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(previously sued as JOHN DOE 2,
aka ELECTRICK_MAN)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

GLOBAL TELEMEDIA INTERNATIONAL, INC., a Delaware corporation; JONATHON BENTLEY-STEVENS, an individual; REGINA S. PERALTA, an individual,

Plaintiffs,

v.

DOE 1 aka BUSTEDAGAIN40; DOE 2 aka ELECTRICK_MAN; DOE 3 aka BDAMAN609; and DOES 4 through 35, inclusive,

Defendants.

Case No.: SACV 00-1155 DOC (EEx)

Reply Memorandum Of Points And Authorities In Support Of Motion For Statutory Attorneys' Fees And Costs And Request For Sanctions;

Declaration of Megan E. Gray;

Declaration of Peter C. Johnson;

Declaration of James E. Houpt; and

Declaration of James M. Chadwick

Date: April 30, 2001
Time: 8:30 a.m.
Courtroom: 9D
Judge: Honorable David O. Carter

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I. CRITICAL FACTS JUSTIFYING FULL FEES, ENHANCEMENT, AND SANCTIONS

In an animated, online forum brimming with banter and debate, Defendant Ronald Reader commented that the thing concerning him about Global Telemedia International, Inc. ("GTMI") was that their PR statements were so cutting-edge but their real life product roll-out was so slow or non-existent. Such commentary was hardly surprising, given the SEC's investigation into material misrepresentations in press releases issued by GTMI's president, Jonathon Bentley-Stevens.[1] Nevertheless, Plaintiffs sued Reader for defamation. Although Bentley-Stevens and Peralta were two of these Plaintiffs, the Complaint did not identify a single statement made "of and concerning" them, as required under defamation law.[2] Even after Reader, in his Special Motion to Strike, presented eleven concrete examples of GTMI's failure to roll out products, Plaintiffs persisted in prosecuting this lawsuit. They even went so far as to file a false declaration stating that the "Smart-Card," one of the failed or stalled GTMI "products" that Reader cited in his Special Motion to Strike, had in fact already been rolled out.[3] Plaintiffs' representation regarding the SmartCard was untrue, as Plaintiffs themselves conceded in a later-discovered press release.[4] In yet another press release, conveniently issued after the Special Motion to Strike had been fully briefed, Plaintiffs expressly admitted that GTMI's product roll-outs had fallen well short of GTMI's prior announcements: "[we] delayed marketing the Company's range of products . . . . We have, of course, experienced some delays."[5] All of this evidence was presented to Plaintiffs well before the hearing on the Special Motion to Strike. Yet, Plaintiffs still insisted on prosecuting this lawsuit.

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[1] See Reader's Special Motion to Strike, pages 14-15, and evidence cited therein.

[2] Church of Scientology of California v. Adams, 584 F.2d 893, 898 (9th Cir. 1978), quoting Cal. Code Civ. Proc. § 460.

[3] The Court is encouraged to peruse the Reply in Support of Special Motion to Strike, because it lays out numerous examples of misleading statements made before this Court.

[4] ". . . the Smart Card is on the market." Declaration of Jonathon Bentley-Stevens Re: Motion Opposition, ¶ 16. Yet, Bentley-Stevens issued a press release apologizing for the delays associated with the Smart-Card and acknowledged that the Smart-Card "is in its final stages of pre-production." Evidence establishing this deception before this Court is present in the Supplemental Brief Re Subsequently Discovered Evidence In Support Of Defendant Ronald Reader's Special Motion to Strike.

[5] See Supplemental Brief, page 2 and Exh. "B" to Supplemental Brief.

Moreover, Plaintiffs' entire Opposition was misleading to this Court because it revolved around GTMI business dealings well after the date of Reader's statements. Even in the Opposition to this Motion for Attorneys' Fees, Plaintiffs persist in their attempt to alter the course of history by refusing to acknowledge any facts regarding GTMI's long and unremarkable history of slow and non-existent product roll-outs, if those facts predate the installation of Bentley-Stevens as GTMI's president. The law does not take such a blind eye to reality, and black-letter law is that an allegedly defamatory statement of fact must be determined as of the time of the defamatory publication. See Restatement of Torts 2d, § 581A, comment g; see also, Reply in Support of Special Motion to Strike, p. 9.

On February 23, 2001, this Court dismissed the lawsuit under California's anti-SLAPP statute, which prohibits lawsuits that impinge upon an individual's free speech rights and that are unlikely to succeed on the merits. Under the anti-SLAPP statute, Reader is entitled not only to an award of his attorneys' fees and costs, but also to an enhancement of that award, in light of factors recently enunciated in Ketchum v. Moses, 24 Cal. 4th 1122, 104 Cal. Rptr. 2d 377 (Cal. 2001), including the contingency-fee basis of the representation. Moreover, because this lawsuit went past the "unlikely to succeed" standard into the "frivolous" category, and in light of the deceptive pleadings filed in this case, sanctions against Plaintiffs' attorneys are warranted.

II. READER'S ATTORNEYS' FEES ARE REASONABLE

Plaintiffs blithely characterize the Special Motion to Strike as a simple matter. While it is practically self-evident that Reader's statements are protected, making such a showing in a court of law is an entirely different matter. Researching specific cases for citation, crafting persuasive and understandable arguments, establishing the substantial truth, and all the other components that go into legal defense take significant time and labor.

As the Ninth Circuit recently noted,

> ". . . the number of hours expended in cases that are relatively straightforward may often seem high if considered in the aggregate, without perusing in detail the actual billing entries . . . . [I]n small cases as well as large ones, opposing parties do not always have the same responsibilities under the applicable rules, nor are they similarly situated with respect to their access to necessary facts . . . . Comparison of the hours spent in particular tasks by the attorney for the party seeking fees and by the attorney for the opposing party, therefore, does

> not necessarily indicate whether the hours expended by the party seeking fees were excessive. [Citation omitted] Rather any such comparison must carefully control for . . . the possibility that the prevailing party's attorney -- who, after all, did prevail -- spent more time because she did better work."

Ferland v. Conrad Credit Corp., 2001 U.S. App. LEXIS 5619, **13-15 (9th Cir. 2001). A perfect example of the fact that a strong legal defense, even in "simple" matters, can take significant time and labor is Rosenaur v. Scherer, 2001 Cal. App. LEXIS 265 (Cal. Ct. App. 2001). In that recent case, the California Court of Appeals applied the anti-SLAPP statute to core political speech, an even more clear-cut matter than this case, and even then, the court affirmed an attorneys' fee award of $65,386.; see also Houpt Decl. (court used a blended rate of $250 per hour to arrive at attorneys' fee award, which resulted in compensation at full hourly rates).

Characteristically, Plaintiffs do not dispute any particular time entry (all of which were attached as exhibits). Nor do Plaintiffs dispute that Reader's counsel charged their standard billing rates, or that those billing rates were reasonable for lawyers in the First Amendment and Internet fields.[6] Although the end result was a total fee amount higher than either Plaintiffs or Reader would prefer, the fact of the matter is that those hours were reasonably spent, and the standard hourly rate was charged.[7] Contrary to the implications of opposing counsel, Reader's counsel did not "pad" any hours. In fact, Reader's counsel were extremely conscientious, unable to forget the fact that they were representing an individual of modest means. Gray Decl. ¶ 3. Indeed, more than $5,000 in fees were written off during the course of the litigation, because Reader's counsel did not believe the time was well spent. Gray Decl. ¶ 3.

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[6] Those rates were even lower than those charged in other law firms. See Houpt Decl., Johnson Decl., and Chadwick Decl.

[7] Indeed, Reader's counsel spent fewer hours than King's counsel. Reader's total fees were higher than King's only because of the billing arrangement presumably arranged between his law firm and insurance carrier, such that the law firm substantially reduced its hourly rate in order to be selected as defense counsel for King and other insureds.

III. ALL OF READER'S FEES IN THE DEFENSE OF THIS LAWSUIT ARE RECOVERABLE

Equally unavailing is Plaintiffs' claim that Reader is not entitled to recover the fees incurred in removing the case to federal court, or in establishing the substantial truth of Reader's allegedly defamatory statement.[8]

In support of this assertion, Plaintiffs cite to inapplicable authorities. The two cases cited by Plaintiffs were not presented with the question of whether a defendant could recover attorneys' fees expended in addition to those fees incurred in connection with a Special Motion to Strike. Because those defendants did not appeal the reduction in fees, these courts did not address the matter. Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 49 Cal. Rptr. 2d 620 (Ct. Cal. App. 1996); Macias v. Hartwell, 55 Cal. App. 4th 669, 64 Cal. Rptr. 2d 222 (Ct. Cal. App. 1997). Moreover, those two cases predated the amendment to Section 425.16 mandating that this statute "be construed broadly." Finally, Plaintiffs' attempt to distinguish Ketchum because it was a contingency-fee matter is inapposite because that court addressed the contingency-fee nature of the representation as a component of the enhancement, not of the lodestar. Plaintiffs further neglect to point out that, in Ketchum, in the context of fees incurred in connection with a motion for attorneys' fees and enforcement proceedings, the California Supreme Court held that a defendant prevailing on an anti-SLAPP motion may recover fees not directly associated with that SLAPP motion. 24 Cal. 4th at 1141.

Contrary to Plaintiffs' assertions, the plain language of the anti-SLAPP statute authorizes a prevailing defendant to recover attorneys' fees and costs without any limitation or qualification. Well-established principles of statutory construction require a court to "look first to the words of the statutes . . . giving them usual and ordinary meaning . . . [and] [I]f there is no ambiguity in the

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[8] Plaintiffs' claim that not all of Reader's attorneys' fees are recoverable also rests on the notion that it was Reader's "choice" to remove to federal court and to present evidence of truth. While Reader can hardly contest his free will, it was also his "choice" to defend this lawsuit and not permit a default judgment to be taken against him, as it was his "choice" to spend money upfront in the hope of dismissing the lawsuit at an early stage, rather than waiting to see if Plaintiffs would tire of the case and later agree to dismiss him for a nominal amount. Such a "choice" -- to exercise his right to

language of the statute, 'then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.'" Truck Insurance Exchange v. Superior Court, 67 Cal. App. 4th 142, 146, 78 Cal. Rptr. 2d 721, 723 (Cal. Ct. App. 1998) (citations omitted). Nothing in the plain language of Section 425.16 limits the recovery of attorneys' fees and costs by a defendant who has prevailed on a Special Motion to Strike.

In this respect, Section 425.16 is similar to California's commercial misappropriation statute, which provides that "[t]he prevailing party in any action under this section shall also be entitled to attorney's fees and costs." Cal. Civ. Code § 3344(a). In the absence of any limiting or qualifying language in the statute, courts have awarded prevailing defendants all reasonable defense costs, and not simply fees and costs incurred in bringing a dispositive motion. See Montana v. San Jose Mercury News, Inc., 34 Cal. App. 4th 790, 798, 40 Cal. Rptr. 2d 639, 643 (Cal. Ct. App. 1995).

Moreover, restricting a prevailing defendant's recovery under Section 425.16 would violate another established principle of statutory interpretation; namely, that a court "may not insert into a statute qualifying provisions not intended by the Legislature, nor may it require the statute to conform to an assumed legislative intent which does not appear from the language of the statute itself." City of Berkeley v. Cukierman, 14 Cal. App. 4th 1331, 1339, 18 Cal. Rptr. 2d 478, 482 (Cal. Ct. App. 1993). A judicially imposed limitation on a prevailing defendant's recovery would be inconsistent with this principle. Indeed, if the California Legislature had intended to limit the recovery of fees incurred in bringing a special motion to strike, it would have done so expressly, as it has done in other sections of the Code of Civil Procedure. See, e.g., Cal. Code Civ. Proc. § 405.38 (limiting attorneys' fee award to those fees incurred in "making or opposing the motion"); Cal. Code Civ. Proc. § 437c(i) (limiting attorneys' fee award on bad-faith affidavits to those expenses "which the filing of the affidavits caused the other party to incur"); Cal. Code Civ. Proc. § 2023(b)(1) (limiting attorneys' fee award for abusive discovery to those expenses incurred "as a result of that [abusive] conduct").

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remove to federal court and to establish the substantial truth of his statement -- hardly justifies a reduction in the attorneys' fee award.

Finally, if there remains any question about the scope of the fee-recovery provision in the anti-SLAPP statute, it was resolved by the Legislature's 1997 amendment mandating that the statute "shall be construed broadly."[9] Such a construction is consistent with the Ketchum case, where the California Supreme Court expressly permitted recovery of fees not directly associated with the anti-SLAPP motion.[10] An award of anything less would be inconsistent with the Legislature's express mandate and the California Supreme Court's decision.

This result makes sense: a defendant who prevails on a special motion to strike but recovers only the fees associated with that motion, or only the fees associated with the arguments reached by the Court in that motion, has won only a pyrrhic victory unless he can recover his remaining legal costs.

III. ENHANCEMENT OF THE FEE AWARD IS APPROPRIATE

Reader has already noted that, while Ketchum approved a fee enhancement based on the contingent nature of the case and because of the exceptional representation by defendant's counsel, the Supreme Court did not foreclose fee enhancements in other instances.[11] In fact, the Supreme Court's opinion indicated that fee enhancements are appropriate under a variety of circumstances. Enhancement under Ketchum is appropriate in this litigation for a number of reasons:

- The expertise of Reader's attorneys, and the skill with which they defended this action, are not reflected in their hourly rates. As shown in the declarations of James E. Houpt ($365/hour senior associate in Sacramento), Peter C. Johnson ($405/hour junior associate in New York), and James M. Chadwick ($305/hour junior partner in Palo Alto), the hourly rate for Reader's counsel is well below those of other well-regarded private lawyers experienced in First Amendment and Internet issues.[12]

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[9] Cal. Code Civ. Proc. § 425.16(a).

[10] Ketchum v. Moses, 24 Cal. 4th at 1133.

[11] Plaintiffs claim that Ketchum is not applicable because GTMI is a struggling start-up. Although GTMI may be struggling, it is hardly a start-up. It is a multi-national, publicly owned company, it has existed in one form or another since at least 1995, and it has been scrutinized by the US Securities and Exchange Commission for possible fraud.

[12] See Declaration of Megan E. Gray filed concurrently with Reader's Motion for Statutory Attorneys' Fees and Costs and Request for Sanctions, ¶ 6 (noting that John R. Sommer's hourly rate was $320/hour in November 1998 and Glen A. Smith's hourly rate was $345/hour in October 2000).

- Speech is being chilled in an important new communication forum. As the Supreme Court has recognized, the Internet, with its "vast democratic fora," is "the most participatory form of mass speech yet developed" and is entitled to the "highest protection."[13] The California Supreme Court has correspondingly interpreted the anti-SLAPP statute and its attorneys' fee provision to permit enhanced fee awards, in order to strengthen the enforcement of free speech rights.[14] In "cyberSLAPP" cases, a nationwide scourge, the potential downside that a defendant may recover his attorneys' fees is not sufficient to deter unmeritorious claims.
- Representing cyberSLAPP defendants precludes other legal employment, and many competent lawyers shy away from defending these cases because standard compensation is insufficient to justify antagonizing other clients and potential clients.

In addition, enhancement is appropriate because Reader's representation is now on contingency.[15] Gray Decl. ¶ 4; Exh. "A". As previously represented to this Court and to opposing counsel, Reader is an individual of modest income. He has unpaid legal bills in this litigation that exceed $25,000, and he is without any current means to pay them. Gray Decl. ¶ 4. Moreover, Plaintiffs have filed a notice of appeal of this Court's ruling on the Special Motion to Strike, so Reader faces the prospect of even greater debt. Recognizing the practical inability of Reader to pay his legal bills, Baker & Hostetler has agreed to continue to represent him only if Baker & Hostetler receives any enhancement of the award ordered by the Court. Gray Decl., ¶ 4; Exh. "A."

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[13] Reno v. ACLU, 521 U.S. 844, 863 and 868, 117 S.Ct. 2329, 128 L.Ed. 2d 874 (1997), affirming lower court opinion's description of the Internet; see also, id. at 870 (on the Internet, "...any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer . . . 'the content on the Internet is as diverse as human thought.'" In addition, given the consolidation of media companies in recent times, some groups look to the Internet as the last bastion for individuals to communicate on a large scale. See Exhibit E to Supporting Declaration of Megan E. Gray, filed concurrently with Reader's Special Motion to Strike.

[14] Ketchum v. Moses, 24 Cal. 4th at 1136-1137; see also, Serrano v. Priest, 20 Cal. 3d 25, 45-47, 141 Cal. Rptr. 315 (Cal. 1977) (societal importance of the public policy vindicated by the litigation is factor in enhancing attorneys' fee award).

[15] At the time of filing the Motion for Attorneys' Fees, the management of Baker & Hostetler had not yet approved this new billing arrangement. Gray Decl., ¶ 4.

The enhancement is necessary to make representation in this case and similar cases a viable option. Collection proceedings involve cost, risks of off-shore accounts and bankruptcy, and headache. For these reasons, collection proceedings will not be undertaken unless the amount of money to be collected is sufficiently large. The fact that collection proceedings are likely in this instance can be fairly presumed from GTMI's history of non-payment in other litigation, its deceptions before this Court and the SEC, and its flailing stock price. Notably, despite the bluster in the Opposition about Reader's concerns that Plaintiffs will never pay any attorneys' fee award, Plaintiffs certainly have not submitted any declaration stating that they would, in fact, comply with an order awarding fees. Nor have opposing counsel themselves provided any opinion in their own declarations as to whether or not Plaintiffs would comply with such an order. Unless the Court enhances the attorneys' fee award, Reader is unlikely to find legal representation.

Under the reasoning of Ketchum, enhancement of Reader's attorneys' fees is appropriate in these circumstances.

IV. SANCTIONS AGAINST PLAINTIFFS' COUNSEL ARE APPROPRIATE

As Plaintiffs note, Rule 11's procedural requirements were not complied with and, therefore, sanctions are not available on that basis. However, despite that citation error, the relief requested is available to Reader.[16]

An order making Plaintiffs' counsel jointly and severally liable with their clients for the attorney fee award is available under a variety of statutory grounds. 28 U.S.C. § 1927, which has a preponderance of the evidence burden, authorizes sanctions against counsel that "multiplies the proceedings in any case unreasonably and vexatiously." Under Section 1927, "unreasonably" and "vexatiously" requires a showing of bad faith, improper motive, or reckless disregard of the duty owed to the court, such as knowingly or recklessly raising a frivolous argument. New Alaska Dev. Corp. v. Guetschow, 869 F.2d 1298, 1306 (9th Cir. 1989). Under Section 1927, "multiplies" means conduct that has resulted in unnecessary proceedings, including continuing proceedings initially

[16] Counsel regrets the error. As noted in the Gray Decl. ¶ 15, filed concurrently with the moving papers, she is not accustomed to requesting sanctions against opposing counsel.

thought to be meritorious after their lack of merit becomes apparent. Schwarzer, Tashima & Wagstaffe, Cal. Prac. Guide: Fed. Civ. Pro. Before Trial (The Rutter Group 2000), § 17:147. In addition to 28 U.S.C. § 1927, this Court has inherent authority to sanction bad faith. See Chambers v. NASCO, 501 U.S. 32, 57, 111 S. Ct. 2123, 2139 (1990). Finally, Local Rule 27 also authorizes sanctions for bad-faith conduct.

As laid out in more detail at the beginning of this Reply, sanctions are appropriate against Plaintiffs' counsel for filing and prosecuting this lawsuit. The Complaint alleges that Reader defamed Bentley-Stevens and Peralta, when the allegedly defamatory statement does not even mention those individuals and cannot be reasonably interpreted to be "of and concerning" them. As to GTMI, Reader's statement was a textbook-example of protected opinion, especially given the rambunctious nature of the message-board forum. Counsel's unfamiliarity with the appropriate contextual evaluation does not immunize them -- they were duty-bound to learn the fundamentals of First Amendment jurisprudence.[17] In any event, that basic lesson was provided to them within Reader's Special Motion to Strike. Nonetheless, they chose to ignore those precepts.

Just as importantly, if there was any disagreement about the protected nature of Reader's speech, the substantial truth of his statement resounded loud and clear.[18] GTMI had a long and troubled history of making overreaching announcements about product roll-outs that never came to fruition. Opposing counsel were aware of the ongoing SEC investigations into material misrepresentations by GTMI's president, his previous company, and GTMI itself. Reader listed

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[17] This is not the first cyberSLAPP case to receive judicial review. There have been numerous and well-publicized cases involving online defamation on message boards (Reader's counsel has been involved in many of these cases). Gray Decl. ¶ 6. This lawsuit is, however, the first cyberSLAPP ruling *in California* that has been appealed. That fact does not change the apparent lack of merit in this case: freedom-of-speech rights, and the protections for opinion and truth, have been an integral part of First Amendment jurisprudence since the Bill of Rights was ratified in 1791.

[18] It is unclear why Mr. Friedman's heart attack is relevant to this Motion. Reader's Special Motion to Strike was fully briefed before that occurred, and Reader readily stipulated to a continuance of the hearing date on the Special Motion to Strike, in order to accommodate this health issue. Gray Decl. ¶ 6. Although Plaintiffs did issue one of their damning press releases while Mr. Friedman was ill, many others were released prior to that, as described in the moving and reply papers to the Special Motion to Strike. Moreover, while Reader's counsel is sympathetic to Mr. Friedman's health problems, Plaintiffs were represented by two lawyers at two different law firms, both of whom were active in this litigation and both of whom Reader's counsel spoke and corresponded with.

eleven concrete examples of slow or non-existent GTMI "products" in the Special Motion to Strike. Reader also described numerous examples of deceptive press releases. However, opposing counsel blindly shut their eyes to these facts. In their Opposition, they instead argued a proposition that is unsupported in the law; namely, that GTMI's history could be erased prior to Bentley-Stevens' installation as president.

The Opposition also attempted to mislead the Court regarding GTMI's product roll-outs by describing a smattering of business developments and prospects that finally took shape in the last quarter of 2000, well after Reader made his generalized statement in March 2000. In addition to being irrelevant to an evaluation of the supposedly defamatory quality of Reader's statement, these later supposed developments were also shown to be supported by misleading, if not outright false, evidentiary showings.

Most tellingly, neither Plaintiffs nor their counsel have provided any justification or explanation for Plaintiffs' specific, public admissions that GTMI's product roll-outs were slow or non-existent: the very same truth that Plaintiffs' sued Reader for voicing.[19] Indeed, they have not commented once about these embarrassing and crucial admissions in any pleading presented to this Court!

And, if the overwhelmingly protected nature of Reader's statement was not sufficient, opposing counsel had no basis for claiming that the statement caused the asserted damage. This is especially so when Reader's statement was made in the midst of 50,000 message board posts, radical stock market fluctuations, and a flurry of corporate press releases and SEC filings.

For all of these reasons, the Court should sanction Plaintiffs' counsel pursuant to 28 U.S.C. § 1927, Local Rule 27, and the Court's inherent powers, ordering Plaintiffs' counsel to be jointly and severally liable with their clients for the award of Reader's attorneys' fees and costs.

[19] See Supplemental Brief, p. 2 and Exhs. "A" and "B" to Supplemental Brief.

V. CONCLUSION

Plaintiffs prosecuted this unmeritorious SLAPP suit in an attempt to punish Reader for exercising his protected free-speech rights. Under Section 425.16, Plaintiffs, not Reader, must suffer the consequences of that conduct, by paying Reader the attorneys' fees and costs that he was forced to incur to defend himself. Given the skill with which Reader's counsel presented the issues, the importance of the constitutional rights vindicated by this litigation, the contingency nature of the representation, and the urgent need to make the defense of similar "cyberSLAPP" cases attractive to competent counsel, the lodestar fee amount of $49,702.44 should be enhanced (by a multiplier of 2.0) to $99,404.88.

The Court should further order Plaintiffs' counsel to be jointly and severally liable with their clients for the award, because of their improper filing and prosecution of this baseless action, even after Plaintiffs' own public statements affirmed the truth of Reader's online statement. Unless these sanctions are imposed, Reader is unlikely to ever actually collect his attorneys' fees from Plaintiffs – meaning that Plaintiffs (and their counsel) will have succeeded in punishing him for exercising his free-speech rights.

Dated: April 23, 2001

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