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7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF LOS ANGELES

11 WILLIAM JAMES MITCHELL,

12 Plaintiff,

13 v.

14 TWIN GALAXIES, LLC; and Does 1-10,

15 Defendants.

Case No. 19STCV12592

Assigned to: Hon. Wendy Chang
[Dept. 36]

**OPPOSITION OF TWIN GALAXIES, LLC
TO MOTION FOR ATTORNEY'S FEES
OF WILLIAM JAMES MITCHELL**

*[Filed concurrently with: (1) Declaration of
David A. Tashroudian; and, (2) Objections to
Evidence]*

Hearing

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendant and cross-complainant Twin Galaxies, LLC ("Twin Galaxies") opposes the
4 attorney's fees motion of plaintiff and cross-defendant William James Mitchell ("Mitchell") on
5 the grounds that its special motion to strike Mitchell's complaint under the anti-SLAPP statute and
6 subsequent appeal were made in good faith, were not frivolous, were not solely for delay, and are
7 warranted under existing law.

8 Mitchell has not met his burden to show the contrary. His motion does not prove that Twin
9 Galaxies' litigation conduct was totally and completely without merit. Mitchell cannot meet this
10 high threshold because of each of the tactics identified in the motion were with merit. The tactics
11 he complains of as dilatory and solely for the purpose of delay were all allowed by law, or
12 condoned by the court. Mitchell's motion must be denied as a result.

13 The motion is also fatally flawed because it is insufficiently supported. Mitchell seeks
14 over \$225,000.00 in attorney's fees for 356.6 hours of work yet his counsel does not submit a
15 single time record. Mitchell's failure to provide any evidence of the amount of time it took to
16 complete the tasks he seeks fees for violates Twin Galaxies' due process rights. Twin Galaxies
17 cannot defend against the motion because it cannot identify with specificity the tasks that are not
18 compensable, and by extension the fees that are unreasonable. Mitchell's supporting evidence is
19 unpersuasive for the additional reason that he relies on inadmissible hearsay to prove the majority
20 of the time spent on this matter. An attorney's fees award of \$225,000.00 cannot stand on this
21 record.

22 As the Court considers this motion, it should keep in mind that this case involves the
23 important issues of the Constitutional right of free speech, and public debate. These issues are at
24 the cutting edge of the law where, as here, the parties to the litigation are public figures. Twin
25 Galaxies' zealous advocacy and defense of its right to free speech should not be found frivolous
26 or dilatory on this record. The caselaw is clear that attorney's fees as sanctions under California
27 *Code of Civil Procedure* section 128.5 should be levied to deter the "most egregious conduct" and
28 in the "clearest of cases." Twin Galaxies respectfully submits that this is not one of those cases.

1 **II. FACTS & PROCEDURAL HISTORY**¹

2 A. Mitchell’s Disputed Scores.

3 Suffice it to say that Mitchell is an infamous videogame player who has at various times
4 held world record high scores in the Donkey Kong arcade videogame. Twin Galaxies is a media
5 company and a world-renowned videogame achievement record keeper that operates the website
6 www.twingalaxies.com. The website publishes world record leader boards across multiple
7 videogame genres including arcade, console, and PC. Mitchell maintained high score world
8 records on Twin Galaxies’ Donkey Kong arcade leader boards from the 1980’s until 2018.

9 In 2018, a member of the public challenged three of Mitchell’s Donkey Kong high score
10 world records (the “Disputed Scores”) by providing evidence that the videotaped recordings
11 historically used to substantiate the scores could not have come from genuine arcade hardware. A
12 public discussion and debate on the veracity of the Disputed Scores took place pursuant to Twin
13 Galaxies’ score dispute resolution process.

14 Part of the dispute resolution process involved Twin Galaxies itself investigating the
15 challenge to Mitchell’s score. Twin Galaxies embarked on a months long public investigation led
16 by several staff members which cost thousands of dollars and ultimately lead to Twin Galaxies
17 validating the dispute. Twin Galaxies then issued a statement in April 2018 stripping Mitchell of
18 his world records on the basis that the investigation results showed that the videotaped recordings
19 historically used to substantiate the Disputed Scores could not have come from original,
20 unmodified Donkey Kong hardware.

21 B. Mitchell’s complaint and Twin Galaxies’ response.

22 Mitchell filed his defamation complaint against Twin Galaxies on April 11, 2019 alleging
23 the April 2018 statement was false. Twin Galaxies was served with the complaint on January 31,
24 2020. Mitchell amended his complaint on March 12, 2020. Twin Galaxies filed its special motion

25 _____
26 ¹ Judge Sam Ohta of the Los Angeles Superior Court, sitting by assignment in the Second Appellate District, authored
27 a comprehensive published opinion on the anti-SLAPP appeal dated October 12, 2021. [Declaration of David A.
28 Tashroudian (“Tashroudian Decl.”), ¶ 2, Exh. A (Appellate Court Opinion).] The opinion outlines the facts giving
rise to Mitchell’s claim, and Twin Galaxies’ arguments against those claims. Twin Galaxies refers the Court to the
facts section of that opinion for reference. [Id. at pp. 2-12.]

1 to strike the amended complaint on March 30, 2020. [*See* Tashroudian Decl., ¶ 3, Exh. B (anti-
2 SLAPP Motion).] Twin Galaxies filed its reply on June 26, 2020. [*Id.* at ¶ 4, Exh. C (Reply ISO
3 anti-SLAPP Motion).]

4 Twin Galaxies' special a motion to strike was set for hearing on October 15, 2021 in
5 Department 36 of the Los Angeles Superior Court, Judge Gregory Alarcon presiding. In the
6 interim, on September 22, 2020, Twin Galaxies filed a motion for undertaking pursuant to
7 California *Code of Civil Procedure* section 1030 on the ground that Mitchell is an out of state
8 plaintiff and Twin Galaxies has a reasonably possibility of prevailing against his claims. Judge
9 Alarcon heard the special motion to strike and the undertaking motion together on October 15,
10 2020. On October 26, 2020, Judge Alarcon issued an order where he denied the special motion to
11 strike, but granted the undertaking motion and ordered Mitchell to put up a costs bond of
12 \$81,225.00. [*See* Tashroudian Decl., ¶ 5, Exh. D (Trial Court Order).]

13 C. The subsequent appeal.

14 On November 13, 2020, Twin Galaxies appealed the order denying the special motion to
15 strike. [Tashroudian Decl., ¶ 6, Exh. E (Opening Appellate Brief).] The order denying the special
16 motion to strike was affirmed in a published decision dated October 12, 2021.

17 Twin Galaxies filed a petition for review of the appellate decision with the California
18 Supreme Court on November 19, 2021. [*See* Tashroudian Decl., ¶ 6, Exh. F (Petition for Review).]
19 On December 30, 2021, the California Supreme Court extended the time to consider the petition
20 *sua sponte*. The California Supreme Court denied the petition for review on January 26, 2022.
21 This matter was then remitted to the trial court on January 31, 2022. [*Id.*]

22 D. Twin Galaxies' cross-complaint against Mitchell.

23 During the pendency of the appeal, Twin Galaxies obtained an order to file, and on
24 February 5, 2021 did file, a cross-complaint against Mitchell for racketeering, deceit, tortious
25 interference with contract, unfair business practices, and breach of contract. Prosecution of the
26 cross-complaint was stayed on appeal of the special motion to strike. Mitchell answered the cross-
27 complaint on March 17, 2022 after remittitur.

28 ///

1 **III. ARGUMENT**

2 Mitchell moves this Court for an order awarding him \$226,014.96 in attorney’s fees and
3 costs against Twin Galaxies and its counsel pursuant to California *Code of Civil Procedure* section
4 425.16(c)(1) on the ground that the special motion to strike was frivolous and solely for delay. To
5 the contrary, the special motion to strike was not frivolous, nor was it brought solely for the
6 purpose of delay; more importantly, the special motion to strike was not brought in bad faith.

7 A. Legal standard for the prevailing plaintiff to recover its fees on anti-SLAPP.

8 If the court finds that a defendant's filing of an anti-SLAPP motion was “frivolous or [was]
9 solely intended to cause unnecessary delay,” then it may award costs and reasonable attorney's
10 fees “pursuant to Section 128.5” as sanctions to a “plaintiff prevailing on the motion.” (See Cal.
11 Code Civ. Proc., § 425.16(c)(1).) The “reference to section 128.5 in section 425.16, subdivision
12 (c) means a court must use the procedures and apply the substantive standards of section 128.5 in
13 deciding whether to award attorney fees under the anti-SLAPP statute.” (Decker v. U.D. Registry,
14 Inc. (2003) 105 Cal. App. 4th 1382, 1392.)

15 Attorney fees as sanctions under California *Code of Civil Procedure* section 128.5 may be
16 levied for “actions or tactics, made in bad faith, that are frivolous or solely intended to cause
17 unnecessary delay.” (See Cal. Code Civ. Proc., § 128.5(a).) A determination of frivolousness
18 requires a finding that the anti-SLAPP “motion is totally and completely without merit, that is,
19 any reasonable attorney would agree such motion is totally devoid of merit. [Citation & quotations
20 omitted.]” (Decker, supra, 105 Cal. App. 4th at p. 1392.) A motion is totally and completely
21 without merit for purposes of a finding of frivolousness under section 425.16(c)(1) or section 128.5
22 only if a reasonable attorney would agree that the motion is totally devoid of merit. (See Moore v.
23 Shaw (2004) 116 Cal. App. 4th 182, 199.) In addition, there must also be a showing of an improper
24 purpose, *i.e.*, subjective bad faith on the part of the attorney or party to be sanctioned. (See In re
25 Marriage of Sahafzadeh-Taeb & Taeb (2019) 39 Cal. App. 5th 124, 135-141 (compiling cases
26 holding that subjective bad faith is an element of a sanctions award under California *Code of Civil*
27 *Procedure* section 128.5); see also Gemini Aluminum Corp. v. California Custom Shapes, Inc.
28 (2002) 95 Cal. App. 4th 1249, 1262 (holding that there must also be a showing of an improper

1 purpose, or subjective bad faith on the part of the attorney or party to be sanctioned.)

2 “Monetary sanctions may not be awarded against a represented party for a violation of
3 presenting a claim, defense, and other legal contentions that are warranted by existing law or by a
4 nonfrivolous argument for the extension, modification, or reversal of existing law or the
5 establishment of new law.” (Cal. Code Civ. Proc., § 128.5(f)(2)(A).) This limitation of California
6 *Code of Civil Procedure* section 128.5 reflects the fact that the “[...] sanction statutes were crafted
7 by the Legislature to strike a balance between competing interests: the need to control improper
8 litigation ‘tactics’ and the desire to avoid chilling vigorous advocacy.” (Pacific Trends Lamp &
9 Lighting Products, Inc. v. J. White, Inc. (1998) 65 Cal. App. 4th 1131, 1136.) Indeed, the arbitrary
10 imposition of sanctions could chill the valid assertion of a litigant’s rights. Therefore, sanctions
11 should be imposed only for the “most egregious conduct” and in the “clearest of cases.” (Luke v.
12 Baldwin-United Corp. (1985) 167 Cal. App. 3d 664.)

13 B. The filing of the special motion to strike and the subsequent appeal were not in bad
14 faith.

15 As a threshold matter, Mitchell has the burden of proof on the issue of whether Twin
16 Galaxies’ special motion to strike and subsequent appeal were made in bad faith. (*See* Cal. Code
17 Civ. Proc., § 128.5(a) (bad faith requirement); *see also* Cal. Evid Code, § 500 (on the burden of
18 proof).) He must identify specific conduct evidencing Twin Galaxies’ bad faith. Mitchell presents
19 absolutely no argument or evidence of Twin Galaxies’ bad faith, and his motion should be
20 summarily denied as a result

21 C. The special motion to strike and the subsequent appeal were not frivolous.

22 Distilling Mitchell’s convoluted frivolousness argument to its four main points, Mitchell
23 argues in Section II(A) of his Fees Motion that the special motion to strike was frivolous because:
24 (1) Mitchell met the minimal threshold of adducing evidence of falsity and actual malice and Twin
25 Galaxies “attempt[ed] to have the court ignore these disputes of fact,” “did not care what evidence
26 [Mitchell] ha[d],” and ignored the factual disputes and law crediting plaintiff’s “evidence for
27 purposes of decision and ruling” [Fees Motion, 11:11-17; 11:23-12:2; & 12:7-13:1]; (2) Twin
28 Galaxies argued its allegedly defamatory statement was non-actionable opinion [Fees Motion,

1 11:18-22]; (3) Twin Galaxies persisted in attempting to have the court weigh evidence on appeal
2 [Fees Motion, 12:3-9]; and, (4) Twin Galaxies petitioned the California Supreme Court for review
3 claiming error because the appellate court relied on circumstantial evidence of actual malice [Fees
4 Motion, 12:10-16]. Twin Galaxies addresses each point in-turn.

5 Point One: The standard on anti-SLAPP is to determine whether the defendant's evidence
6 supporting the motion defeats the plaintiff's evidence as a matter of law. (See Taus v. Loftus
7 (2007) 40 Cal.4th 683, 714.) Twin Galaxies' legal contention that its evidence of truth and lack
8 of actual malice defeat Mitchell's evidence as a matter of law is not frivolous. On falsity/truth,
9 Twin Galaxies argued that Mitchell as a public figure had the burden to adduce evidence of falsity
10 but he failed to do so. [See Tashroudian Decl., ¶ 7, Exh. F (Reply ISO anti-SLAPP Motion, 4:7-
11 6:7).] Twin Galaxies argument on the issue was buttressed by the fact that it had instead adduced
12 significant evidence – including expert testimony – that showed the truth of its statement. [Id. at
13 6:8-7:7.] Twin Galaxies was required to argue and present supporting evidence to disprove falsity
14 and prove truth. These argument cannot be frivolous when they are required under the law to
15 prevail on anti-SLAPP.

16 On actual malice, Twin Galaxies was similarly required to adduce evidence that defeats
17 Mitchells claim as a matter of law. Twin Galaxies did bring evidence before the court in its special
18 motion to strike that it conducted its own extensive investigation which validated the dispute
19 thereby negating the actual malice element. [See Tashroudian Decl., ¶ 3, Exh. B (anti-SLAPP
20 Motion, 13:24-14:26).] Twin Galaxies also provided other compelling evidence showing the lack
21 of actual malice; most notably evidence in the form of declarations by people (Carlos Pineiro and
22 Steven Kleisath) working for Mitchell during Twin Galaxies investigation of the Disputed Score
23 who also found that the Disputed Scores were not from original arcade hardware, and who alerted
24 Twin Galaxies to this fact publicly before the statement was issued in April 2018. [See
25 Tashroudian Decl., ¶ 7, Exh. F (Rely ISO anti-SLAPP Motion, 7:8-11:23).] Twin Galaxies
26 argument that these facts defeat Mitchell's claim of actual malice are warranted by existing law
27 which requires a higher quality of evidence of actual malice where the plaintiff is – like here – a
28 public figure. A finding of frivolousness cannot be justified where Twin Galaxies arguments are

1 supported by existing law and copious facts.

2 Point Two: The argument made by Twin Galaxies in the anti-SLAPP motion that its
3 statement regarding the legitimacy of the Disputed Score was non-actionable opinion is not
4 frivolous. [See Tashroudian Decl., ¶ 3, Exh. B (anti-SLAPP Motion, 10:9-11:18).] In determining
5 whether a statement is nonactionable opinion, courts will look to the circumstances which gave
6 rise to the statement, and the particular context of the statement. (Franklin v. Dynamic Details,
7 Inc. (2004) 116 Cal. App. 4th 375, 389) “This contextual analysis demands that the courts look at
8 the nature and full content of the audience to whom the publication was directed.” (Id.) In
9 determining whether statements are nonactionable opinion, a number of cases have relied heavily
10 on the fact that the statement was made in Internet forums. (See, Summit Bank v. Rogers (2012)
11 206 Cal. App. 4th 696, 701; see also Krinsky v. Doe 6 (2008) 159 Cal. App. 4th 1154, 1162.)

12 Twin Galaxies’ argument that the statement regarding the Disputed Scores was non-
13 actionable opinion is warranted by existing law. The circumstances which gave rise to the
14 statement involved a member of the public invoking Twin Galaxies score dispute process on an
15 Internet forum which – under Twin Galaxies’ rules – required Twin Galaxies to give its opinion
16 on, and adjudicate, the dispute. Indeed, the fact that all of this took place over the Internet on the
17 Twin Galaxies website is further support for the contention that the statement was opinion since
18 the Summit Bank and Krinsky cases have acknowledge that statements made on Internet forums
19 are susceptible to being interpreted as nonactionable opinion. Accordingly, Twin Galaxies’
20 argument that its statement was opinion is not frivolous and had merit even though the argument
21 was ultimately unsuccessful.

22 Point Three: Mitchell seems to argue that Twin Galaxies persisted to make the same
23 arguments it made in its anti-SLAPP motion on appeal and thus its appeal was frivolous. But the
24 standard for review on appeal from an order denying an anti-SLAPP motion is *de novo* and it is
25 expected that the party seeking *de novo* review make the same argument in the reviewing court as
26 it did in the lower court, because it is not seeking review of any error but instead seeking review
27 of the facts supporting its anti-SLAPP motion anew. (Raining Data Corp. v. Barrenechea
28 (2009) 175 Cal. App. 4th 1363, 1367.) That Twin Galaxies made the same arguments on appeal

1 as it did in the lower court has no bearing on frivolousness because such tactics are expected
2 considering the standard of review.

3 Point Four: Twin Galaxies' petition for review with the California Supreme Court was not
4 frivolous because the legal contentions made therein were warranted by existing law, and were
5 nonfrivolous arguments for the extension of existing law. In its petition, Twin Galaxies argued
6 that the appellate court impermissibly relied on circumstantial evidence that did not have a
7 tendency to show the state of mind of the declarant who made the allegedly defamatory statement.
8 The argument was that established caselaw circumscribed the use of circumstantial evidence in
9 the actual malice context to those situations where the circumstantial evidence relates directly to
10 the declarant's state of mind. (See Annette F. v. Sharon S. (2004) 119 Cal. App. 4th 1146, 1167
11 ("[a]lthough these factors may provide circumstantial evidence of actual malice in appropriate
12 cases, their significance will vary depending on the extent to which they reflect on the defendant's
13 subjective state of mind.") Twin Galaxies argument that evidence of live performances of the
14 Disputed Score performances is circumstantial and has no bearing on its state of mind in making
15 the statement about the videotaped recordings used to justify the scores is an argument warranted
16 by existing law in Annette F. v. Sharon S. and a nonfrivolous argument for the extension and of
17 the law in that case such that fees are not appropriate under *California Code of Civil Procedure*
18 section 128.5(f)(2)(A).

19 D. The filing of the special motion to strike and the subsequent appeal were not for
20 unnecessary delay.

21 Mitchell identifies five instances that allegedly show the special motion to strike and the
22 appeal that followed were for unnecessary delay: "(1) new voluminous records filed for the first
23 time with defendant's reply in support of its motion; (2) the timing of the filing of its motion for
24 undertaking; (3) the filing of an appeal; (4) the numerous requests by defendant for extensions to
25 file its opening brief; and (5) the petition for review to the California Supreme Court." (Fees
26 Motion, § II(B) at 13:3-8.) Each of these points are addressed below.

27 Point One: The trial court found that Twin Galaxies had the right to file "new voluminous
28 records" on reply when it denied Mitchell's *ex parte* application to strike new evidence on reply.

1 [See Tashroudian Decl., ¶ 8, Exh. G (Order on *Ex Parte* Application).] Twin Galaxies successfully
2 argued the court should consider reply evidence under College Hospital, Inc. v. Superior Court
3 (1994) 8 Cal.4th 704; Jay v. Mahaffey (2013) 218 Cal. App. 4th 1522; San Diego Watercrafts,
4 Inc. v. Wells Fargo Bank (2002) 102 Cal. App. 4th 308. The trial court’s denial of the application
5 indicates that Twin Galaxies submission of reply evidence was a legal tactic warranted by existing
6 law precluding the imposition of sanctions.

7 Point Two: The timing of the filing of the undertaking motion was within the notice period
8 set forth in California *Code of Civil Procedure* section 1005(b), and heard with the special motion
9 to strike because the same evidence and argument supported both motions resulting in the
10 conservation of judicial resources. Important is the fact that the Court granted the undertaking
11 motion and ordered Mitchell to post a bond in the amount of \$81,225.00 showing that the motion
12 was not frivolous.

13 Point Three: The filing of Twin Galaxies’ appeal was not for unnecessary delay. This
14 case involves two high-profile parties in the videogame community that have been in the public
15 eye for forty (40) years. The issues are complex in that they have to do with Twin Galaxies’ right
16 to free speech in the media with respect to a public figure, and also implicate Constitutional issues
17 relating to the sufficiency of evidence to prove actual malice. The relevant authority to support
18 Twin Galaxies’ arguments on appeal was spread among the law on special motions to strike, the
19 law on defamation, the law on burdens of proof (regarding actual malice), and the law on the
20 Constitutional right to free speech.

21 The jurisprudence in these areas of law is always developing. Twin Galaxies appealed the
22 anti-SLAPP decision to obtain *de novo* review of these very complex issues to test the bounds of
23 the established case law to preserve the freedom of speech. And the *de novo* review resulted in a
24 published decision that has further advanced jurisprudence. Although Twin Galaxies was
25 unsuccessful on appeal, it was not unreasonable for it to file the appeal all things considered.

26 Point Four: Twin Galaxies requests for extensions of time to file its opening brief on
27 appeal were not for unnecessary delay. Mitchell stipulated to the first thirty (30) day extension of
28 time for Twin Galaxies to file its brief. Twin Galaxies showed good cause and obtained an order

1 granting it an additional thirty (30) day extension on the basis that counsel was preparing for trial
2 (which did go) scheduled for the week after the brief's due date. [See Tashroudian Decl., ¶ 9, Exh.
3 H (First Extension Request & Order).] And Twin Galaxies obtained a final order continuing the
4 briefing deadline by a mere seven (7) days by showing the good cause that lead appellate counsel
5 had recently been inoculated against COVID-19 and was incapacitated as a side-effect. [Id. at ¶
6 10, Exh. I (Second Extension Request & Order).]

7 The extensions of time to file Twin Galaxies' opening brief were made and granted in
8 accordance with California *Rules of Court*, rules 8.60 & 8.63. Twin Galaxies obtained orders
9 which require a showing of good cause indicating that none of the requested continuances were
10 made to delay.

11 Point Five: Twin Galaxies' petition to the California Supreme Court was not for delay.
12 Again, it cannot be stressed enough that this matter involves the important right to freedom of
13 speech, and debate about public figures. And the law in this field is ever-evolving. The petition
14 for review was to challenge the law created in the published decision. The issue presented to the
15 California Supreme Court was whether circumstantial evidence that did not have a bearing on the
16 defendant's state of mind was sufficient to prove actual malice. It was reasonable to petition for
17 review of this question considering the appellate court relied on circumstantial evidence of actual
18 malice; and considering that no case in California after Annette F. v. Sharon S., *supra*, has
19 considered the interplay of circumstantial evidence and actual malice.

20 Moreover, and contrary to Mitchell's unsubstantiated argument that the California
21 Supreme Court "summarily denied" the petition, there is evidence that the Court did in-fact
22 consider Twin Galaxies' petition. The California Supreme Court has sixty (60) days to order
23 review pursuant to a petition, or the petition is deemed denied. (Cal. R. Ct., Rule 8.512(b)(2).)
24 The Court may also order an extension of time to consider the petition. (Cal. R. Ct., Rule
25 8.512(b)(a).) Here, the Court did not summarily deny the petition as evinced by the fact that it
26 ordered more time to review before denial, rather than denying the petition by operation of law
27 after 60 days. [Tashroudian Decl., ¶ 7.]

28

1 E. Mitchell’s has not met his burden to establish the reasonableness of the fees
2 requested.

3 i. The legal standard for loadstar fee requests.

4 “It is well established that the amount of an attorney fee award under the anti-SLAPP
5 statute is computed by the trial court in accordance with the familiar ‘lodestar’ method. [Citation.]
6 Under that method, the court tabulates the attorney fee touchstone, or lodestar, by multiplying the
7 number of hours reasonably expended by the reasonable hourly rate prevailing in the community
8 for similar work.” (569 East County Boulevard LLC v. Backcountry Against the Dump, Inc.
9 (2016) 6 Cal. App. 5th 426, 432.) “The trial court must carefully review attorney documentation
10 of hours expended; ‘padding’ in the form of inefficient or duplicative efforts is not subject to
11 compensation.” (Ketchum v. Moses (2001) 24 Cal.4th 1122, 1132.)

12 The burden is on the party seeking attorney’s fees to prove that the fees it seeks are
13 reasonable. (Gorman v. Tassajara Development Corp. (2009) 178 Cal.App.4th 44, 98.) On the
14 other hand, “[i]n challenging attorney fees as excessive because too many hours of work are
15 claimed, it is the burden of the challenging party to point to the specific items challenged, with a
16 sufficient argument and citations to the evidence.” (Premier Medical Management Systems, Inc.
17 v. California Ins. Guarantee Assn. (2008) 163 Cal. App. 4th 550, 564.)

18 ii. Mitchell has not met his burden of proving that the fees are reasonable.

19 Mitchell seeks \$226,014.96 in fees for 356.5 billable hours by: (a) Senior Partner Anthony
20 J. Ellrod (23.2 hours); (b) Partner James Gibbons (225.3 hours); (c) Partner Steven Renick (48.4
21 hours); (d) Of Counsel Trisha Newman (27.7); (e) Associate Natalya Vasyuk (.8 hours); (f)
22 Associate Chelsea Clayton (19.8 hours); and (g) Paralegal Elaine Berman (11.3 hours). Mitchell’s
23 counsel has not submitted a single billing record to justify any of this time. Counsel does not even
24 identify the time that it took to perform any specific task related to this matter. Instead, Mitchell’s
25 counsel Anthony J. Ellrod alone vaguely declares to the tasks that were completed in connection
26 with this matter.

27 Mr. Ellrod’s declaration is insufficient to establish the reasonableness of the hours spent
28 because he only generally describes the tasks performed in connection with this matter. He

1 testifies to a description of the work performed by his firm as: (1) interviewing its client; (2)
2 gathering evidence; (3) review the pleadings; (4) requesting leave to file a sur-reply; (5) drafting
3 and filing the sur-reply brief; (6) preparing a respondent’s brief and an answer to a petition for
4 review; and, (7) preparing the fees motion. [Declaration of Anthony J. Ellrod (“Ellrod Decl.”), ¶
5 5, lns. 3-6.] He goes on to testify that the billable hours consist of: (7) time spent evaluating the
6 pleadings and facts of the case; (8) researching the anti-SLAPP statute; (9) preparing the moving
7 papers for the Special Motion to Strike; (10) reviewing the Opposition, preparing the Reply papers;
8 (11) attending the hearing on the Special Motion to Strike, and reviewing the evidence and case
9 file; and (12) document review. [Id. at ¶ 9.] Mr. Ellrod makes no attempt to allocate the 365.5
10 billable hours Mitchell seeks compensation for among these twelve tasks or between the seven
11 timekeepers except that he, in a very conclusory fashion, describes the contribution of each of the
12 timekeepers across nine lines of pleading paper. [Id. at ¶ 3.] Mitchell cannot meet his burden of
13 showing the hours spent are reasonable because there is an insufficient allocation between hours
14 and tasks and timekeeper.

15 Mitchell’s failure to document the hours spent and to identify the specific tasks those hours
16 were expended on has serious implications on Twin Galaxies’ due process rights. Twin Galaxies
17 has the burden of proof on its challenge that the hours of work claimed as excessive by citations
18 to evidence. To do that, Twin Galaxies must point to the tasks and time it challenges. It cannot
19 do so where there are only twelve specific items identified without any allocation to the 356.5
20 billable hours. Twin Galaxies cannot, for example, challenge the hours spent on fee item number
21 two of “gathering evidence” without any indication from Mitchell’s counsel how many of the
22 356.5 claimed hours were spent on the task and by which timekeepers. The same goes for each of
23 the eleven other tasks identified by Mr. Ellrod. This lack of specificity violates Twin Galaxies’
24 due process right to challenge the fees request, and is fatal to Mitchell’s claim.

25 Mitchell excuses his failure to account for hours spent by banking on the proposition that
26 the court may rely on counsel’s declaration where detailed time records are not provided. Instead
27 of detailing the time and tasks, Mr. Ellrod testifies that: “I have reviewed reports from our billing
28 program for all time and costs billed to this matter, including work in progress (WIP), and I have

1 segregated out those items that pertain to the anti-SLAPP motion, the appeal, and/or this motion
2 for attorneys' fees and costs." [Ellrod Decl., ¶ 5.] He goes on to say, "[t]he hours reflected above
3 represent attorney and paralegal time, and costs pertaining to this matter and pertaining to the anti-
4 SLAPP motion, appeal, and/or this motion for attorneys' fees and costs." [Id.] These conclusory
5 statements are insufficient for Mitchell to meet his burden to show the 356.5 hours were reasonable
6 as divided to each timekeeper.

7 Moreover, counsel's declaration is only good for his work. Mr. Ellrod has personal
8 knowledge of his work, but not his colleagues' work. Mr. Ellrod relies on the hearsay statements
9 in the billing records and testifies to what tasks his colleagues performed. Even if the records
10 themselves are properly qualified business records, the statements contained therein remain
11 hearsay and are insufficient to support the fees request. (Cal. Evid. Code, § 1200; *see also* People
12 v. Alexander (2010) 49 Cal.4th 846, 876 (holding that statements inside business records
13 inadmissible "in light of its double hearsay nature").) Curiously absent from the record is any
14 declaration by the most prolific timekeeper James Gibbons who accounts for 225.3 of the hours.
15 And since the other timekeepers have not provided oral testimony in support of their time, Mitchell
16 cannot prove reasonableness on a total of 333.3 hours it seeks. Mr. Ellrod's declaration is no
17 saving grace as he cannot declare to matters that he has no personal knowledge of. Mitchell has
18 not proven reasonableness for this other reason as well.

19 F. The circumstances warrant an award of attorney's fees in the amount of \$13,650.00
20 against Mitchell and his counsel in favor of Twin Galaxies for successfully
21 opposing this motion.

22 "If warranted, the court may award to the party prevailing on the [sanctions] motion the
23 reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent
24 exceptional circumstances, a law firm shall be held jointly responsible for violations committed
25 by its partners, associates, and employees." (Cal. Code Civ. Proc., § 128.5(f)(1)(C).) Twin
26 Galaxies respectfully submits that an attorney's fees award against Mitchell and his counsel
27 Anthony J. Ellrod and the firm Manning & Kass, Ellrod, Ramirez, Trester, LLP in the amount of
28 \$13,650.00 is warranted for successfully opposing this motion. [See Tashroudian Decl., ¶ 12.]

1 Mitchell's motion for fees is so poorly conceived, and ill supported that it is frivolous. To
2 start, Mitchell makes no attempt to show any subjective bad faith or improper motive on Twin
3 Galaxies' part as required by the sanctions statute in subsection (a). And as argued in greater detail
4 above, all of the specific conduct Mitchell complained of as frivolous and dilatory was either
5 expressly required by law; or were legal tactics where the court has granted Twin Galaxies'
6 motions, issued orders on a finding of good cause in its favor, or denied Mitchell's requests. These
7 tactics are reasonable to any attorney considering that Twin Galaxies is fighting for its
8 Constitutional right to free speech against a defamation claim by a public figure.

9 Despite the obvious merit to the anti-SLAPP motion and appeal, Mitchell filed this motion
10 and failed to support it with competent evidence. The evidentiary support for this fees request in
11 excess of \$225,000.00 for 356.5 hours was slapped together haphazardly without any thought and
12 contains mostly inadmissible hearsay. Mitchell does not attach one billing record, or specify how
13 much time was spent on any one given task. Not only is the evidence lacking, but it was designed
14 to prevent Twin Galaxies the due process to challenge the reasonableness of the fees requested. A
15 fees award against Mitchell is therefore warranted.

16 **IV. CONCLUSION**

17 Twin Galaxies respectfully requests that, based on the foregoing, the Mitchell's attorney's
18 fees motion should be denied, and an award of attorney's fees in the amount of \$13,650.00 should
19 be made in Twin Galaxies' favor against Mitchell and his counsel Anthony J. Ellrod and the firm
20 Manning & Kass, Ellrod, Ramirez, Trester, LLP.

21 Respectfully submitted,

22 Dated: March 22, 2022

TASHROUDIAN LAW GROUP, APC

23
24 By: /s/ David Tashroudian, Esq.
25 David Tashroudian, Esq.
26 Mona Tashroudian, Esq.
27 Attorneys for Defendant Twin Galaxies,
28 LLC

PROOF OF SERVICE
Case No. 19STCV12592

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is **TASHROUDIAN LAW GROUP, APC**, located 12400 Ventura Blvd., No. 300, Studio City, CA 91604. On March 22, 2022, I served the herein described document(s):

**OPPOSITION OF TWIN GALAXIES, LLC TO MOTION FOR ATTORNEY'S FEES
OF WILLIAM JAMES MITCHELL**

by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Woodland Hills, California addressed as set forth below.

X E-File - by electronically transmitting the document(s) listed above to aje@manningllp.com pursuant to an agreement of the parties.

by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

by overnight courier of the document(s) listed above to the person(s) at the address(es) set forth below.

Anthony J. Ellrod
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Attorneys for Plaintiff
WILLIAM JAMES MITCHELL

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 22, 2022 at Woodland Hills, California.



Mona Tashroudian