAT DEFENDANT "HAD NO CHOICE BUT TO FILE THAT MOTION AT THE SAME TIME ITS INITIAL RESPONSE WAS DUE, LEST IT RUN THE RISK OF BEING FORECLOSED FROM MAKING THE ARGUMENT IN THE FUTURE." (REPLY P. 4-5)

DEFENDANT CAN RECOVER ALL REASONABLE FEES AND COSTS FOR THE MOTION TO STRIKE, NOT THE ENTIRE LITIGATION. (SEE *DOVE AUDIO, INC.* , *SUPRA*, 47 CAL.APP.4TH AT P. 785.)

THE FEES BILLED FOR PREPARATION OF THE DEMURRER TOTAL \$3,592.00, BASED ON PLAINTIFF'S UNDISPUTED CALCULATIONS. (OPPO. P. 5, REPLY P. 4)

LIKewise, DEFENDANT DOES NOT CONTEST PLAINTIFF'S ESTIMATE OF THE FEES BILLED FOR THE MOTION TO STRIKE THE PUNITIVE DAMAGES IN THE AMOUNT OF \$3,852.00. THE TOTAL OF \$7,444.00 SHOULD THEREFORE BE DEDUCTED FOR THESE MATTERS.

THE TOTAL FEE AWARD REQUESTED \$65,126.00 + \$2,500.00 FOR THE REPLY BRIEF = \$67,626.00. DEDUCTING \$14,872.00 FROM THIS AMOUNT EQUALS \$52,754.00 AS THE AMOUNT TO BE AWARDED TO DEFENDANT AS THE PREVAILING PARTY.

4. DEFENDANT IS ENTITLED TO RECOVER ITS REASONABLE COSTS INCURRED IN SUPPORT OF THE SPECIAL MOTION TO STRIKE AND THIS FEE MOTION.

HOWEVER, DEFENDANT CANNOT RECOVER COSTS (E.G., FILING FEES, MESSENGER COSTS, LEGAL RESEARCH FEES, ETC.) RELATED TO THE NONCOMPENSABLE DEMURRER AND MOTION TO STRIKE DAMAGES MATTERS. DEFENDANT HAS NOT IDENTIFIED THE MATTERS FOR WHICH ITS COSTS WERE INCURRED. (SEE MAYER DECL. EX. B)

BEFORE THIS COURT CAN MAKE AN AWARD OF REASONABLE COSTS, DEFENDANT MUST FILE A REVISED COST SUMMARY INCLUDING ONLY THOSE COSTS RELATED TO THE COMPENSABLE MATTERS AS DISCUSSED HEREIN. DEFENDANT IS ORDERED TO DO SO BY 12/08/09; PLAINTIFF MAY FILE OPPOSITION BY 12/22/09; THE HEARING ON COSTS IS SET FOR 12/29/09 AT 8:30 A.M. IN DEPARTMENT J.