

Gordon Rees Scully Mansukhani, LLP  
101 W. Broadway, Suite 2000  
San Diego, CA 92101

GEORGE FORMAN – CSB NO. 47822  
JAY B. SHAPIRO -- CSB NO. 224100)  
MARGARET C. ROSENFELD --CSB NO. 127309  
FORMAN & ASSOCIATES  
4340 REDWOOD HWY STE E-352  
SAN RAFAEL, CA 94903  
TELEPHONE: (415) 491-2310  
FAX NUMBER: (415) 491-2313  
EMAIL: GEORGE@GFORMANLAW.COM

ATTORNEY FOR DEFENDANTS ARLA RAMSEY, ANITA HUFF, THOMAS FRANK,  
LESTER MARSTON, RAPPORT AND MARSTON, DAVID RAPPORT, DARCY  
VAUGHN, ASHLEY BURRELL COOPER DEMARSE, AND KOSTAN LATHOURIS

KEVIN W. ALEXANDER - CSB NO 175204  
ALLISON L. JONES – CSB NO. 162976  
GORDON REES SCULLY MANSUKHANI, LLP  
101 W. BROADWAY, SUITE 2000  
SAN DIEGO, CA 92101  
TELEPHONE: (619) 230-7712  
FACSIMILE: (619) 696-7124  
EMAIL: AJONES@GRSM.COM

ATTORNEYS FOR DEFENDANTS LESTER MARSTON, ASHLEY BURRELL, COOPER  
DEMARSE, AND DARCY VAUGHN

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ACRES BONUSING, INC., et al.	)	
	)	Case No.: 3:19-cv-05418-WHO
Plaintiffs,	)	
	)	<b>OPPOSITION TO PLAINTIFF'S</b>
v.	)	<b>ADMINISTRATIVE MOTION TO</b>
	)	<b>STRIKE ANTI-SLAPP MOTION</b>
LSTER MARSTON, et al.	)	
	)	
	)	Judge Hon. William H. Orrick
Defendants.	)	
	)	

**I. INTRODUCTION**

Plaintiff Acres Bonusing, Inc. ("ABI") has moved on two days' notice to strike the Anti-SLAPP Motion filed on March 6, 2020 by Defendants Lester Marston, Arla Ramsey, Thomas Frank, David Rapport, "Rapport and Marston," Ashley Burrell, Darcy Vaughn, Cooper DeMarse

and Kostan Lathouris, contending that these Defendants' Anti-SLAPP Motion is untimely under California law, violates the parties' stipulation regarding the briefing and hearing of various motions, and is duplicative of these Defendants' pending Rule 12(b)(6) motion. For the reasons set forth below, ABI's motion should be denied.

## II. ARGUMENT

### A. **CALIFORNIA'S 60-DAY TIME LIMIT FOR FILING AN ANTI-SLAPP MOTION DOES NOT APPLY IN FEDERAL COURT**

The Ninth Circuit has "determined that California anti-SLAPP motions to strike and entitlement to fees and costs are available to litigants proceeding in federal court, and that these provisions do not conflict with the Federal Rules of Civil Procedure." *Thomas v. Fry's Elecs., Inc.*, 400 F.3d 1206, 1206-07 (9th Cir. 2005) (citing *United States ex rel Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972-73 (9th Cir. 1999)). However, the procedural rules applicable in state court under the California anti-SLAPP statute apply in federal court only to the extent that they do not conflict with the Federal Code of Civil Procedure.

Although an anti-SLAPP motion must be filed within 60 days after service of a complaint filed in California Superior Court, the 60-day time limit is a procedural rule that does not apply to an anti-SLAPP motion applicable to pendent state-law claims in a district court complaint. *Sarver v. Chartier*, 813 F.3d 891, 900 (9th Cir. 2016) [district court did not abuse its discretion in allowing an anti-SLAPP motion to be filed almost one year after service of the Complaint]. At least one court in this District has ruled that "the filing deadline in California's anti-SLAPP law does not apply in federal court because it is a procedural rule that 'directly collide[s] with the more permissive timeline Rule 56 provides for the filing of a motion for summary judgment.'" *Clark v. Hidden Valley Lake Ass'n*, No. 16-cv-02009-SI, 2017 U.S. Dist. LEXIS 180418, at \*8-9 (N.D. Cal. Oct. 31, 2017), citing *Sarver v. Chartier*, 813 F.3d 891, 900 (9th Cir. 2016) (citing Fed. R. Civ. P. 56(b)). Other courts have reached a similar conclusion. (See e.g. *Wonderful Real Estate Dev. LLC v. Laborers Int'l Union of N. Am. Local 220*, No. 1:19-cv-00416-LJO-SKO, 2020 U.S. Dist. LEXIS 3069, at \*33 n.12 (E.D. Cal. Jan. 7, 2020) ["The Ninth Circuit has specifically held that the 60-day time frame in section 425.16(f) does not apply in federal

court.”]; *Quidel Corp. v. Siemens Med. Sols. USA, Inc.*, No. 16-cv-3059-BAS-AGS, 2019 U.S. Dist. LEXIS 167363, at \*6-7 (S.D. Cal. Sep. 27, 2019) [“But this 60-day deadline is a procedural rule under the Erie doctrine that can conflict with the Federal Rules of Civil Procedure.”]

However, while the 60-day rule does not apply, that does not mean a defendant can wait until the end of a case and file an anti-SLAPP motion in lieu of a summary judgment motion in the hopes of recovering attorneys’ fees. While “the Ninth Circuit has held that the strict timeframe under section 425.16(f) for filing a special motion to strike does not apply in the Ninth Circuit. [Citation] I cite this as a recognition of the California legislature's commonsense concern that these motions be brought and resolved early in the life of the case.” *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 402 F. Supp. 3d 615, 716 n.127 (N.D. Cal. 2019) [Denying an anti-SLAPP motion filed on the eve of trial.]

In this case, the primary factor that should guide this Court's ruling on ABI's motion is whether these Defendants' filing of their anti-SLAPP motion on March 6, 2020, rather than on January 3, 2020, would prejudice ABI in any meaningful way. Given that Defendants' motion was filed more than the 35 days in advance of the hearing that the Court's rules require, and that there have been no further proceedings in this action between ABI and these Defendants since the filing and briefing of these Defendants' Motion to Dismiss pursuant to Rule 12(b)(1) (ABI mistakenly asserts that these Defendants have moved to dismiss under Rule 12(b)(6)), and that ABI already has responded to separate anti-SLAPP motions filed by the Boutin Jones and Janssen Malloy Defendants, it is difficult to conceive of how ABI would be prejudiced by permitting this motion to be briefed in the normal course.

#### **B. THESE DEFENDANTS' MOTION IS NOT DUPLICATIVE OF THEIR 12(b)(6) MOTION**

As noted above, these Defendants have moved to dismiss only under Rule 12(b)(1), not Rule 12(b)(6). While there is some inevitable overlap in the arguments, particularly as regards these Defendants' tribal, judicial or prosecutorial immunities, the ultimate issues to be resolved in the anti-SLAPP motion are not identical to the issues to be resolved in these Defendants' Rule 12(b)(1) motion previously filed.

**B. THE SCHEDULING STIPULATION DOES NOT PRECLUDE THIS MOTION**

The parties' prior scheduling stipulation contemplated filing defense motions that attack the Complaint by January 3, 2020, with a hearing on those motions to be held on February 26, 2020. Plaintiffs were given a longer time to respond than the rules normally would allow, because they would be responding to multiple motions by three different sets of defendants.

Further, Defendants' anti-SLAPP motion does not come within the ambit of the stipulation's reference to motions "attacking the Complaint." The Court's order on the stipulation [ECF 28] specifically refers to Rule 12(b)(1), 12(b)(2) and 12(b)(6) "and other threshold motions." The anti-SLAPP motion does not fall within that definition. As can be seen from the motion, the anti-SLAPP motion includes evidence outside of the Complaint itself. It is a substantive motion rather than an attack on the sufficiency of the pleadings.

Further, now that the February 26, 2020 hearing date has been postponed until April 15, 2020, and given that ABI now has completed its responses to all of the various Defendants' pending motions, it should be no great hardship for ABI to respond to these Defendants' anti-SLAPP motion within the normal time allowed for responding to such motions.

However, if ABI needs additional time in which to respond to these Defendants' Anti-SLAPP motion, Defendants would be agreeable to postponing the hearing on their motion to a mutually agreeable date on which the Court will be available.

Dated: March 10, 2020

GORDON REES SCULLY MANSUKHANI, LLP

By: /s/ Allison Jones

Kevin W. Alexander

Allison L. Jones

Attorneys for Defendants

Lester Marston, Ashley Burrell, Cooper

DeMarse and Darcy Vaughn

1 Dated: March 10, 2020

FORMAN & ASSOCIATES

2 By: /s/ George Forman

3 George Forman

4 Attorney for Defendants Lester Marston, Arla  
5 Ramsey, Thomas Frank, Anita Huff, "Rapport and  
6 Marston," David Rapport, Cooper DeMarse, Darcy  
7 Vaughn, Ashley Burrell and Kostan Lathouris  
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