IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Case No. 16-cv-80855-DMM

TRIPLE7VAPING.COM, LLC,
and JASON W. CUGLE

Plaintiffs,

vs.

SHIPPING & TRANSIT LLC,

Defendant.
_____/

REPLY TO PLAINTIFFS' OPPOSITION TO AMENDED MOTION TO DISMISS PLAINTIFFS' COMPLAINT

August 8, 2016

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S&T covenanted not to sue Plaintiffs, a proffer made before this suit was even filed and Plaintiffs now agree that their declaratory judgment claims are moot. [DE 34 at 12]. S&T's motion to dismiss pursuant to Fed. R. Civ. P. Rule 12(b)(1) must be granted.

All that remains of the Complaint is Count IX under Maryland Commercial Law §11-1601 based upon diversity jurisdiction under 28 U.S.C. § 1332. Plaintiffs' opposition demonstrates they have not met their heavy burden to show that their claim meets the jurisdictional amount ($75,000) as of the filing of the Complaint. Plaintiffs have no provable actual damages, citing only some "time and energy" – if provable those damages are miniscule and way below the amount in controversy requirements.

Plaintiffs simply cannot meet their heavy burden to show jurisdiction. Adding speculative discretionary attorneys' fees to speculative damages does not satisfy the amount in controversy requirement. The calculation of the jurisdictional amount cannot be made using estimates of possible attorneys' fees awards at the termination of the lawsuit. Furthermore, there is simply no support in Maryland Commercial Law §11-1605 for Plaintiffs' argument that attorneys' fees are part of Plaintiffs' damages. In fact, the language of the statute demonstrates just the opposite, namely, that attorneys' fees are optional, permissive, not compulsory, and not an element of Plaintiffs' damages.

Even if attorneys' fees could be considered to help Plaintiffs meet their heavy burden, Plaintiffs' lawyers' declarations demonstrate that Plaintiffs' fee claim is clearly speculative and therefore should not be counted towards the amount in controversy. As of the date of the filing of the Complaint Plaintiffs' claim for attorneys' fees was tentative, and the dismissal of Counts I through VIII has made Plaintiffs' claim under the Maryland Act even more uncertain. Plaintiffs' subsequent generation of attorney fees cannot retroactively establish subject-matter jurisdiction.

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I. PLAINTIFFS HAVE FAILED TO ESTABLISH THE AMOUNT IN CONTROVERSY FOR DIVERSITY JURISDICTION EXCEEDS $75,000.

The party asserting jurisdiction bears the burden of establishing facts supporting federal jurisdiction. See *Allen v. Toyota Motor Sales, U.S.A., Inc.*, 155 F. App'x 480, 481 (11th Cir. 2005). It is the Plaintiffs' burden to prove by a preponderance of the evidence that the amount-in-controversy exceeds $75,000. *Leonard v. Enterprise Rent-A-Car,* 279 F.3d 967, 972 (11th Cir. 2002). The Court must review the amount in controversy as of the time of filing the Complaint to determine whether plaintiff's claim meets the jurisdictional prerequisite. *Pease v. Medtronic, Inc.*, 6 F. Supp. 2d 1354, 1356 (S.D. Fla. 1998).

Plaintiffs cannot satisfy the amount in controversy requirement. Plaintiffs' actual damages are *de minimus* and well below the $75,000 threshold. Plaintiffs' attorneys' fee amount is speculative. Under the Maryland statute attorneys' fees are discretionary and then only in a reasonable amount at the reasonable rate awarded proportionate to Plaintiffs' actual damages.

A. Plaintiffs' Attorneys' Fee Claim is Speculative

Plaintiffs ask this Court to consider as evidence for purposes of subject matter jurisdiction their lawyers' fee estimates.[1] Plaintiffs' speculative future attorneys' fee claim fails to satisfy jurisdictional requirements. Plaintiffs' attorneys' fees are completely illusory because they are contingent upon a court awarding them in the future. There is no justification for consideration of Plaintiffs' attorneys' declarations.

Plaintiffs offer two declarations from staff attorneys at Electronic Frontier Foundation ("EFF"): Vera Ranieri, Esq., a 2010 Harvard Law School graduate who claims she spent a total

[1] Plaintiffs also ask the Court to consider surveys of the members of the AIPLA regarding the costs of patent infringement litigation to meet their burden to show jurisdiction. Those surveys are for patent infringement and validity disputes, not disputes regarding purported violation of state laws prohibiting bad-faith patent assertion such as Maryland Commercial Law § 11-1603.

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of 124.6 hours to date on this case. (DE 34-3); Daniel Nazer, a 2004 Yale Law School graduate, who claims he spent 20.1 hours to date on this case. (DE 34-2). Both Ms. Ranieri and Mr. Nazer quote the same EFF fee agreement with the Plaintiffs that contains the following provision:

> **Deferred Fees** Legal services will be provided to Clients on a fully deferred basis, to be paid or recovered only from a court-ordered award of attorneys' fees in this litigation, and only if such an award is specifically designated as attorneys' fees by court order or a settlement agreement.

(DE 34-2 at 2; DE 34-3 at 3). Both declarations also quote an additional provision entitled **Calculation of Entitlements and Fees** that confirms that "[t]he precise amount of Clients' entitlement to attorneys fees shall be determined by the order, judgment, or settlement awarding fees and costs . . ." (DE 34-2 at 2; DE 34-3 at 3). Plaintiffs' two other lawyers have also submitted declarations: Julie S. Turner, Esq., who claims to have spent 35.1 hours to date; and Matthew Sarelson, who has spent 19.5 hours to date.

Taken together all four lawyers claim over 199 total hours and over $75,000 in legal fees incurred to date on a case that is moot as to eight out of nine claims. In fact, had Plaintiffs **lawyers** not "jumped the gun" **none** of those fees would have been incurred. The reason supporting this conclusion is that after Plaintiff Cugle explained to Defendant's representative why he was not infringing, the dispute ended. Plaintiff Cugle was asked to provide a confirming declaration, but there was no threat of litigation if he failed to do so. (See, Amended Motion [DE 27] at 11 and DE 1-6, Exhibit F, DE 1-8, pages 3-4 and DE 1-6, Exhibit F, page 2, footnote 3) To the contrary, long prior to this suit being filed, Defendant asked Cugle if more information regarding the Maryland State Law Claim was needed.(*Ibid.*) The response was the filing of this lawsuit and the request for about 200 hours of legal services to date.

Plaintiffs' fees are contingent and speculative, and nothing more than a "transparent attempt to puff up" attorney fees to reach the jurisdictional amount. *Raymond v. Lane*

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Construction Corp, 527 F.Supp. 2d 156, 163 (D. Maine 2007)(cited in Plaintiffs opposition). It would be difficult for this Court to conclude that a paying client would tolerate these billing practices -- 200 hours so far on a dispute that S & T proffered to resolve at no cost and even asked Cugle if more information was necessary.

Lawyers proceeding *pro bono* and/or to be paid on a contingent basis do not subject an attorney fee claim to a lower threshold of reasonableness. Plaintiffs incurred no fees whatsoever unless and until a court-ordered award is issued, and only if such an award is designated as attorneys' fees by court order or settlement agreement. (DE 34-2 at 2; DE 34-3 at 3). The amount of any potential fee award is discretionary when and if a court chooses to award fees.[2]

B. Plaintiffs' Speculative Prospective Attorneys' Fees Cannot be Used to Calculate Amount in Controversy

In this Circuit prospective attorneys' fees are excluded from the calculation of the amount in controversy because those fees have not been incurred and may never be incurred, and therefore are not "in controversy" between the parties at the time the Complaint is filed. *Davis v. Tampa Ship, LLC,* No. 8:14-cv-651-T-23MAP, 2014 U.S. Dist. LEXIS 73937, at *4 (M.D. Fla. May 30, 2014). *Lott & Friedland, P.A. v. Creative Compounds, LLC*, 2010 U.S. Dist. LEXIS 57888, 2010 WL 2044889 (S.D. Fla. Apr. 21, 2010) ("[T]he subsequent generation of attorney fees[] cannot create jurisdiction that was lacking at the outset."); *Rogatinsky v. Metro. Life Ins.*

[2] Even if this Court were permitted to consider prospective attorneys' fees towards the amount in controversy, only $27,824 in fees attributable to Vera Ranieri, Esq. (approximately 75 hours) were incurred prior to filing the Complaint. (DE 34-4 at 4). These are the only attorneys' fees that can conceivably be considered toward the jurisdictional requirement because only these fees were incurred **before this action was filed.** However, in order to even consider these fees towards the jurisdictional minimum, this Court will first need to assume a) that Plaintiffs will prevail, b) that the Court will award fees in its discretion, c) that the hours spent are reasonable, a difficult task considering S &T's attempts to resolve the dispute at no cost to Plaintiffs, d) that the hourly rate charged is reasonable, and e) that in addition to the attorneys' fees of $27,824, the Plaintiffs will recover compensatory damages, punitive damages and costs that add up to at least $47,146. Plaintiffs' calculations are not proof but pure speculation.

Co., 2009 U.S. Dist. LEXIS 100402, 2009 WL 3667073 (S.D. Fla. Oct. 26, 2009) ("[P]ost-removal events, such as the subsequent generation of attorney fees, will not retroactively establish subject-matter jurisdiction."); *Waltemyer v. Nw. Mut. Life Ins. Co*., 2007 U.S. Dist. LEXIS 7769, 2007 WL 419663 (M.D. Fla. Feb. 2, 2007) (same). Nebulous and speculative assertions of potential attorneys' fees and compensatory damages recovery do not meet a party's burden to demonstrate amount in controversy. *Ogle v. Kauffman Tire, Inc*., No. 8:16-CV-894-T-EAK-TBM, 2016 U.S. Dist. LEXIS 94622, at *5 (M.D. Fla. July 20, 2016).

In a footnote (DE 34 at 14, n. 6), Plaintiffs acknowledge the rule that prospective attorney's fees are not considered for purposes of calculating amount in controversy. *Gardynski-Leschuck v. Ford Motor Co.,* 142 F.3d 955, 958 (7th Cir. 1998). The rule against consideration of prospective attorneys' fees in *Gardynski-Leschuck* followed logically from the Seventh Circuit's holding in that same case that attorneys' fees are not "costs" under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d). The Seventh Circuit's holding in *Gardynski-Leschuck* that Magnuson-Moss does not count attorneys' fees as "costs" was adopted twenty years ago by this Circuit in *Ansari v. Bella Auto. Grp.*, 145 F.3d 1270 (11th Cir. 1998).

C. Plaintiffs' Prospective Attorneys' Fees are Not Damages.

The Eleventh Circuit's decision in *Ansari* to follow the Seventh Circuit's decision in *Gardynski-Leschuck* totally undermines Plaintiffs' argument that this Court should consider prospective fees in the amount in controversy calculation. The Seventh Circuit held that legal expenses that lie in the future and can be avoided by the defendant's prompt satisfaction of the plaintiff's demand are not an amount in controversy when the suit is filed. *Gardynski-Leschuck,* 142 F.3d at 959. The determination that "costs" does not include prospective attorneys' fees for amount in controversy requirements under Magneson-Moss is analogous to the determination

that "damages" does not include prospective attorneys' fees under the Maryland statute at issue. The reasoning employed is the same.

Maryland Commercial Law §11-1605 does not provide for attorneys' fees to be awarded "as part of the damages" as Plaintiffs claim. In fact, it says the opposite, namely that if damages are awarded attorneys' fees **may** be part of an additional award by the Court that also includes court costs, exemplary damages not to exceed either $50,000 or "three times the total of damages, costs, and fees," and equitable relief. Md. Code, Com. Law § 11-1605 (2016).

Section 11-1605 provides that a "target may bring an action in an appropriate court to recover for injury or loss sustained as a result of a violation of this subtitle."

> (b) If a target prevails in an action brought under this subtitle and **is awarded damages**, the court also **may** award:
> (1) Court costs and fees, including reasonable attorney's fees;
> (2) Exemplary damages in an amount not to exceed the greater of:
> (i) $50,000; or
> (ii) Three times the total of damages, costs, and fees; and
> (3) Any equitable relief that the court considers appropriate.

Md. Code, Com. Law § 11-1605(b) (2016). (emphases added)

The language is plain and clear.[3] If a target prevails, and if in prevailing that target is also awarded damages, then the court may, as a discretionary matter, make an additional award of court costs, exemplary damages not to exceed either $50,000 or "three times the total of damages, costs, and fees," and equitable relief. The statute **does not say** that attorneys' fees, court costs, or exemplary damages are part of the target's damages. In fact, it says the exact opposite. The statute says that attorneys' fees are something "the court also may award,[as part

[3] Principles of statutory construction in Maryland (like most jurisdictions) require this Court to first consider the plain language of the statute when the words of the statute are clear and unambiguous. *State Dept. of Assessments and Taxation v. Maryland-National Capital Park and Planning Comm'n,* 348 Md. 2, 13, 702 A.2d 690, 696 (1997); *Chesapeake and Potomac Telephone Co. of Maryland v. Director of Finance for Mayor and City Council of Baltimore*, 343 Md. 567, 579, 683 A.2d 512, 517 (1996).

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of Court costs and fees]" an extra, a bonus, and allowable, **not obligatory**. The words "must" or "shall" are absent from the statute. Nothing in the statute indicates that attorneys' fees are required to accompany a damage award. To the contrary, they "may" be awarded indicating discretion which, in turn, indicates that attorneys' fees are optional, extra, and definitely not a part of damages. See, e.g., *Kirtsaeng v. John Wiley & Sons, Inc*., 136 S. Ct. 1979 (2016) (determining that the language of Section 505 of the Copyright Act providing that a district court "may . . . award a reasonable attorney's fee to the prevailing party" requires the exercise of the Court's discretion in making such awards, and overruling cases determining that fee awards are the rule rather than the exception).

Reading the statute in this manner is consistent with common sense and logic. *Frost v. State*, 336 Md. 125, 137, 647 A.2d 106, 112 (1994)(Courts should not read a statute in a way that is inconsistent with, or ignores, common sense or logic). Reading the Maryland statute as excluding an award of attorneys' fees from the target's damages is also consistent with the American Rule, followed in Maryland, prohibiting the prevailing party in a lawsuit from recovering his attorney's fees as an element of damages in the absence of statute or contract. *Empire Realty Co. Inc. v. Fleisher*, 269 Md. 278, 305 A.2d 144 (1973). This is especially important here because Maryland regards awards of attorneys' fees as punitive in nature. *St. Luke Evangelical Lutheran Church v. Smith*, 318 Md. 337, 351 (1990) (Permitting the finder of fact to consider the amount of attorneys' fees expended by a plaintiff in pursuing her claim when determining the amount of an award of punitive damages).

Plaintiffs' opposition is devoid of any analysis or explanation for their conclusory assertion that attorneys' fees are part of damages; Plaintiffs fail to meet their burden of proof.

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D. Maryland's Lodestar Approach to Attorneys' Fees and Limitations on Punitive Damages Preclude Plaintiffs from Meeting their Burden of Proof

Maryland has adopted the lodestar approach to determining statutory awards of attorneys' fees based upon the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Friolo v. Frankel*, 373 Md. 501, 523 (2003).[4] This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Additional factors are considered such as the level of success, and whether the plaintiff achieved a level of success that makes the hours reasonably expended a satisfactory basis for a fee award. *Id*. 461 U.S. at 434.

Maryland Rules of Professional Conduct Rule 1.5 also places a limit on what a lawyer may charge his or her own client, prohibiting charging or collecting an unreasonable fee. *Friolo,* 373 Md. at 528. The Maryland Court of Appeals has concluded that "it is generally a violation of the rule for the attorney's stake in the result to exceed the client's stake." *Attorney Griev. Comm'n v. Korotki*, 318 Md. 646, 665, 569 A.2d 1224, 1233 (1990). As a result, in *Friolo*, the Maryland Court of Appeals observed that it would have been impermissible under Rule 1.5 for counsel to charge the plaintiff "$57,000 based on a less-than-$12,000 recovery."

Yet what Maryland prohibits is exactly what Plaintiffs' attorneys seek here. Plaintiffs' Complaint is devoid of any basis upon which to determine actual damages, relying instead on spurious and nebulous claims for lost "time and energy." What is that lost "time and energy" worth and how could that value, when added to a reasonable fee that does not exceed that "value" ever come close to the $75,000 amount in controversy requirement?

Punitive damages do not help Plaintiffs meet the threshold either. First, and as noted above, punitive damages under the statute, like attorneys' fees, are in addition to damages, not

[4] 200 hours that could have been totally avoided if Cugle or his lawyers had responded to S&T's question about what else do you need, cannot be deemed reasonable or plausible.

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part of damages. Second, even if they are considered part of the amount in controversy, Maryland's strong policy severely limiting awards of punitive damages makes Plaintiffs' claim to entitlement to such damages doubly doubtful. See *Bowden v. Caldor, Inc.*, 350 Md. 4, 27-28 (1998) (Observing that reprehensible conduct must be found and the amount of the award limited in order to ensure that the award is not "disproportionate to the gravity of the defendant's conduct," because "it is the degree of heinousness which is important."). A 1998 survey of punitive damages awards in Maryland cases filed from the 1960's through the 1990's found that of the 12 highest awards of punitive damages upheld by the Maryland Court of Appeals, only 5 exceeded the $75,000 amount in controversy requirement. *Bowden*, 350 Md. at 32. When the Court revisited the issue in 2008, little had changed. See *Khalifa v. Shannon*, 404 Md. 107, 945 A.2d 1244 (2008). There is simply no plausible claim for $75,000 here.

II. DISCRETIONARY SUPPLEMENTAL JURISDICTION UNDER 28 U.S.C. § 1367 -- ABSENT WHEN SUIT FILED – BUT IF NOT IT SHOULD BE DECLINED

Supplemental jurisdiction is statutorily controlled by 28 U.S.C. § 1367 which provides that, "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). "This section 'defines the permissible boundaries for the exercise of supplemental jurisdiction; that is, it delineates the power of the federal courts to hear supplemental claims and claims against supplemental parties.'" *Estate of Amergi v. Palestinian Auth.*, 611 F.3d 1350, 1366 (11th Cir. 2010), quoting *Palmer v. Hosp. Auth. of Randolph County*, 22 F.3d 1559, 1566 (11th Cir. 1994).

Plaintiffs' declaratory judgment claims were already moot when filed, (remember, S & T had already inquired about what else Plaintiffs needed to resolve any questions) and Plaintiffs'

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claim under Maryland Commercial Law §11-1605 failed to satisfy the amount in controversy for diversity jurisdiction. As a result, measured at the date of the filing of the Complaint there was no original jurisdiction that could provide a basis for the exercise of supplemental jurisdiction.

Even if this Court disagrees, however, Plaintiffs' declaratory judgment claims were not "so related to claims in the action … that they form part of the same case or controversy." Plaintiffs pointed to "the myriad factual allegations in Plaintiffs' complaint" and "over forty pages of allegations" alleging violations of a law that prohibits "mak[ing] an assertion of patent infringement against another in bad faith" as evidence that the claim is not preempted. (DE 3 at 6-7).[5] Plaintiffs fail to address the statutory presumption of validity and the right to put putative infringers on notice as explained in S&T's Amended Motion. Further, Plaintiffs' allegations demonstrate that Plaintiffs' bad faith claim occupies a separate universe from the original declaratory judgment controversy which simply concerned patent infringement, patent validity, but not whether any assertion was subjectively in bad faith. Inasmuch as "[t]he decision to exercise supplemental jurisdiction over pendant state claims rests within the discretion of the district court," *Holt v. Crist*, 233 Fed. Appx. 900, 904 (11th Cir. 2007), citing *Raney v. Allstate Ins. Co*., 370 F.3d 1086, 1088-89 (11th Cir. 2004), and since the Eleventh Circuit has "encouraged district courts to dismiss any remaining state claims when … the federal claims have been dismissed prior to trial," *Id*., citing *Raney*, 370 F.3d at 1089, that is exactly what should occur here.

III. CONCLUSION

For the foregoing reasons, the Complaint should be dismissed.

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[5] Plaintiffs' defense against preemption [DE 34 at 10-11] chastising S & T for not citing a prior decision in this Court has the burden of proof backwards. In that earlier case, where ArrivalStar sued for infringement, the infringers' counterclaim (for violation of a Massachusetts statute) was not preempted but Plaintiffs, relying on that decision fail to meet their burden of proof that the Maryland and Massachusetts statutes have the same substantive provisions.

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DATED: August 8, 2016

Respectfully submitted,

/s/ Jerold I. Schneider

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 8, 2016, a true and correct copy of the foregoing has been electronically filed with the Clerk of the Court using the CM/ECF system, which will provide electronic service to the parties on the Service List below.

/s/ Jerold I. Schneider
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