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Superior Court of California, County of Alameda
Hayward Hall of Justice

Direct Action Everywhere Plaintiff/Petitioner(s) VS. Diestel Turkey Ranch Defendant/Respondent(s) (Abbreviated Title)	No. RG17847475 Order Motion for Attorney Fees Denied

The Motion for Attorney Fees was set for hearing on 02/17/2021 at 02:00 PM in Department 520 before the Honorable Julia Spain. The Tentative Ruling was published and has not been contested.

IT IS HEREBY ORDERED THAT:

The tentative ruling is affirmed as follows: Plaintiff DIRECT ACTION EVERYWHERE SF BAY AREA's Motion for Attorney's Fees is DENIED.

Plaintiff DxE seeks an award of attorney's fees in the amount of $1,541,006.00 pursuant to Code of Civil Procedure 1021.5, contending that its lawsuit was the catalyst through which it obtained its primary litigation objection "for Diestel to cease its false advertising" (P Motion, p.2) and therefore it is entitled to attorney's fees for securing a public benefit. This contention is supported by neither the facts nor the law.

California voters approved Proposition 64 on November 2, 2004. In doing so, the California Supreme Court held "the voters found and declared that the UCL's broad grant of standing had encouraged '[f]rivolous unfair competition lawsuits [that] clog our courts[,] cost taxpayers' and 'threaten[ ] the survival of small businesses....' (Prop. 64, § 1, subd. (c) ['Findings and Declarations of Purpose'].) The former law, the voters determined, had been 'misused by some private attorneys who' '[f]ile frivolous lawsuits as a means of generating attorney's fees without creating a corresponding public benefit,' '[f]ile lawsuits where no client has been injured in fact,' '[f]ile lawsuits for clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant,' and '[f]ile lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision.' (Prop. 64, § 1, subd. (b)(1)-(4).) '[T]he intent of California voters in enacting' Proposition 64 was to limit such abuses by 'prohibiting private *317 attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact' (id., § 1, subd. (e)) and by providing 'that only the California Attorney General and local public officials be authorized to file and prosecute actions **33 on behalf of the general public' (id., § 1, subd. (f))." ((Mervyn's, supra, 39 Cal.4th at p. 228, 46 Cal.Rptr.3d 57, 138 P.3d 207,italics added.) as quoted by In Re Tobacco II (2009) 46 Cal.4th 298.

The California Supreme Court then clarified that to sue for fraud under either the UCL or FAL, a plaintiff must truthfully plead and prove that it actually relied upon and was deceived by a defendant's alleged misrepresentation or false advertising and suffered economic injury as a result. In Re Tobacco II (2009) 46 Cal.4th 298;
Kwikset Corporation v. Superior Court (2011) 51 Cal. 4th310.

Wayne Hsiung, plaintiff's founder and lead activist in this case, testified at trial that in 2015, Plaintiff DxE decided to target Defendant Diestel with an investigation and negative media campaign because it strongly suspected Diestel's marketing campaign regarding the "humane" treatment of its turkeys was false. In furtherance of that investigation, plaintiff intentionally employed the criminal strategies of trespass and theft. Thereafter, it made misleading public representations regarding its alleged findings by publishing a 2 to 3 minute video clip just before Thanksgiving entitled "Deadly Feast " of 10 or so distressed birds taken out of context from over 40 hours of video footage filmed during 9 different trips to Defendant's farms over the course of many months in which 50,000 to 60,000 birds were easily viewed in good health.

Despite having never relied upon or been deceived by Defendant's alleged false advertising of humane turkey treatment, Plaintiff filed this lawsuit in January, 2017, accusing Defendant of false advertising under the UCL and FAL and animal cruelty. Plaintiff prosecuted this lawsuit through the following 3 years of litigation and ultimately lost at trial for its either intentional or willfully ignorant violation of the standing rules established by the California Supreme Court as to its false advertising claims and for its failure to prove the existence of animal cruelty on its other claim. Throughout the litigation, Plaintiff continued its media campaign against Defendant and on November 13, 2017 issued a misleading press release in which it claimed toxic, harmful and hallucinogenic chemicals had been found in tests done on Defendant's turkeys by the FDA and USDA, citing its own amended complaint as the source for such information. Notably, all these claims were abandoned at trial.

In short, plaintiff now seeks to be rewarded for having used criminal and falsely misleading tactics in pursuit of its goal of stopping defendant's alleged false advertising and for filing a lawsuit which it had no legal right to pursue as to one cause of action and no facts in support of the other.

Code of Civil Procedure 1021.5 provides in relevant part:

> Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.

In the companion cases of Tripton-Whittingham v. City of Los Angeles (2004) 34 Cal.4th 604 and Graham v Daimler Chrysler Corp. (2004) 34 Cal.4th 553, the California Supreme Court declared that the terms "prevailing party" and "successful party" as used in section 1021.5 are synonymous, and explained that a plaintiff can be considered a prevailing or successful party eligible for an award of attorney fees if it achieves its litigation objective even though the litigation is ultimately settled or dismissed. "An award of attorney fees may be appropriate where plaintiff's lawsuit was a catalyst motivating defendant to provide the primary relief sought." Westside Community for Independent Living v. Obledo (l983) 33 Cal. 3d 348. In Tripton-Whittingham court recognized, however, the potential for abuse because allowing recovery under this "catalyst theory" could encourage nuisance lawsuits by unscrupulous attorney hoping to obtain fees without having the merits of their suit adjudicated. (Id. at p 177.) To guard against this abuse, the court held that a plaintiff must show: "1) the lawsuit was a catalyst motivating the defendants to provide the primary relief sought; 2) that the lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense; and 3) that the plaintiffs reasonably attempted to settle the litigation prior to filing the lawsuit." Graham defined the required "merit" as "not frivolous, unreasonable or groundless." (Id. at p 575.)

As explained below, the court finds plaintiff was not the "successful" party under section 1021.5 because the lawsuit was unreasonable and lacked merit and plaintiff failed to obtain the primary relief sought.

Does the Catalyst Theory Even Apply

Order

As in Skaff v. Rio Nido Roadhouse (2020) 55 Cal.App. 5th 522, this court questions whether the catalyst theory should even apply to this case. "The catalyst theory is generally not invoked in cases where the merits have been fully litigated to a final judgment. 'The catalyst theory provides that a plaintiff is successful for purposes of an attorney fee award...despite the lack of a favorable judgment or other court action, if the lawsuit was a catalyst in motivating the defendant to provide the primary relief sought." (Id. at 540) Unlike the mooted claim in Graham, plaintiff's claims herein were fully adjudicated after an 8 day bench trial in which the trial court heard witness testimony and considered voluminous exhibits and rendered judgment against plaintiff and in favor of defendant.

Plaintiff's First Cause of Action was Unreasonable and so Lacked "Merit"
for purposes of CCP 1021.5

As this court ultimately determined, plaintiff had no standing to bring its first cause of action for fraud under the UCL or FAL because it had not suffered any actual injury. Plaintiff is not an unsophisticated organization that does not know the law or know how to ascertain it. Its officers and lead activists, like Wayne Hsiung, are themselves licensed attorneys. The requirement of actual injury was not new. It had been established and upheld for years before plaintiff filed suit. Whether done intentionally or by willful ignorance, plaintiff's choice to file and prosecute a lawsuit which it was not legally entitled to pursue was unreasonable.

Plaintiff's Second Cause of Action was Groundless

Although plaintiff apparently abandoned its second cause of action for violation of the UCL based on animal cruelty, the court nonetheless addressed that claim on its
legal and factual merits and entered judgment in favor of defendant. Plaintiff was found to have failed to produce any evidence on a key element of the cause of action and failed to carry its burden of proof because the "overwhelming weight of the evidence" was to the contrary. (St of Dec. p 25-26).

Plaintiff failed to Obtain the Primary Relief Sought

In both the first Complaint and the final Third Amended Complaint, plaintiff sought: 1) an order enjoining Defendant's unlawful and deceptive practices by removing and/or refraining from making representations that its products are "thoughtfully raised," "humanely raised on sustainable family farms,"
"range grown," "slow grown," and/or "thoughtfully raised on sustainable family farms;" 2) an order requiring an accounting for all profits derived from said false advertising; 3) punitive damages; 4) attorneys' fees and litigation costs; and 5)
pre and post judgment interest. In pretrial rulings, the court struck all but plaintiff's request for injunctive relief and attorneys fees. At trial and in practical effect, plaintiff failed to bring about any meaningful change in defendant's marketing practices.

Despite having had judgment rendered against it on all counts, Plaintiff contends that it obtained its "primary litigation objective" of motivating Diestel to "cease
its false advertising." (P Motion, pg.2) In support of this claim, Plaintiff submitted the hearsay declaration of Almira Tanner, a "client representative" of Plaintiff who stated that Plaintiff obtained its primary objective of ending false advertising when during trial, it "learned that Defendant finally changed its advertising campaign and took down from public view its primary false advertising: animal raising claims on its website" and launched a "new advertising campaign devoid of the false animal raising claims that Plaintiff had repeatedly identified in pre-suit letters." (Tanner Decl., p. 2) First, this inadmissible hearsay lacks any foundation of personal knowledge. Second, it is vague and ambiguous. It appears to be referring to Defendant having removed excerpts from a video produced by Whole Foods entitled "Meet the Ranchers" from its website (St. of Dec. p 15) and to having completed a brand refresh and label update in 2014, a year before Plaintiff "targeted" Defendant as described by Wayne Hsiung. (St. of Dec. p 8)

The court notes that at trial, Plaintiff in no way conceded, admitted or advised the court it had already obtained the primary goal(s) of its lawsuit. Rather, Plaintiff
vigorously pursued the prosecution of the case contending all the way through post-trial briefing that Defendant was actively engaged in false advertising. At trial both in its presentation of evidence and in its many trial briefs, Plaintiff contended that six specific elements of Defendant's advertising were false

and misleading: 1) references to the Sonora family ranch; 2) the turkeys are "thoughtfully raised"; 3) defendant's overly emphasizes its Gap 5+ rating; 4) the terms "slow grown" and "proprietary breeds"; 5) "small family farm"; 6) antibiotic free. Plaintiff has produced no admissible evidence that Defendant is not still using all of these terms. Rather, in opposition to this motion, Heidi Orrock and Jason Diestel filed admissible declarations stating Defendant made no changes to its marketing or animal raising practices in response to Plaintiff's lawsuit. (Orrock Decl, pg. 5, para 10; Diestel Decl, pg. 1, para. 2). In fact, viewing the attachments to the Orrock declaration, one can see several of these terms in plain view on the front of the current turkey labels. Orrock and Diestel testified at trial and in their declarations filed in opposition, that of the five specific terms referenced in Plaintiff's request for injunctive relief in the Third Amended Complaint, two had been discontinued before Plaintiff ever began its investigation in 2015 and over two years before Plaintiff filed its complaint. Although Defendant may have removed the "Meet the Ranchers" from their website, it was replaced by an equally homespun, folksy video which emphasized the Diestel family with many screen shots of the Sonora ranch, turkeys roaming freely and family members, to which plaintiff took great exception and which its expert, Dr. Sanjay Hukku, testified is misleading. Plaintiff's claim that it achieved its "primary litigation objective" is further undercut by the declarations of Heidi Orrock and Brian Blackman which state that since Judgment was entered in this case, Plaintiff and its lead counsel have instituted two more lawsuits against Defendant on essentially the same grounds, albeit they have apparently learned from the standing error in this case and filed in the names of allegedly injured individual parties. (Decl Heidi Orrock, pg. 5,para.9) The court finds Plaintiff's contention that it obtained the primary relief sought to either be a flight of fantasy or disingenuous to the extreme.

An Award of Attorneys Fees Under CCP 1021.5 is Discretionary

As the California Supreme Court held in Graham, "[T]he private attorney general doctrine 'rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible.' Thus, the fundamental objective of the doctrine is to encourage suits enforcing important public policies by providing substantial attorney fees to successful litigants in such cases." (Maria P. v. Riles (1987) 43 Cal.3d 1281, 1288-1289, 240 Cal.Rptr. 872, 743 P.2d 932 (Maria P.).)....In determining whether a plaintiff is a successful party for purposes of section 1021.5, '[t]he critical fact is the impact of the action, not the manner of its resolution.' (Folsom [v. Butte County Assn. of Governments (1982)] 32 Cal.3d at [668], 685 [186 Cal.Rptr. 589, 652 P.2d 437] (Folsom).) [¶¶] The trial court in its discretion 'must realistically assess the litigation and determine, from a practical perspective, whether or not **148 the action served to vindicate an important right so as to justify an attorney fee award' under section 1021.5. (Woodland Hills Residents Assn., supra, 23 Cal.3d at p. 938 [154 Cal.Rptr. 503, 593 P.2d 200].)" (Maria P., supra, 43 Cal.3d at pp. 1290-1291, 240 Cal.Rptr. 872, 743 P.2d 932.) as quoted in Graham, supra, 34 Cal.4th 553, 565.)

Thus, even if plaintiff had been the "successful party" to this litigation, this court would still be required to assess whether the litigation, from a practical perspective, served to vindicate an important right. "The substantive right extended to the public by the UCL is the " ' "right to protection from fraud, deceit and unlawful conduct" ' " (Prata v. Superior Court (2001) 91 Cal.App.4th 1128, 1137, 111 Cal.Rptr.2d 296), and the focus of the statute is on the defendant's conduct." In re Tobacco II, supra, 46 Cal.4th 298. In contrast, the purpose of Proposition 64 was to focus on the plaintiff's motivation. As "[t]he proponents' statement in the voter information guide for Proposition 64 described the purpose of the initiative as "prot [ecting] small business from frivolous lawsuits" generated by "[s]hakedown lawyers [who] 'appoint' themselves to act like the Attorney General and file lawsuits on behalf of the people of the State of California, demanding thousands of dollars from small business that can't afford to fight in court." (Voter Information Guide, Gen. Elec. (Nov.2004) argument in favor of Prop. 64, p. 40.) (Id.)

Before awarding attorney's fees the court must ask was the purpose of this litigation to protect the public from fraud and deceit or was it to "shakedown" the Defendant or was it something else? The Plaintiff's Organizers Handbook states that Plaintiff's goal is to "target companies and institutions that claim to sell products with superior animal welfare standards...for lying about the actual conditions on their farms and using these conditions to deceive customers with the idea that it is possible to raise and kill animals in a humane way, which we reject." (emphasis added). Plaintiff's mission is to use "revolutionary social and political change for animals;" to make the consumption of meat illegal; and pass a "constitutional amendment granting equal rights and legal personhood to "non-human animals" within one generation." As the Organizers Handbook further states, "Direct Action Everywhere stands

out from other animal advocacy groups for a variety of reasons, but perhaps one of these reasons is because our strategy and tactics are so different from the norm within the animal rights movement..... We use the proven tactics of nonviolent civil resistance, social influence and mass mobilization." It also promotes the use of the illegal criminal tactics of theft and trespass: "In open rescue, activists enter farms and other facilities without permission [usually at night], document the conditions and remove some sick and injured animals." (Plaintifif's New Activists Handbook)

It therefore appears the purpose of this lawsuit was to advance Plaintiff's mission of social and political change by drawing attention to its belief that animals cannot be commercially raised and killed in a humane way. Social and political change is the province of the legislature not the courts. Nonetheless, had Plaintiff been the successful party and actually identified fraudulent behavior by Defendant which had been meaningfully stopped or altered by this litigation, the court would have considered an award of attorneys fees, had it not been for the illegal, unscrupulous tactics with which Plaintiff pursued this litigation.

Plaintiff's criminal actions of trespass and theft cannot be sanctioned by the court as legitimate "discovery" tactics. Plaintiff's strategy of releasing a false and misleading video without any disclosure of the much larger context and publishing a false and misleading Press Release containing unfounded accusations of the use of toxic and even hallucinogenic drugs in Defendant's turkeys are tactics which cannot be sanctioned by the court through an award of attorney's fees. It is axiomatic that one who seeks justice must do justice. To sue for fraud and then use fraudulent tactics in furtherance of the accusation is not something this court is prepared to regard with a blind eye. If plaintiff wishes to anoint itself as the self-righteous crusader for truth in advertising, then it must hold itself to a standard of honesty and integrity in its representations which is above reproach. Even if plaintiff had been the successful party to this litigation, the court would not have used its discretion to award Plaintiff attorney's fees because of its illegal and unscrupulous tactics.

Dated: 02/17/2021

facsimile

Judge Julia Spain