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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER RECOUVREUR, Plaintiff, v. CHARLES CARREON, Defendant.	No. 3:12-cv-03435 **FIFTH AFFIDAVIT OF PAUL ALAN LEVY** Date: February 7, 2013 Time: 1:30 PM Courtroom #3, 17th Floor

1. My name is Paul Alan Levy. I am lead counsel for plaintiff in this case.

2. On December 17, I asked Mr. Carreon to meet and confer about the issue of attorney fees. He and I met and conferred about the motion by telephone this afternoon.

Hourly Rate

3. I was graduated in 1976 from the University of Chicago Law School and in 1973 from Reed College.

4. I am an active member of the Bars of the District of Columbia and New York. I am admitted to practice in the United States District Courts for the Districts of Colorado and Columbia, the Southern District of New York, and the Eastern District of Michigan, in the United States Courts of Appeals for every circuit except the Federal Circuit, and in the Supreme Court of the United States. I have been admitted pro hac vice in many different federal and state trial and appellate courts.

5. After law school, I served as a law clerk to the Honorable Wade H. McCree, Jr., of the United States Court of Appeals for the Sixth Circuit. When Judge McCree was appointed Solicitor General of the

United States, I served as his Special Assistant.

6. Since December 1977, I have been employed as an attorney at Public Citizen Litigation Group. I have represented parties and argued scores of cases in the United States Courts of Appeals, including three arguments en banc, as well as many cases in state supreme and intermediate appellate courts; I have also argued four cases in the Supreme Court of the United States. In addition, I was the lead author of the merits briefs in several other Supreme Court cases. I have filed many amicus briefs in both the Supreme Court and state and federal courts of appeals, and have often been permitted to argue as amicus curiae in state appellate courts as well. In the academic year 1983-84, I took a leave of absence from Public Citizen to serve as a visiting professor at Cardozo Law School in New York. My biographical sketch in outline form, including my publications and the cases that I have handled in the Supreme Court (including cases where I wrote the briefs but counsel who handled the case below did the oral argument), and a prose version of my resume, were attached to my Second Affidavit in this case, DN 32-1, as Exhibit U.

7. For my first twenty-odd years at Public Citizen, I specialized in representing individual workers in cases involving union democracy, union corruption, and employees' rights of access to judicial and administrative tribunals. However, for the past twelve years my specialty has shifted to Internet free speech cases, with a particular concentration in three areas — the right to speak anonymously online; the right of web hosts and Internet service providers to host comments by others without being subject to suit; and the right of people who want to comment on companies to use the trademarks of those companies to denote the subject of that commentary. For several years I have actively participated in the Intellectual Property Section of the American Bar Association, such as by chairing subcommittees on trademark issues relating to Internet domain names and keyword advertising. In 2005 and 2006, I was the leader of a coalition of consumer, civil liberties, and arts organizations lobbying to preserve protections for expressive uses of trademarks as Congress was considering the 2006 Trademark Dilution Revision Act. I have also lobbied on the issues of libel tourism and the need to protect U.S.-based web hosts against foreign judgments entered without consideration of our federal law immunity against suit for content provided by others. In recent Congresses, I have been working on a proposed federal statute protecting against SLAPP suits (strategic litigation against public participation). Since 2009, I have represented Public Citizen on the Intellectual Property Policy Committee of the Transatlantic Consumer Dialogue ("TACD"); for the past two years, I have been Public

Citizen's alternate representative on the TACD Steering Committee.

8. I have also spoken at law school, bar and other meetings in the United States and abroad on issues of the statutory and constitutional protections for the use of trademarks for purposes of commentary and about the immunity for the hosts of Internet discussion facilities, as well as other Internet free speech issues. For example, at the annual meeting of the ABA's Intellectual Property Section last spring, I spoke on the "Hot Topics" panel about how trademark law applies to the use of trademarks in keyword advertising.

9. Among the reported trademark cases in which I have been lead counsel for a party are *Lamparello v. Falwell*, 420 F.3d 309 (4th Cir. 2005); *Bosley Medical Inst. v. Kremer*, 403 F.3d 672 (9th Cir. 2005); *TMI v. Maxwell*, 368 F.3d 433 (5th Cir. 2004); *Taubman v. WebFeats*, 319 F.3d 770 (6th Cir. 2003); *Smith v. Wal-Mart Stores*, 537 F. Supp.2d 1302 (N.D. Ga. 2008), and *Jenzabar, Inc. v. Long Bow Group*, 82 Mass. App. Ct. 648, 977 N.E.2d 75 (Mass. App. 2012).

10. My co-counsel in this case was Julie Murray, who was graduated magna cum laude from Harvard Law School in 2009 and summa cum laude from the University of Kentucky in 2003. She belongs to the Bars of the District of Columbia and New York, and is admitted to practice in the United States District Court for the District of Columbia and in the United States Courts of Appeals for the D.C. and Seventh Circuits. After law school, she served as a law clerk to the Honorable Marsha S. Berzon of the United States Court of Appeals for the Ninth Circuit and as a fellow for education and employment at the National Women's Law Center in Washington, D.C. She was worked with me at the Litigation Group since October 2011.

11. Because Public Citizen is a public interest group, we generally do not bill clients for our services. Indeed, our non-profit tax status limits fees we can be paid by clients. However, we are able to seek court-awarded attorney fees at the full hourly rates set by the market for the relevant community (as the Supreme Court has allowed non-profits to do, in cases such as *Blum v. Stenson*, 465 U.S. 886 (1984)). However, courts in Washington, D.C. have encouraged the use of the so-called *Laffey* matrix, named after the case in which it was first devised, *Laffey v. Northwest Airlines*, 572 F. Supp. 354, 371 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984). Courts in the District of Columbia use *Laffey* matrices to determine the reasonable rates of counsel seeking awards of attorney fees. *See Smith v. District of Columbia*, 466 F. Supp.2d 151, 156 (D.D.C. 2006); *Brown v. Pro Football*, 846 F.

Supp. 108, 120 (D.D.C. 1994).

12. There are two different versions of the *Laffey* matrix. One version is maintained by the United States Attorney's Office for the District of Columbia, showing the hourly rates that the United States Attorney's office will accept for fee applications against the United States in cases not arising under the Equal Access to Justice Act. This version of the *Laffey* matrix has been updated each year by applying the inflation rate, as determined by the local Consumer Price Index for All Urban Consumers (CPI-U), to the rates for previous years, going back to the hourly rates that were originally determined to be reasonable in the *Laffey* case. It can be found on the web site for our local United States Attorney's office, http://www.justice.gov/usao/dc/divisions/Laffey_Matrix_2003-2013.pdf, and was attached to DN 32-1 as Exhibit V. This matrix shows that for attorneys with at least 20 years following graduation from law school, the reasonable hourly rate is $505. District Judges in California have recognized this version of the Laffey matrix, but have found its rates to be unduly low compared to California rates, and have applied multipliers to bring its rates into sync with California rates. *E.g.*, *Theme Promotions v. News America Marketing*, 731 F. Supp.2d 937, 948-949(N.D. Cal. 2010)

13. An "Adjusted Laffey Matrix" has been created that calculates current hourly rates by using the inflation rate for legal services instead of inflation in consumer prices generally. http://www.laffeymatrix.com/see.html. A copy of this matrix was attached to DN 32-1 as Exhibit W. Decisions have specifically approved of the Adjusted Laffey Matrix, including the *Smith* case cited above, as did the court in *Bond v. Ferguson Enterprises*, 2011 WL 2648879, at *12 (E.D. Cal. June 30, 2011). According the Adjusted Laffey Matrix, for attorneys with at least 20 years following graduation from law school, the reasonable hourly rate is $753.

14. Exhibit X to DN 32-1 is the affidavit of Richard Pearl, which was submitted in support of the claimed attorney fee rates in *Rosenfeld v. U.S. Dept. of Justice*, — F. Supp.2d —, 2012 WL 4933317 (N.D.Cal. 2012), and which I downloaded from the Court's PACER site. The $700 per hour rate that plaintiff argues should be the basis of the award of attorney fees on this motion is well within the levels supported by Mr. Pearl's affidavit; indeed, *Rosenfeld* found that $700 per hour was a reasonable rate for lead counsel in that case, James Wheaton. Mr. Wheaton's own affidavit in that case reveals him to have been a 1984 graduate of Boalt Hall.

15. I attach as Exhibit CC the opinion of Judge Wilken in *Prison Legal News v. Scharzenegger*, No. 4:07-cv-02058-CW, at 7 (N.D. Cal. Dec. 5, 2008). (The letter is sequential to previous affidavits, for ease of reference).

SERVICES

16. My Litigation Group colleagues and I both record our time on our personal computers, using a program designed by one of my former colleagues. These records reflect that, through December 28, I spent approximately sixty hours representing plaintiff in this case, and Ms. Murray had spent nearly six hours. A copy of the relevant time entries is attached as Exhibit DD. However, as explained below, plaintiff does not seek to be awarded fees for all time that I spent on this case, and seeks no fees for the time spent by Ms. Murray.

17. My work on this matter began after a California lawyer who pays close attention to free speech issues asked me to take a look at Mr. Carreon's original threat to sue the then-anonymous operator of the satirical blog at charles-carreon.com (a copy of his demand latter is attached to the complaint as Exhibit D; printouts of the blog are attached to the complaint as Exhibits A, B and C). Public Citizen was interested in the case because we had pursued the line of cases exemplified by *Bosley Medical Inst. v. Kremer*, 403 F.3d 672 (9th Cir. 2005), and by our amicus brief in *Nissan Motor Co. v. Nissan Computer Co.*, 378 F.3d 1002 (9th 2004), cases involving the right to use a trademark in the domain name of a web site about a trademark holder. Ordinarily, Public Citizen would not have taken a case like this one, because the law was so clearly established in favor of the anonymous blogger, but the anonymity of the blogger raised issues related to a separate line of authority that Public Citizen attorneys have developed about the right to speak anonymously on the Internet, such as *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. 2007), and *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. 2001). This line of cases had recently been muddied by a Ninth Circuit decision, *In re Anonymous Online Speakers*, 661 F.3d 1168 (9th Cir. 2011), and this case could have presented an opportunity to address those issues further, and in the context of the trademark issues in which we have a special expertise.

18. Although I agreed to take the case if necessary, I hoped not to have to litigate, because the law was so clearly established, and because, as it happened, my office had a relationship with Mr. Carreon, in that one of my colleagues had filed a brief as amicus curiae in the New York Court of Appeals supporting

Mr. Carreon's position in a case about personal jurisdiction of a copyright suit against a company that he and his wife operate. In fact, Mr. Carreon had relied on my colleague's oral argument as amicus curiae, and did not come to New York to argue the case himself. I also noted that Mr. Carreon named his company web site, which was at the heart of the claims of copyright infringement, after Ralph Nader, who started Public Citizen many years ago. Therefore I telephoned Mr. Carreon to explain to him why, as we saw it, he could not possibly prevail in the lawsuit that he was threatening to bring against the blogger and against the registrar of the domain name, and to urge him not to pursue the threatened litigation. During the conversation, Mr. Carreon acknowledged that the blogger had not solicited money for the domain name. After the phone conversation ended, I sent Mr. Carreon an email confirming our conversation and enumerating many of the relevant cases; the email is attached to the Complaint as Exhibit E. I also contacted the registrar, whose personnel assured me that they would not identify the blogger without a court order.

19. Mr. Carreon responded to my telephone call and email with his own email, a copy of which was attached to the Complaint as Exhibit F. I then drafted the complaint and cast around for local counsel, in part with the assistance of the lawyer who had asked me to look at the case in the first place. With the assistance of Cathy Gellis, we filed the complaint in this case. At about the same time, the registrar disclosed our client's name. Mr. Carreon thereafter created his own blog that used Mr. Recouvreur's name publicly, taking the possible issue of anonymity out of the case.

20. Throughout the litigation, I have had the assistance of several Litigation Group colleagues in addition to Julie Murray, who has appeared on the papers with me. Almost every paper filed in the case has been read by other Litigation Group colleagues, both for substance and for proofreading, and I have had the benefit of discussing the case with those colleagues on a regular basis. However, no fees are sought for the time spent by other Litigation Group lawyers. In addition, the California lawyer who originally asked me to look at this case reviewed most of my drafts and often offered his comments and edits; in addition, he sent me legal research done for the litigation by his office. No fees are sought for any of that legal work.

21. In addition, in the exercise of billing judgment, I have decided that no fees will be sought for some of the work identified in my time sheets and Ms. Gellis's time sheets, that no fees will be sought for Ms. Murray's time, and that fees should be sought for only part of certain time entries. For example, no fees are sought for time spent communicating with Register.com about its eventual disclosure of Mr.

Recouvreur's name in response to the threats it had received from Mr. Carreon; we have been trying to discuss Register.com policies with its counsel, and have not decided whether further legal action against that entity would be appropriate. Nor are any fees sought for time spent researching possible additional claims against Mr. Carreon for revealing Mr. Recouvreur after obtaining it through his threats against Register.com.

22. Although, as discussed in plaintiff's motion papers, we believe that Ninth Circuit law authorizes awards of attorney fees for time spent on unsuccessful motions, no fees at all are sought for time spent opposing Mr. Carreon's request for an extension of time to respond to plaintiff's motion for an award of service expenses and attorney fees for seeking service expenses. In addition, fees are only sought for half of the time spent on plaintiff's motion to authorize service by email and to have service deemed effective (11.6 hours for me and 1.9 hours for Ms. Gellis).

23. I have indicated the elimination or reduction of time entries by marking on my own time entries; I have reflected elimination or reduction of Ms. Gellis's time entries by including a separate column on the right-hand side of a spreadsheet reflecting her time entries. The marked version of the Gellis time entries is attached as Exhibit EE.

24. Fees have already been sought for some of the hours reflected on the time sheets for plaintiff's counsel, in plaintiff's motion under Rule 4(d)(2)(B). In the event that the Court grants that motion in full, the award under the Lanham Act should be reduced accordingly by 10.7 hours for me and by 3.2 hours for Ms. Gellis. I have marked the relevant time entries on the respective time sheets using the abbreviation DN 32.

I hereby certify under penalty of perjury that the foregoing is true and correct. Executed on December 29, 2012.

Paul Alan Levy