CHARLES CARREON, ESQ. (127139)
2165 S. Avenida Planeta
Tucson, Arizona 85710
Tel: 520-841-0835
Fax: 520-843-2083
Email: chas@charlescarreon.com

Attorney pro se for Defendant Charles Carreon

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER RECOUVREUR,

Plaintiff,

v.

CHARLES CARREON,

Defendants.

CASE NO. 3:12-CV-03435 RS

RESPONSE TO MOTION FOR COSTS PURSUANT TO F.R.CIV.P. (d)(2); DECLARATION OF CHARLES CARREON

Defendant Charles Carreon hereby requests that the Court deny the motion of plaintiff for an award of costs as moot; alternatively, to find that plaintiff's reasonable costs do not exceed $725.

The grounds for defendant's request are: that defendant has accepted the Rule 68 Offer of Judgment incorporating a lump-sum offer for payment of $725 as costs of service; that F.R.Civ.P. 4(d)(2) is a statute that includes attorneys fees incurred in the filing of a motion thereunder as costs; and, that acceptance of a Rule 68 Offer of Judgment that includes a lump-sum amount for fees that are defined as a subset of costs in the statute authorizing recovery of costs fixes the amount of attorneys fees recoverable by the accepting party as the lump-sum amount. Alternatively, if the merits are considered, the motion is overreaching, and in keeping with established precedents from other District Courts, should award the plaintiff a very modest amount.

This response is based on the attached Memorandum of Points and Authorities, the facts set forth in the Declaration of Charles Carreon, and the proposed Order submitted herewith.

Dated: December 20, 2012

CHARLES CARREON, ESQ.

s/Charles Carreon/s
CHARLES CARREON (127139)
Attorney pro se for defendant

TABLE OF CONTENTS

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE MOTION FOR COSTS SHOULD BE DENIED AS MOOT

A. Plaintiff Accepted Defendant's Lump-Sum Rule 68 Offer of Judgment That Includes Costs in the Amount of $725

Defendant requests that the Court take judicial notice of the records of this action pursuant to F.R.E. 201(c) of the records of this action, Docket # 38, the Accepted Offer of Judgment pursuant to Rule 68 signed by plaintiff's counsel (the "AOOJ"). (Exhibit 1.) The AOOJ unambiguously states in paragraph 4: "Plaintiff shall take a total money judgment inclusive of costs in the amount of $725, being the sum of the filing fee and service costs claimed."

The leading Supreme Court case, *Marek v. Chesny*, 473 U.S. 1, 87 L.Ed.2d 1 (1985) construing the effect of Rule 68[1] explained why lump-sum offers are enforced according to their terms:

> "This construction of the Rule best furthers ***the objective of the Rule***, which ***is to encourage settlements***. ***If defendants are not allowed to make lump-sum offers that would, if accepted, represent their total liability, they would understandably be reluctant to make settlement offers.***"
>
> *Marek v. Chesny*, 473 U.S. at 7 (emphasis added).

B. The Pending Motion is Made Pursuant to Rule 4(d)(2), That Defines Attorneys Fees As An Element of "Expenses," *i.e.*, Costs

Rule 4(d)(2)(B) defines fees incurred in a motion to collect costs as "expenses," *i.e.*, costs.[2] Accordingly, the applicable rule is set forth in Moore's, *citing Marek*, *supra*:

> "***Attorney's fees are generally treated as recoverable costs under the offer of judgment rule when a statute*** or the parties' underlying contract ***makes an exception to the American rule, providing for attorney fee-shifting in favor of a prevailing party and defining attorney's fees as a 'cost'***."
>
> Moore's Federal Practice 3d § 68.02[4], at 68-10 (2012) (emphasis added).

---

[1] Judicial construction of the term "costs" is required, because "Rule 68 does not come with a definition of costs; rather, it incorporates the definition of costs that otherwise applies to the case." *Marek v. Chesny*, 473 U.S. 1, 9 (U.S. 1985)

[2] Subsection (B) provides for recovery of "the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses."

In *Marek*, the Court denied a Section 1983 civil rights plaintiff an award of attorneys fees because he secured a $60,000 verdict after rejecting a $100,000 Rule 68 lump-sum offer of judgment. *Marek v. Chesny*, 473 U.S. at 3 - 4. Quoting the Seventh Circuit's opinion reversing the District Court's award of fees with approval, the Court noted found:

> "As the Court of Appeals observed, 'many a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff.'"

The wording of 42 U.S.C. § 1988, that governs awards of fees under Section 1983, was dispositive[3] in construing the effect of Rule 68:

> "Pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, as amended, 42 U. S. C. § 1988, a prevailing party in a § 1983 action may be awarded attorney's fees 'as part of the costs.' Since Congress expressly included attorney's fees as 'costs' available to a plaintiff in a § 1983 suit, such fees are subject to the cost-shifting provision of Rule 68. This 'plain meaning' interpretation of the interplay between Rule 68 and § 1988 is the only construction that gives meaning to each word in both Rule 68 and § 1988."

Similarly, the plain meaning of fees as a subset of expenses in Rule 4(d)(e)(B) is dispositive of the issue in this case. The $725 in costs designated in the lump-sum offer accepted by plaintiff is the amount of costs to which plaintiff is entitled. To hold otherwise would contravene the teachings of the Supreme Court and discourage settlements by making a Rule 68 offer nothing but a means for resolving liability. As the Seventh Circuit Court observed in the decision the Supreme Court upheld: "[M]any a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff." *Chesny v. Marek*, 720 F.2d 474, 477 (7th Cir. Ill. 1983).

Subsequent decisions make it clear that even when there is no specific designation of the amount of costs, a lump sum designated in a Rule 68 offer is deemed to subsume attorneys fees

---

[3] Although the offer in *Marek, supra*, was phrased, "for a sum, including costs now accrued and attorney's fees, of ONE HUNDRED THOUSAND ($100,000) DOLLARS," the inclusion of the term "attorney's fees" was clearly not the dispositive factor. The recitation would have been of no effect but for Section 1988's inclusion of fees as costs in the fee-shifting provision.

within its scope when it incorporates by reference the allegations of the plaintiff's complaint that pray for attorney's fees; therefore, plaintiffs who have accepted a Rule 68 offer are barred from seeking additional fees via motion. *Eg., Sanchez v. Prudential Pizza, Inc.,* 2012 U.S. Dist. LEXIS 55483 (N.D. Ill., 2012), *quoting Marek v. Chesny, supra*.

C. The Motion Is Moot Because The Case Has Been Resolved By the AOOJ

"A case becomes moot 'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Simmons v. United Mortg. & Loan Inv.,* LLC, 634 F.3d 754, 763 (4th Cir. 2011), *quoting Warren v. Sessoms & Rogers, P.A.,* 676 F.3d 365, 370 (4th Cir. N.C. 2012). When a case becomes moot, there is no subject matter jurisdiction, and when subject matter jurisdiction is challenged, the plaintiff bears the burden of showing that subject matter jurisdiction exists. *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d at 371.

Plaintiff cannot establish the existence of subject matter jurisdiction at this juncture, because no case or controversy remains. By accepting defendant's Rule 68 offer, plaintiff obtained all he could obtain in this declaratory relief action, and there is no case or controversy to adjudicate. Plaintiff cannot recover attorneys fees as the prevailing party, because the declaratory relief statute does not provide for any award of fees, and no other authority for an award of fees is even alleged in the amended complaint. And as noted in *Sanchez v. Prudential Pizza, quoted supra,* to be valid, a Rule 68 offer need only address the claims alleged in the operative complaint.[4]

Plaintiff's counsel was well aware that the case would become moot if he rejected defendant's Rule 68 offer, because although he argued that defendant's Rule 68 offer was "incomplete" because it did not include any designation of additional attorneys fees, citing

---

[4] "Here, the Offer of Judgment stated that it applied to 'all of Plaintiff's claims for relief.' Courts use contract interpretation principles to construe the meaning of the language in offers of judgment. [Citation.] The goal in contract interpretation is ascertaining the parties' intent. [Citation.] For written contracts, the court looks to the plain and ordinary meaning of the contract language to determine the parties' intent. [Citation.] The plain and ordinary meaning of the language in the Offer of Judgment in this case indicates that it was the parties' intent to cover all of plaintiff's claims for relief***. Sanchez's claims for relief are contained in her Amended Complaint*** (Dkt. #33)." *Sanchez v. Prudential Pizza, Inc.*, 2012 U.S. Dist. LEXIS 55483, 2-3 (N.D. Ill. Apr. 20, 2012) (emphasis added).

Greisz v. Household Bank, 176 F.3d 1012, 1015-1016 (7th Cir. 1999), he accepted it ***on the fourteenth day after email service was effectuated***, which he noted was the last day to accept the offer, after which it would lapse by its terms. As he noted in his brief:

> "The fourteen days that plaintiff has to accept or not accept the offer of judgment expires December 17, which is after defendant's opposition to an award of service costs and fees is currently due, but before the proposed deadline. Counsel would prefer to see any arguments that defendant may have about the claim for fees before advising plaintiff about his response to the offer of judgment. Counsel have told defendant that they would be prepared to accept a settlement offering plaintiff full equitable relief and leaving the issue of fees to be determined by a separate motion."
>
> (Opposition to Motion for Extension of Time to Respond to motion for Award of Service Expenses, 3:21-28, Docket # 35.)

Once required to advise plaintiff regarding the Rule 68 offer, however, plaintiff's counsel knew that if he allowed the offer to lapse, he would end up in the same position as the hapless lawyer who was excoriated in *Greisz* for rejecting a valid Rule 68 offer and getting his client's case dismissed as moot:

> "You cannot persist in suing after you've won. Lawyer Longo may have thought that he had something to gain by pressing on--additional attorney's fees. But if that is what he thought, he was mistaken. Once a party has won his suit and obtained the attorney's fees that were reasonably expended on winning, additional attorney's fees would not be reasonably incurred. So by spurning the defendant's offer, Longo shot both himself and his client in the foot. He lost his claim to attorney's fees by turning down the defendant's offer to pay them, and Greisz lost $ 1,200. If further evidence of Longo's incompetence were needed than his sorry record in previous suits, this would be it."
>
> *Greisz v. Household Bank, N.A.*, 176 F.3d 1012, 1015 (7th Cir. Ill. 1999).

If plaintiff does not concede the mootness of the pending motion for costs that have been disposed of by his acceptance of defendant's Rule 68 offer, he is simply trying to "have his cake and eat it, too." Citations to cases where a legitimate claim for fees under a statutory regime that provides for an award of fees to a prevailing party are unavailing. A case alleging the right to satirize an individual does not arise under any statute that authorizes an award of attorneys fees, and even if there were such a statute, plaintiff did not allege it in this case.

Accordingly, this entire action, and this motion, are moot, and the motion must be denied.

II. PLAINTIFF'S COUNSEL'S FEE REQUEST IS OVERREACHING

Although an award of fees on this moot motion would be improper, it is worth noting that plaintiff's motion would be a grandiose exercise in overreaching if it could properly be decided. A Rule 4(b) motion is not an opportunity to wreak vengeance on a reticent defendant,[5] and a motion for costs of service is not to be turned into a profit center. Inflated motions like the one at bar, when they must be decided, are modest affairs. It is instructive to review the facts of a case from the Western District of New York, that deflated a similarly abusive motion down to one twenty-third of its initial bloated size:

> "The parties do not dispute that defendants failed to return the acknowledgement of receipt of summons and failed to comply with the request for waiver within the time specified in FED. R. CIV. P. 4(d). Plaintiff subsequently served defendants, and now cross-moves for the recovery of $ 1,845.00 in attorneys' fees and $50.00 in costs related to such service on defendants. *** Notwithstanding defendants' arguments to the contrary, plaintiff is entitled to recover the $ 50.00 expended on a process server. Plaintiff's request for payment of 16.20 hours of attorney and paralegal time, on the other hand, is unreasonable. Recovery of fees shall be limited to $ 80.00 for the time expended on December 10, 2001."
>
> *Ahern v. Northern Techs. Int'l Corp.*, 206 F. Supp. 2d 418, 422 (W.D.N.Y. 2002)

A somewhat more generous decision from the Southern District of New York awarded Plaintiff's counsel $406.25 in attorney's fees on a Rule 4(d) motion. *Donaghue v. CT Holdings, Inc.*, 2001 U.S. Dist. LEXIS 19791 (S.D.N.Y. Dec. 3, 2001).

Plaintiff's primary counsel, who has never held a position in a private lawfirm or government office, contends that he is worth $700 per hour, based on the "Laffey matrix." In the Northern District, Judge Wilken's rejection of the Laffey matrix in a Section 1983 case met with

---

[5] The Court should not be incited by the assertion that defendant evaded service. He did not. He simply declined to waive service. Indeed, the now-moot motion is defective on many other grounds, for it does not even recite the essential requirements of the statute. (Carreon Declaration ¶ 3.) As explained by defendant in his declaration, he did not waive service in large part because he had been so vilified on the Internet that he genuinely doubted his ability to maintain a professional demeanor in Court filings and in person. (Carreon Dec. ¶¶ 4 – 6.) Quite far from intending disrespect for the Court by his silence, he tenders his sincere apology for the inconvenience to the Court occasioned by his inaction, and has sought to end matters expeditiously and with finality by tendering the Rule 68 offer. (Carreon Dec. ¶¶ 4 – 6.)

the hearty approval of the Ninth Circuit, that cited Fourth Circuit decisions in support of its view that the Laffey matrix is an interpolation that commands no reverence here:

> ***"[J]ust because the Laffey matrix has been accepted in the District of Columbia does not mean that it is a sound basis for determining rates elsewhere, let alone in a legal market 3,000 miles away.*** It is questionable whether the matrix is a reliable measure of rates even in Alexandria, Virginia, just across the river from the nation's capital. *Robinson v. Equifax Info. Servs.*, LLC, 560 F.3d 235, 245 (4th Cir. 2009); *see also Grissom v. Mills Corp.*, 549 F.3d 313, 323 (4th Cir. 2008) (noting that the plaintiff provided 'no evidence' that the Laffey matrix was 'a reliable indicator of the hourly rates of litigation attorneys in Reston, Virginia, a suburb of Washington, D.C.'). We thus cannot fault the district court for declining to use the Laffey matrix."
>
> *Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 454 (9th Cir. Cal. 2010) (emphasis added).

In summary, if the Court were to decide the pending motion on the merits, it could fairly allow defendant no more than an hour or two of work at a modest rate. There was no seven-hundred dollar an hour lawyering involved in filing this motion, and if the costs of service were reasonably calculated, they would not exceed the amount provided for in the Rule 68 offer that plaintiff already accepted, well-knowing this fact.

III. CONCLUSION

The motion should be denied as moot. In the alternative, the total amount of costs awardable, inclusive of attorneys fees, should be determined to be $725.

Dated: December 20, 2012

CHARLES CARREON, ESQ.

/s/Charles Carreon
Charles Carreon (CSB 127139)
Attorney for Plaintiff iCall, Inc.

DECLARATION OF CHARLES CARREON

Charles Carreon declares and states as follows:

1. I am an attorney licensed to practice law in the State of California, and the attorney for the defendant herein. I make this declaration on personal knowledge, and if called as a witness could and would so competently testify.

2. Attached hereto as Exhibit 1 is a true and correct copy of the accepted Rule 68 offer of judgment filed with the Court as Docket # 38.

3. I never evaded service of process, and plaintiff's assertions to the contrary are false. I never saw a process server. Nor did I ever see a request to waive service. Mr. Levy may have mailed me a request to waive service, but I do not concede that fact, nor do I concede that any request to waive service complied with the numerous requirements of law that are not established by the motion to which I am now responding. The motion, for example, does not establish that he sent me a waiver in the correct form, along with two copies of the complaint, and a stamped, self-addressed envelope.

4. I also must note that I made no effort to avoid Mr. Levy's mail. As a longtime fan of Ralph Nader, and a member of Public Citizen, I was quite disappointed that one of my favorite non-profit entities would take up legal arms against me. Accordingly, I sent just about everything that Public Citizen sent me, including donation requests, membership renewals, and the circular that reports on lobbying efforts, right back to Public Citizen, enclosing a note to Mr. Levy, advising him that I wanted nothing to do with the organization.

5. One of the reasons I was hesitant to engage in the judicial forum over this case was the amount of publicity that focused on me. If the court wishes to Google "The Internet's most hated man," it will find one of the articles dedicated to attacking me. I knew that everything I filed with the Court would be dissected by unsympathetic critics, and I questioned whether I would be able to "keep my cool" and respond in a professional manner in Court papers.

6. This entire experience has been a trying, difficult ordeal. In addition to being savagely lampooned by plaintiff's website, I received hundreds of emails from persons of his ilk, many wishing me an ill fate, including that my career would collapse, that I would raped to

death by a bear, and other unpleasantness. The Court will not be able to understand the intense psychological pain engendered by such a brutal onslaught from a public that really knows nothing about me. I not only had no desire to litigate this case, I found it hard to believe it was really happening, and that Mr. Levy was pursuing it with such exaggerated dedication. I am a hardy soul, thank heavens, and did not give in to the destructive self-hatred that has caused many victims of cyberbullying to injure themselves and others, but I will say this – I felt their pain deeply, and I will never inveigh against anyone in the public forum by deriding their character as others have mine.

7. Finally, I would like to inform the Court that at no time did I wish to disrespect the authority of the Northern District of California District Court, where I have been admitted to practice since 1987, and never once suffered a sanction or adverse judicial decision directed toward my conduct as an advocate. I now realize that the Court's time was taken up with matters that arose entirely due to my failure to waive service. I regret that, because in my understanding, the Court is a precious resource that should always be respected, and never squandered. Accordingly, I tender my apology to the Court for failing to waive service, and request that my effort to resolve the matter via the accepted Rule 68 offer be seen as a timely act to bring finality to a series of events that I never foresaw, never invited, and would have much preferred to do without.

I hereby declare, pursuant to the provisions of 28 U.S.C. § 1746 (2), under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed at Tucson, Arizona on December 20, 2012

s/Charles Carreon/s
Charles Carreon, Declarant

Exhibit 1

CHARLES CARREON, ESQ. (127139)
2165 S. Avenida Planeta
Tucson, Arizona 85710
Tel: 520-841-0835
Fax: 520-843-2083
Email: chas@charlescarreon.com

Attorney for Defendant Charles Carreon

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER RECOUVREUR,

Plaintiff,

v.

CHARLES CARREON,

Defendants.

CASE NO. 3:12-cv-03435 RS

OFFER OF JUDGMENT

[RULE 68]

Pursuant to F.R.Civ.P. 68, without waiving any defenses or conceding any claims, or that any valid claim is stated by the operative complaint, or that defendant is liable in any manner whatsoever, defendant hereby offers to give judgment on the following specified terms:

The Court shall enter a declaration declaring that:

1. Plaintiff's domain name "charles-carreon.com," plaintiff's use of the domain name, and plaintiff's current manner of using his web site, do not violate defendant's rights;
2. Plaintiff's use of the domain name "charles-carreon.com," in its current manner of use, is fair use and protected under the First Amendment, and does not infringe on defendant's mark;
3. Defendant is not entitled to an injunction against plaintiff using the domain name "charles-carreon.com" or operating the Web site located at the URL "www.charles-carreon.com;" and

4. Plaintiff shall take a total money judgment inclusive of costs in the amount of $725, being the sum of the filing fee and service costs claimed.

Dated: December 3, 2012

CHARLES CARREON, ESQ.

Charles Carreon
2012.12.03
17:00:53 -07'00'

By: _____
Charles Carreon
Attorney for Defendant Charles Carreon

Accepted:

Dated: December 7, 2012

PUBLIC CITIZEN LITIGATION GROUP

By: _____
Paul Alan Levy
Attorney for Plaintiff Christopher Recouvreur