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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER RECOUVREUR,

Plaintiff,

v.

CHARLES CARREON,

Defendants.

CASE NO. 3:12-CV-03435 RS

REPLY IN SUPPORT OF EX PARTE MOTION PURSUANT TO F.R.CIV.P. 6(b)

MEMORANDUM OF POINTS AND AUTHORITIES

In his moving papers seeking an extension of time to thoroughly explore the machinery that plaintiff's counsel has engaged in his efforts to strongarm defendant into making an unauthorized, undeserved, unearned, and unjust payment for "attorneys fees," defendant cited authority showing that plaintiff's counsel has tried to sell his wrongheaded application of the Lanham Act to other courts unsuccessfully. Plaintiff's counsel's silence regarding the judicial rebuffs his arguments suffered in the Eleventh and Fourth Circuits speaks volumes.

Mr. Levy is simply engaging in a form of forum shopping, eagerly seeking and recruiting clients who create gripe sites to file preemptive declaratory relief actions in various venues, hoping to coerce settlements from vulnerable defendants, or perhaps to lead some court into error by failing to disclose his prior defeats on the very same issue in other jurisdictions.

But for defendant's diligence in searching for Mr. Levy's fee-trolling history, this Court would not know of:

1. The denial of Mr. Levy's fee application in *Smith v. Wal-Mart Stores, Inc.*, N.D. Georgia, Case no. 1:06-cv-526-TCB (the "Wal-Qaeda.com case");

2. The dismissal for lack of subject matter jurisdiction in *Riley v. Dozier Internet Law*, E.D. Va. Case No. 3:08CV642-HEH, affirmed on appeal on other grounds in *Riley v. Dozier Internet Law, PC*, 371 Fed.Appx. 399; 2010 U.S. App. LEXIS 6081 (2010); and,
3. The remand of *Riley v. Dozier Internet Law*, E.D. Va. Case No. 3:08CV642-HEH, in which Mr. Levy tried to spin a legally-untenable claim for attorney's fees into the damages component of diversity jurisdiction in another no-dollar legal maneuver to defend the interests of a semi-slanderous cybersquatter.

Plaintiff's opposition cites *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. Cal. 2008) for the proposition that the fee-recovery "tail" ought not to wag the merits "dog." However, in seeking an outlandish award of fees in excess of $40,000 where the Court never adjudicated the existence of subject-matter jurisdiction or any material issue, the plaintiff accepted an offer of judgment, the judgment has been paid, and plaintiff's counsel has not recovered a penny for his client beyond the costs of litigation, plaintiff's counsel is precisely the one trying to "wag the dog."

Camacho is good authority also for the general principle that, in the absence of an applicable fee-shifting statute, the American rule applies:

> "'Generally, litigants in the United States pay their own attorneys' fees, regardless of the outcome of the proceedings.' However, '[i]n order to encourage private enforcement of the law . . . Congress has legislated that in certain cases prevailing parties may recover their attorneys' fees from the opposing side. When a statute provides for such fees, it is termed a 'fee shifting' statute.'"
>
> *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. Cal. 2008), *quoting Stanton v. Boeing Co.*, 327 F.3d 938, 965 (9th Cir. 2003).

Plaintiff has not cited a single case showing that a declaratory relief case filed to preempt a cybersquatting or trademark suit removes a case from the American Rule, nor has defendant found any such authority. Defendant has presented out-of-circuit authority ruling precisely the opposite, *i.e.*, the Hon. Timothy C. Batten's denial of Mr. Levy's fee application in the Wal-Qaeda.com case, that plaintiff failed to disclose. (Exhibit 3 to moving papers.)

Northern District authority relevant by analogy supports Judge Batten's denial of Mr. Levy's request for fees. Less than two years ago, Judge Edward M. Chen ruled that a declaratory relief action based on a contract with an attorney's fees clause is subject to the American Rule:

> "Under California law, an insurer does not owe fees incurred by its insured in defending a declaratory judgment action on coverage."

> *Allstate Ins. Co. v. Barnett*, 2011 U.S. Dist. LEXIS 12815 (N.D. Cal. Feb. 9, 2011), *citing United Services Auto. Ass'n v. Dalrymple*, 232 Cal. App. 3d 182, 187, 283 Cal. Rptr. 330 (1999) (award of attorney's fees for insured's defense of a declaratory relief action would violate American Rule)

The American Rule has its wisdom. Litigation ought not be encouraged, least of all over trivial matters like the right to publish a website using free software at a domain that costs the registrant $10 to register, for the purpose of simply posting silly, nonsensical chatter that is "satirically" imputed to a member of the California Bar who happened to have the ill-luck to represent a client called "FunnyJunk.com" in an Internet dustup over cartoons copied from a website called "TheOatmeal.com." Defendant is not a public figure, no issue of public importance has been addressed, and the matter has not been found newsworthy except in online publications desperate for pseudo-legal content.

Even the racist caricatures published by the Ku Klux Klan enjoy First Amendment protection, but that does not grant Klan propagandists an affirmative claim backed with statutory fees against a private citizen. If Congress wanted to arm plaintiff and other caricature-publishers with a claim for relief that would entitle them to statutory fees if anyone dared to impede them in the act of publishing derisive images and statements, it knows how to enact the appropriate law, doubtless with a stylish acronym. Not surprisingly, no such law exists, and Mr. Levy's plea for this Court to judicially create one will not prevail.

There is nothing sacred in Mr. Levy's quest, and much that is venal. Discovery should be allowed to learn whether the evils of champerty and maintenance have resurrected themselves under the guise of "public interest litigation." And defendant should have an opportunity to seek Amicus Briefs from trademark holders who stand to lose from Mr. Levy's gambit to put them in the crosshairs of any random, disgruntled blogger, turning a USPTO trademark into an invitation to a preemptive declaratory relief lawsuit from which Mr. Levy can mint a small fortune in fees.

Accordingly, defendant's request for an extension of time should be granted, and briefing rescheduled appropriately.

Dated: January 18, 2013

CHARLES CARREON, ESQ.

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