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DIVISION II

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STATE OF WASHINGTON

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No. 46095-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

DOUGLAS VERDIER and TODD VERDIER,

Appellants,

vs.

GREGORY BOST AND LAURIE BOST,

Respondents.

BRIEF OF RESPONDENTS

HEURLIN, POTTER, JAHN, LEATHAM,
HOLTMANN & STOKER, P.S.
Stephen G. Leatham, WSBA #15572
211 E. McLoughlin Blvd, Suite 100
Vancouver, WA 98663
(360) 750-7547
sgl@hpl-law.com
Attorneys for Respondents

TABLE OF CONTENTS

I. INTRODUCTION 1

II. RESPONSE TO ASSIGNMENT OF ERROR..... 1

 A. Response to Assignment of Error No. 1 1

 B. Issues Presented 2

III. STANDARD OF REVIEW 2

IV. STATEMENT OF THE CASE 3

V. ARGUMENT..... 4

 A. The Trial Court Properly Denied the Motion to
Strike as Moot..... 4

 B. Filing An Amended Counterclaim to Remove Certain
Allegations Does Not Make the Other Party the
"Prevailing Party" 11

 C. The Allegations That Were Removed From the
Counterclaims do not Implicate the Anti-SLAPP
Statutes..... 12

 D. The Court Should Decline Plaintiff's Invitation to
Address Issues That Will Likely Never Arise on
Remand 13

VI. REQUEST FOR ATTORNEY FEES..... 13

VII. CONCLUSION 14

VIII. APPENDIX 15

Elf-Man, LLC v. Lamberson, No. 13-CV-0395-TOR
(E.D. Wash. 2014) A-1

TABLE OF AUTHORITIES

Table of Cases

Alaska Structures, Inc. v. Hedlund, 180 Wn. App. 591 (2014)..... 12

Aronson v. Dog Eat Dog Films, Inc., 738 F. Supp. 2d. 1104,
(W.D. Wash. 2010)..... 13

Bevan v. Meyers, 183 Wn. App. 177 (2014) 7

City of Seattle v. Egan, 179 Wn. App. 333 (2014)..... 12

Davis v. Cox, 180 Wn. App. 514 (2014) 14

Elf-Man, LLC v. Lamberson, No. 13-CV-0395-TOR
(E.D. Wash. 2014) 8, 9, 11

Ennis v. Ring, 49 Wn.2d 284 (1956) 11

Fluke Capital & Management Services Company v. Richmond,
106 Wn.2d 614 (1986)..... 11

Hasan v. Frederickson, 37 Wn. App. 800 (1984) 11

Henne v. City of Yakima, 177 Wn. App. 583 (2013), reversed on
other grounds, __ Wn.2d __, 341 P.3d 284 (2015) 4-7, 9, 10

Kelley v. Centennial Contractors Enterprises, Inc., 147 Wn. App. 290,
(2008), *aff'd*, 169 Wn.2d 381 (2010)..... 2

Navallier v. Sletten, 106 Cal. App. 4th 763 (2003) 10

Phillips v. World Publishing Company, 822 F. Supp. 1114 (W.D.
Wash. 2011)..... 7, 8

Statutes

RCW 4.24.510 13

RCW 4.24.525(5)(a)..... 3

Court Rules

CR 15.....	11
CR 15(a).....	6
CR 41.....	11
GR 14.1.....	8
FRAP 32.1.....	8

I. INTRODUCTION

The issue to be decided on appeal is whether the trial court properly denied plaintiff's and counterclaim defendant's¹ "anti-SLAPP" motion to strike, as moot, once defendants properly filed an amended answer which eliminated the allegedly offending language. The purposes and policies behind the anti-SLAPP statutes would not be served by reversing the trial court's decision. Defendants filed their amended answer immediately upon learning of plaintiff's issue. No discovery was done regarding the allegations at issue. Plaintiff suffered no prejudice. There was no dilatory conduct. And the allegations at issue formed only a very small component of defendants' counterclaims for infliction of emotional distress. Under these circumstances, no legitimate purpose would be served by sanctioning defendants with attorney's fees and statutory penalties. The trial court should be affirmed.

II. RESPONSE TO ASSIGNMENT OF ERROR

A. Response to Assignment of Error No. 1: The trial court properly denied plaintiff's motion to strike as moot, given that defendants had filed an amended answer which omitted the allegedly offending allegations.

¹ Collectively referred to as "plaintiff".

B. Issues Presented:

1. Is an anti-SLAPP motion to strike properly denied as moot where the opposing party properly and immediately files an amended pleading which completely eliminates the allegedly offending allegations?

2. Is a party to be deemed the "prevailing party" for purposes of an attorney fee award simply because his opponent files an amended pleading that revises the allegations of his claim?

3. Are the anti-SLAPP statutes implicated where a claim for emotional distress damages only briefly mentions the other party making false reports to governmental agencies?

4. Should this Court decline to address potential issues on remand where plaintiff's motion to strike was properly denied as moot?

III. STANDARD OF REVIEW

A ruling determining that an issue is moot presents a question of law that is subject to de novo review. *Kelley v. Centennial Contractors Enterprises, Inc.*, 147 Wn. App. 290, 295 (2008), *aff'd*, 169 Wn.2d 381 (2010).

IV. STATEMENT OF THE CASE

This lawsuit was commenced on January 30, 2013. CP 1-3. Defendants filed an answer and affirmative defenses, without counterclaims, on February 20, 2013. CP 4-7.

After obtaining leave to join Todd Verdier as a counterclaim defendant, plaintiffs filed an amended answer on December 13, 2013. CP 8-18. The amended answer contained six counterclaims, including the fifth and sixth counterclaims for negligent and intentional infliction of emotional distress. *Id.* Defendants alleged ongoing and threatening actions taken by the Verdiers which defendants claimed had caused them emotional distress. These actions included Mr. Bost being threatened with a weapon, Ms. Bost and her mother being verbally accosted with profanity, and the Bosts' property being deprived of water. Incidental to these core allegations of intimidation and harassment, defendants referenced two false reports that had been made to the Clark County Department of Health and the Washougal Fire Department. *Id.*

On or about February 12, 2014, Todd Verdier filed a special motion to strike. CP 19-21. Approximately one week later, plaintiff filed a joinder in that motion. CP 22-26.² The hearing on the special motion to

² It is questionable whether Douglas Verdier's joinder in Todd Verdier's motion was timely or properly before the Court. *See* RCW 4.24.525(5)(a) (requiring a special motion

strike was noted for March 7, 2014. No discovery had been undertaken regarding defendants' allegations in the interim.

On February 27, 2014, defendants filed their second amended answer. CP 27-38. While otherwise identical to the amended answer, the second amended answer eliminated the two allegations which plaintiff complained of in the motion to strike. *Id.*

On March 7, 2014, the trial court entered its order denying the motion to strike as moot. CP 43-44. Plaintiff filed the notice of appeal at issue on or about April 2, 2014. CP 45-48.

V. ARGUMENT

A. **The Trial Court Properly Denied the Motion to Strike as Moot.**

Case law regarding whether to grant or deny anti-SLAPP motions to strike has very little relevance to this appeal. The trial court did not decide whether defendants' now-removed allegations were in fact made in violation of the anti-SLAPP statutes. There was no question but that defendants had acted within their rights in filing their second amended answer, withdrawing the allegations at issue. The only decision made by the trial court was that the filing of the second amended answer rendered the motion to strike moot. This ruling was entirely consistent with *Henne*

to strike to be filed within 60 days of service of the most recent complaint, or here, counterclaims).

v. City of Yakima, 177 Wn. App. 583 (2013), *reversed on other grounds*, ___ Wn.2d ___, 341 P.3d 284 (2015). Thus, the question before the Court concerns mootness, not the substantive terms of the anti-SLAPP statutes.

The facts and procedural posture of this case demonstrate that the trial court properly found the motion to strike to be moot. In *Henne*, the facts made such a determination much less clear. There, plaintiff was granted leave to file an amended complaint so as to remove the offending claims after the trial court had already denied the City's motion to strike. In the present case, defendants filed their second amended answer before the motion to strike had even been argued and before the Court considered whether the anti-SLAPP statutes applied to defendants' allegations. The Court of Appeals' decision that the amendment of the complaint rendered *Henne's* appeal moot contains language which is applicable to the present case. *Henne*, 177 Wn. App. at 588:

Here, the motion to amend was filed before the City filed its answer and before the parties engaged in discovery. There is no showing of prejudice, dilatory practice, or undue delay. A different situation might be presented if the City had notified Mr. Henne's counsel that the claims violated the anti-SLAPP statute, had warned that a motion would be filed if Mr. Henne did not voluntarily amend his complaint, had given him a reasonable amount of time to make that amendment and yet Mr. Henne had failed to take action — thereby making it necessary for the City to prepare a motion. Absent prejudice, dilatory practice, or

undue delay, Officer Henne had a right to amend his complaint while the anti-SLAPP motion was pending. Thus, the amended complaint supersedes the original complaint. With the removal of the allegations relating to the City's internal investigations of Officer Henne, the issues raised in this appeal are moot.

While the Supreme Court reversed the Court of Appeals, it did not address the issue that is now before the Court. *See, Henne, supra*, n.4-5:

I agree with Justice Fairhurst's concurrence that Henne's amended complaint did not clearly eliminate all the claims that Yakima targeted in its anti-SLAPP motion. Hence, the question of whether Yakima could take advantage of the 2010 anti-SLAPP statute is squarely before us. And the question of whether an amended complaint that deletes *all* allegedly objectionable SLAPP claims is not. (Emphasis in original.)

Yakima and Henne also argue about whether the Court of Appeals erred when it held that Henne's amendments to his complaint cured any possible SLAPP problem. But as discussed above...Yakima had the same complaints about the amended complaint. Whether a voluntary amendment to delete objectionable claims moots an anti-SLAPP motion is thus an issue left for another day.

The issue of mootness is now squarely presented for this Court to decide. Here, defendants were well within their rights to file their second amended answer, since no party had filed a reply to their first amended answer. *See* CR 15(a). Moreover, defendants clearly removed all allegations that were the subject of the motion to strike. Because the second amended answer superseded defendants' first amended answer, none of the allegedly offending allegations remained pending before the trial court. Under the

particular circumstances of this case, the decision to deny plaintiff's motion as moot was unquestionably correct.

The facts that defendants' second amended answer was properly before the court and that defendants removed all allegedly offending allegations from the pleading distinguishes this case from cases such as *Bevan v. Meyers*, 183 Wn. App. 177 (2014). The *Bevan* court distinguished *Henne* explicitly, at 182-83 n.3:

...the Meyers cite *Henne*...in support of their argument that the trial court erred in granting Bevan's motion because their second amended counterclaim for damages removed any express reference to Bevan's report to the [Department of Public Health-Seattle & King County] KCHD. The case is inapposite because, in *Henne*, the amended complaint was properly before the court. Here, the Meyers' second amended counterclaim had not been accepted by the court and thus was not properly before it. In addition, in *Henne*, the amended complaint eliminated the protected activity as a basis for the claims. Here, the Meyers' second amended counterclaim recharacterizes their claim but does not alter the basis for it—namely, Bevan's report to KCHD.

Bevan actually supports the trial court's ruling, as defendants' second answer in this case was in fact properly before the court and because defendants had in fact removed all offending language from the second amended complaint.

Two federal judges in Washington have also addressed the issue of mootness in connection with anti-SLAPP motions to strike. In *Phillips v. World Publishing Company*, 822 F. Supp. 1114 (W.D. Wash. 2011), the

court denied a special motion to strike as moot. The defendant had filed its motion to strike at the same time it filed a Rule 12(b)(6) motion to dismiss. *Id.* at 1124. Because the court had concluded that all of plaintiff's claims were to be dismissed without leave to amend, the court found the motion to strike to be moot. *Id.* The court declined to grant defendant statutory penalties or attorney fees, finding that the burden on the court and the parties to consider the motion to strike outweighed the relief that might have been available to the defendant. *Id.* at 1125.

The court rejected a claim of mootness in *Elf-Man, LLC v. Lamberson*, No. 13-CV-0395-TOR (E.D. Wash. 2014) (copy attached).³ In *Elf-Man*, the plaintiff filed a special motion to strike. In response, defendant filed a motion to withdraw its amended answer, to dismiss plaintiff's complaint, and if the complaint was not dismissed, to file a second amended answer. After the court granted the motion to dismiss in part, defendant still sought leave to file a second amended answer. He contended that a second amended answer would moot the motion to strike because the offending counterclaims would be removed. The court found that the motion to strike was not moot:

³ Discussion of this opinion is not prohibited by GR 14.1, as that rule only prohibits citing an unpublished opinion of the Washington Court of Appeals as an authority. Further, FRAP 32.1 provides that "a court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and (ii) issued on or after January 1, 2007."

At this juncture, Defendant's Amended Answer is the operative pleading. Although Defendant has *offered* to file a second amended answer which omits the subject counterclaims, he has not yet been granted leave to do so. (Emphasis in original.)

While finding that the motion to strike was not moot, the court noted, at n.1, that defendant could have mooted the motion:

The court notes that defendant could have mooted the motion by filing a notice of voluntary dismissal of the subject counterclaims pursuant to Federal Rule of Civil Procedure 41(c). Given that plaintiff has not filed a responsive pleading—*i.e.*, an answer to the counterclaims or a motion for summary judgment—such a dismissal would have unilaterally mooted plaintiff's special motion to strike.⁴

Even though the court found that the motion to strike was not moot, it denied plaintiff's request for statutory damages and attorney fees on policy grounds. The court found that defendant's offer to file an amended answer which removed the offending counterclaims was:

...consistent with the underlying purpose of the statute, which is to facilitate efficient resolution of claims which arise from actions involving public participation and petition....Where, as here, a party promptly offers to abandon potentially offending claims upon being served with a special motion to strike, the purpose of the statute is adequately served.⁵

⁴ This is precisely what defendants did in this case when they filed their second amended answer.

⁵ Defendants here, of course, did more than *offer* to amend their amend their counterclaims. They filed their amended pleading as soon as they received the motion to strike. If plaintiff had given notice of an intention to file a motion to strike, defendants would have filed the amendment at that time. Such advance notice was not "required" under the Court of Appeals' opinion in *Henne*, however, contrary to plaintiff's assertion. *See* Brief of Appellants, at 12.

These federal court decisions strongly support the trial court's conclusion that plaintiff's motion to strike was moot in light of defendants having filed a second amended answer.

Because the Washington case law is contrary to plaintiff's position, plaintiff seeks to have this court utilize California law to undercut defendants' right to file an amended answer in the face of a pending special motion to strike. The Court should decline plaintiff's attempts, as the Washington Supreme Court has held that California law does not control a Washington court's interpretation of Washington's anti-SLAPP statutes. *Henne*, 341 P.3d at ____ ("But despite some similarities, the laws also have significant differences....Our Legislature thus phrased its findings more narrowly than California's...").

No statute, rule, or published opinion in the State of Washington precludes defendants from filing a second amended answer as they did. While California may have chosen not to allow "eleventh hour amendments",⁶ Washington courts have announced no such similar policy. This Court should not embrace principles from California to eliminate defendants' right to file an amended pleading within the terms of the Civil Rules.

⁶ *Navallier v. Sletten*, 106 Cal. App. 4th 763, 772-73 (2003).

B. Filing An Amended Counterclaim to Remove Certain Allegations Does Not Make the Other Party the "Prevailing Party."

Plaintiff next makes the frivolous contention that plaintiff should be considered the "prevailing party" because defendants filed an amended answer which removed the allegations at issue. It would certainly be news to litigants in this state that their opponents were to be considered prevailing parties every time a party filed an amended complaint or amended counterclaim.⁷ The rule is that filing an amended pleading renders the prior pleading inoperative. *See, e.g., Fluke Capital & Management Services Company v. Richmond*, 106 Wn.2d 614, 619 n.4 (1986):

When a party files an amended pleading that abandons a former cause of action the original pleading is considered abandoned and ceases to perform any function. (Citing *Hasan v. Frederickson*, 37 Wn. App. 800 (1984) and *Ennis v. Ring*, 49 Wn.2d 284 (1956)).

See also Elf-Man, supra. Plaintiffs were not the "prevailing parties" at the trial court simply because defendant's filed a second amended answer.

Indeed, defendants should be considered the prevailing parties if this Court affirms the trial court's ruling. Plaintiff filed a motion to strike,

⁷ The filing of an amended pleading under CR 15 is far different from filing a voluntary dismissal under CR 41. Case law concerning the effect of voluntary dismissals, cited at p. 9 of plaintiff's brief, have no bearing on this case.

and an order was entered denying that motion. Defendants should be awarded attorney fees on appeal as the prevailing parties. *See* § VI, *infra*.

C. The Allegations That Were Removed From the Counterclaims do not Implicate the Anti-SLAPP Statutes.

It is also very questionable whether the anti-SLAPP statutes would have applied to the amended answer at all. A SLAPP suit is "a meritless suit filed primarily to chill a defendant's exercise of First Amendment rights." *City of Seattle v. Egan*, 179 Wn. App. 333, 337 (2014) (emphasis added). Where the gravamen of the action is not primarily concerned with limiting one's protected activity, the anti-SLAPP statutes do not apply. *Id.* at 341.

As in *Egan*, defendants' counterclaims for infliction of emotional distress did not "arise" from the reports made to the two public agencies. Defendants' counterclaims arose from the ongoing pattern of harassment and intimidation to which plaintiff was subjecting the Bosts. Defendants' purpose in filing the counterclaims was not to prevent plaintiff from making reports to governmental agencies; it was to recover an award of damages caused by plaintiff's ongoing actions to harass and terrorize defendants. For these reasons as well, the anti-SLAPP statutes are inapplicable to the first amended answer. *Id.* *See also Alaska Structures, Inc. v. Hedlund*, 180 Wn. App. 591 (2014).

D. The Court Should Decline Plaintiff's Invitation to Address Issues That Will Likely Never Arise on Remand.

The trial court made no ruling as to whether the allegations contained in defendants' now-superseded amended answer violated the anti-SLAPP statutes. As set forth *supra*, it is quite likely that the allegations did not constitute such a violation.⁸ Nevertheless, plaintiff has asked the Court to address several issues regarding the claimed violation of the anti-SLAPP statutes and the remedies which are available for such a violation. None of those issues are before this Court on this appeal. The Court should therefore decline to address those issues in a vacuum. If the finding of mootness is reversed, the trial court can make its own determination as to whether the anti-SLAPP statutes were violated and what remedies are available. The dissatisfied party can then bring those rulings to this Court's attention in a subsequent appeal. For now, plaintiff's request is premature.

VI. REQUEST FOR ATTORNEY FEES

Defendants request an award of attorney's fees on appeal. *See Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d. 1104, 1117 (W.D. Wash. 2010) (defendant, having prevailed in opposing the plaintiff's anti-

⁸ It is also likely that the trial court would find that plaintiff's reports to the government agencies were made in bad faith, such that statutory relief should be denied. *See* RCW 4.24.510.

SLAPP motion, was entitled to reasonable attorney's fees). *See also Davis v. Cox*, 180 Wn. App. 514, 551 (2014) (prevailing party in anti-SLAPP proceedings is entitled to reasonable attorney fees on appeal).

VII. CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's ruling that the filing of defendants' second amended answer, with all allegedly offending allegations having been removed, rendered plaintiff's motion to strike moot.

DATED this 28 day of April, 2015.

HEURLIN, POTTER, JAHN, LEATHAM,
HOLTMANN & STOKER, P.S.



Stephen G. Leatham, WSBA #15572
Of Attorneys for Respondents

VIII. APPENDIX

TABLE OF CONTENTS

Elf-Man, LLC v. Lamberson, No. 13-CV-0395-TOR
(E.D. Wash. 2014).....A-1

ELF-MAN, LLC, Plaintiff,
v.
RYAN LAMBERSON, Defendant.

No. 13-CV-0395-TOR.

United States District Court, E.D. Washington.

March 17, 2014.

ORDER ON PENDING PROCEDURAL MOTIONS

THOMAS O. RICE, District Judge.

BEFORE THE COURT are the following motions: (1) Plaintiff's "Motions in Response to Defendant's First Amended Answer" (ECF No. 20); Defendant's Motion to Dismiss or for Leave to File Second Amended Answer (ECF No. 21); and (3) Plaintiff's Motion to Add Additional Defendant (ECF No. 28). These matters were submitted for consideration without oral argument. The Court has reviewed the briefing and the record and files herein, and is fully informed.

PROCEDURAL HISTORY

Plaintiff **Elf-Man**, LLC ("Plaintiff") originally sued Defendant Lamberson, along with twenty-eight other defendants, on March 22, 2013, in Cause No. 13-CV-0115-TOR. On October 18, 2013, Defendant Lamberson moved to sever the claims against him. The Court granted the motion on November 21, 2013, and opened the above-captioned case. The following day, the Court issued a notice setting a telephonic scheduling conference for December 19, 2013. ECF No. 13. The parties subsequently filed a joint Rule 26(f) report on December 5, 2013. ECF No. 14. In this report, the parties suggested that Defendant "defer responding to the First Amended Complaint until after the Court has ruled on the Fed. R. Civ. P. 12 motions (ECF No. 76) pending in the related consolidated action (Case No. 2:13-cv-00115-TOR)." ECF No. 14 at 6.

Defendant filed an Answer to Plaintiff's Amended Complaint on December 17, 2013, without awaiting a ruling on the motions to dismiss pending in Cause No. 13-CV-0115-TOR. ECF No. 15. The Court held a telephonic scheduling conference on December 19, 2013, and issued a Scheduling Order later the same day. ECF Nos. 16, 17. Defendant filed an Amended Answer on January 3, 2014. ECF No. 18.

On January 17, 2014, Plaintiff moved to dismiss several of the counterclaims and affirmative defenses asserted in Defendant's Amended Answer. ECF No. 20. Incorporated into this motion was a special motion to strike Defendant's state law counterclaims for defamation, tortious interference with business relationships, and for violations of the Washington Consumer Protection Act ("CPA") pursuant to RCW 4.24.525, the Washington "**Anti-SLAPP**" Act. ECF No. 20 at 3-8. Three days later, Defendant filed a motion seeking to: (1) withdraw its Amended Answer; (2) dismiss Plaintiff's Amended Complaint for failure to state a claim under Rule 12(b)(6) in light of (i) a ruling issued by Judge Lasnik in a companion case filed in the Western District of Washington, and (ii) the possibility that this Court might issue a similar ruling on the motions to dismiss pending in Cause No. 13-CV-0115-TOR; and (3) as an alternative to dismissal of the Amended Complaint, for leave to file a Second Amended Answer. ECF No. 21.

On January 22, 2014, the Court granted in part and denied in part the motions to dismiss in Cause No. 13-CV-0115-TOR. This ruling dismissed Plaintiff's alternative cause of action for "indirect infringement" of its copyright with prejudice. **Elf-Man**, LLC v. Charles Brown, et al., Case No. 13-CV-0115-TOR, ECF No. 106 (E.D. Wash., Jan. 22, 2014). In light of this ruling, Defendant withdrew the portion of his motion to dismiss (ECF No. 21) seeking to withdraw his Amended

Answer and dismiss Plaintiff's Amended Complaint. ECF No. 22. Defendant did, however, indicate that he still sought leave to file a Second Amended Answer. ECF No. 22.

Plaintiff filed a motion to add an additional fictitiously named defendant on February 14, 2014. ECF No. 28. This motion was unrelated to the motions above.

DISCUSSION

A. Plaintiff's Special Motion to Strike Under RCW 4.24.525

Plaintiff has filed a special motion to strike Defendant's counterclaims for defamation, tortious interference with business relationships, and for violations of the CPA pursuant to RCW 4.24.525. ECF No. 20 at 3-8. Commonly referred to as the "Anti-SLAPP" statute, RCW 4.24.525 allows for summary dismissal of "any claim, however characterized, that is based upon an action involving public participation and petition." RCW 4.24.525(2). The statute defines "action involving public participation and petition" as follows:

- (a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;
- (b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;
- (c) Any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;
- (d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or
- (e) Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

RCW 4.24.525(2)(a)-(e).

Any civil claim which is "based upon" one of the actions above is subject to a "special motion to strike" by the party against whom the claim is asserted. RCW 4.24.525(4). The party bringing a special motion to strike "has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition." RCW 4.24.525(4)(b). "If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim." RCW 4.24.525(4)(b). If the moving party prevails, it is entitled to recover attorney's fees and costs incurred in bringing the motion, plus a \$10,000 damages award. RCW 4.24.525(6)(a).

The Court finds that Defendant's state law counterclaims are based upon an action involving public participation and petition. In support of his counterclaims for defamation, tortious interference with business relationships, and violations of the CPA, Defendant alleges:

Plaintiff has intentionally and recklessly named Mr. Lamberson in a federal lawsuit that never should have been brought against him. Plaintiff has made several published knowingly false statements in furtherance of that activity.

Mr. Lamberson has been damaged by plaintiff's intentional and reckless defamatory activity.

* * *

Plaintiff is engaging in a systematic, unlawful business scheme that includes multiple commercial acts of defamation not in the public interest and which will continue if not enjoined. Additionally, plaintiff has no certificate of authority to conduct business in Washington.

Mr. Lamberson and others who have been falsely accused have been damaged by plaintiff's unlawful scheme which is unlawful under the Washington Consumer Protection Act, RCW 19.86.010 et. seq. This is an exceptional case warranting an award of multiple damages and attorney's fees and costs to Mr. Lamberson. Defendant has notified the Washington State Attorney General of the filing of this action, as required under statute.

* * *

Plaintiff filed this action claiming to be a victim of bit torrent without admitting its role in seeding the very work it claims was copied. Plaintiff sought and received the right to issue Subpoenas to the ISP of Mr. Lamberson based on its self-manufactured claims. Mr. Lamberson's ISP has communicated with him about the Subpoenas and the existence of these Subpoenas is noted in Mr. Lamberson's customer service files. Plaintiff had no right to force Mr. Lamberson's ISP to respond to a Subpoena when plaintiff knew it was manufacturing its own claims, not enforcing legitimate rights.

Plaintiff's activity has affected the relationship between Mr. Lamberson and his ISP. He may not [sic] longer be entitled to discounts or promotional offerings made to other customers about whom no subpoenas have been issued. Plaintiff's activity is unlawful tortious activity interfering with Mr. Lamberson's business relationships.

Def.'s Am. Compl., ECF No. 18, at ¶¶ 38-39, 41-42, 44-45. There can be little question that Plaintiff's Amended Complaint is a "document submitted" in a "judicial proceeding" under RCW 4.24.525(2)(a). As a result, the filing of the instant lawsuit qualifies as "activity involving public participation and petition." Because Defendant's state law counterclaims arise from that activity, they are properly subject to a special motion to strike. As Plaintiff has met its initial burden under RCW 4.24.525(4)(b), the burden now shifts to Defendant to "establish by clear and convincing evidence a probability of prevailing" on his counterclaims.

Rather than attempting to demonstrate a probability of prevailing on his counterclaims, Defendant argues that Plaintiff's special motion to strike has been rendered "moot" by his offer to file a Second Amended Answer which omits the subject counterclaims. ECF No. 25 at 9. Defendant further requests an award of attorney's fees incurred in defending against Plaintiff's "ill-conceived" motion. ECF No. 25 at 9.

Contrary to Defendant's assertions, Plaintiff's special motion to strike is not moot. At this juncture, Defendant's Amended Answer is the operative pleading. Although Defendant has *offered* to file a Second Amended Answer which omits the subject counterclaims, he has not yet been granted leave to do so.^[1] Nor is the motion ill-conceived. As noted above, Plaintiff's special motion to strike falls squarely within the ambit of RCW 4.24.525. Defendant's request for attorney's fees incurred in defending against the motion is not well-taken.

The question, then, is whether Plaintiff is entitled to an award of attorney's fees, costs, and a \$10,000 damages award pursuant to RCW 4.24.525(6) given that Defendant has offered to abandon the subject counterclaims. There are two factors which counsel against such an award. First, Defendant's offer is consistent with the underlying purpose of the statute, which is to facilitate efficient resolution of claims which arise from actions involving public participation and petition. See Substitute Senate Bill 6395, Laws of 2010, Chapter 118, § 1 (explaining that the purpose of RCW 4.24.525 is to provide an "efficient, uniform and comprehensive method for speedy adjudication" of claims which have a chilling effect on the exercise of First Amendment rights). Where, as here, a party promptly offers to abandon potentially offending claims upon being served with a special motion to strike, the purpose of the statute is adequately served.

Second, an award of attorney's fees, costs and \$10,000 in statutory damages under RCW 4.24.525(6) is only available

to a party who "prevails" on a special motion to strike. Here, Defendant offered to abandon the subject counterclaims within three days of receiving Plaintiff's motion. When Plaintiff refused the offer, Defendant was forced to respond to the motion. To his credit, Defendant simply asked the Court for leave to file a Second Amended Answer; he made no effort to establish a likelihood of prevailing on the subject counterclaims. Under these circumstances, Plaintiff cannot fairly be deemed a "prevailing" party.

Accordingly, the Court will deny Plaintiff's special motion to strike and will grant Defendant's motion for leave to file a Second Amended Answer. Defendant shall file his Second Amended Answer on or before March 24, 2014. In view of this resolution, the Court declines to address the remaining arguments raised in Plaintiff's motion to dismiss (ECF No. 20). In the event that Plaintiff wishes to challenge any counterclaim or affirmative defense raised in Defendant's Second Amended Answer, it may do so within the timeframe provided by Rule 12(b).

B. Plaintiff's Motion to Add Additional Defendant

Plaintiff has moved "for the addition of a fictitiously named Defendant as a party to this action" under Federal Rule of Civil Procedure 21. ECF No. 28 at 1. In a declaration attached to the motion, counsel explains that the purpose of the motion is to pave the way for Plaintiff to proceed against a different party in the event that discovery reveals that Defendant Lamberson did not personally copy Plaintiff's movie. ECF No. 28-1 at ¶¶ 3-4. Defendant opposes the motion on the grounds that Rule 21 does not allow for the addition of fictitious "placeholder" parties and that adding such a party would unnecessarily delay the proceedings. ECF No. 33 at 2-4.

The Court will deny the motion with leave to renew at a later time in the event that discovery reveals that someone other than Defendant Lamberson is responsible for copying Plaintiff's movie. The Court appreciates that Plaintiff filed the motion in an effort to comply with the deadline to add or drop parties set forth in the Scheduling Order, but at this juncture Plaintiff's proffered reason for adding a party is entirely speculative. In the event that discovery reveals that someone other than Defendant Lamberson copied Plaintiff's movie, Plaintiff may move to add that person as a defendant at that time. Notwithstanding the deadline set forth in the Scheduling Order, the Court may add or drop a party "at any time, on just terms" under Rule 21. Fed. R. Civ. P. 21. Just terms for adding a new party would likely require the simultaneous dismissal of Plaintiff's claims against Defendant Lamberson.

IT IS HEREBY ORDERED:

1. Plaintiff's "Motions in Response to Defendant's First Amended Answer" (ECF No. 20) are DENIED as to Plaintiff's Special Motion to Strike and DENIED as moot as to all other requests for relief.
2. Defendant's Motion to Dismiss or for Leave to File Second Amended Answer (ECF No. 21) is DENIED as to Defendant's motion to dismiss and GRANTED as to Defendant's motion for leave to file a Second Amended Answer. Defendant shall file his Second Amended Answer on or before March 24, 2014.
3. Plaintiff's Motion to Add Additional Defendant (ECF No. 28) is DENIED with leave to renew.

The District Court Executive is hereby directed to enter this Order and provide copies to counsel.

[1] The Court notes that Defendant could have mooted the motion by filing a notice of voluntary dismissal of the subject counterclaims pursuant to Federal Rule of Civil Procedure 41(c). Given that Plaintiff has not filed a responsive pleading— *i.e.*, an answer to the counterclaims or a motion for summary judgment—such a dismissal would have unilaterally mooted Plaintiff's special motion to strike.

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CERTIFICATE OF SERVICE

I certify that I caused the foregoing BRIEF OF RESPONDENTS
to be served on the following:

Ben Shafton
Caron, Colven, Robison & Shafton
900 Washington St Ste 1000
Vancouver, WA 98660-3455

Thomas Patton
Law Offices of Thomas Patton
8 N State St Ste 301
Lake Oswego, OR 97034-3956

by mailing, by U.S. Mail, First Class postage prepaid, a true copy to the
foregoing on the 28 day of April, 2015.

HEURLIN, POTTER, JAHN, LEATHAM,
HOLTMANN & STOKER, P.S.



Stephen G. Leatham, WSBA #15572
Of Attorneys for Respondents