

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

SOUTH BUILDING

TENTATIVE RULINGS - May 19, 2023

EVENT DATE: 05/22/2023

EVENT TIME: 09:00:00 AM

DEPT.: N-31

JUDICIAL OFFICER: Blaine K. Bowman

CASE NO.: 37-2022-00038601-CU-BC-NC

CASE TITLE: WALSH VS. BLAKESPEAR [IMAGED]

CASE CATEGORY: Civil - Unlimited

CASE TYPE: Breach of Contract/Warranty

EVENT TYPE: Motion Hearing (Civil)

CAUSAL DOCUMENT/DATE FILED: Motion - Other, 04/12/2023

RULING ON MOTION FOR ATTORNEY FEES

The *Motion for Attorney Fees* brought by defendant Catherine Blakespear is disposed as follows:

--as to the \$73,279.00 in attorney fees associated with the anti-SLAPP motion – **GRANTED**

--as to the \$47,298.50 in attorney fees associated with the *Motion for Attorney Fees* – **GRANTED**

The **total** award of attorney fees shall be **in the amount of \$120,577.00**.

Factual Background

Catherine Blakespear is a former local mayor who ran for, and won, election to the California Senate. She is now a sitting Senator (hereinafter, **Senator Blakespear**). A dispute erupted between her and some of her constituents regarding social media. The accusation was that Senator Blakespear's act of *blocking* constituents from being able to comment on her social media violated their First Amendment rights.

The parties reached a settlement agreement on that issue in which then-candidate Blakespear agreed to do two things: (1) make a one-time payment of \$5,000.00, and (2) issue a public apology on social media. Senator Blakespear is now being sued by certain of those constituents for failure to comply with the terms of that settlement agreement. Those constituents include plaintiffs J. Garvin Walsh, Jordan Marks, Stephen Meiche, and Matthew Wheeler (collectively, **Plaintiffs**). (Incidentally, the constituents also included one Robert Nichols, but Mr. Nichols withdrew his complaint in response to Senator Blakespear filing an anti-SLAPP motion in order to avoid attorney fees – which are the very subject of the instant motion.)

This lawsuit was filed on September 28, 2022. Senator Blakespear was sworn into office about three months later on December 5, 2022. The lawsuit alleged five causes of action for: (1) breach of settlement agreement, (2) breach of the implied covenant of good faith and fair dealing, (3) specific performance, (4) freedom of speech violations, and (5) declaratory relief. Underneath these various causes of action were really two theories of liability:

--that Senator Blakespear failed to issue a settlement-term-compliant apology

--that Senator Blakespear failed to pay the \$5,000.00 that was due under the terms of the settlement

Senator Blakespear filed an anti-SLAPP motion in this case on December 2, 2022 (about three days before she was sworn into office). That anti-SLAPP motion came on for hearing on January 19, 2023.

The anti-SLAPP motion only sought to strike those aspects of the causes of action that pertained to the failure to make a settlement-term-compliant apology. It did not target any of the aspects of the causes of action that dealt with the failure to pay \$5,000.00. In this regard, the anti-SLAPP motion was granted in its entirety.

However, as mentioned above, there was one almost procedural aspect in which the anti-SLAPP motion was denied – namely as to plaintiff Robert Nichols who had *withdrawn* his complaint in response to the filing of the anti-SLAPP. This Court issued a ruling clarifying that the motion was "DENIED as moot" as to Mr. Nichols, but the motion was otherwise granted in full. (ROA 69.)

Plaintiffs appealed that ruling on April 3, 2023. (ROA 93.) Senator Blakespear now seeks attorney fees pursuant to Code of Civil Procedure § 425.16(c). In addition, Senator Blakespear also seeks a stay of the proceedings in this case pursuant to Code of Civil Procedure § 595 due to her status as a sitting legislator – but requests that that stay only be imposed *after* she is awarded a total of \$120,577.50 in attorney fees (\$73,279.00 in connection with the anti-SLAPP motion and \$43,298.50 in connection with the instant *Motion for Attorney Fees*).

Legal Standard

"[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." (Code of Civil Procedure § 425.16(c)(1).) Senator Blakespear prevailed on a special motion to strike. Under California law, only attorney fees that are "reasonable" are awardable. Christian Research Institute v. Alnor (2008) 165 Cal.App.4th 1315, 1321. Senator Blakespear now seeks attorney fees in the amount of \$120,577.50. Plaintiffs challenge this on numerous grounds, as addressed below.

Merits of Motion – Application of Code of Civil Procedure § 425.17

Plaintiffs argue that Code of Civil Procedure § 425.17 applies. That particular subdivision specifically states that it was passed in response to "a disturbing abuse of Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16." (Code of Civil Procedure § 425.17.) It exempts certain lawsuits "brought solely in the public interest or on behalf of the general public" if certain conditions are met. (Code of Civil Procedure § 425.17(b).) The Court declines to analyze those conditions at this time. These arguments may have been appropriate in opposition *to the anti-SLAPP motion*, but the time for opposing that motion has passed. That motion has been decided. To the extent that Plaintiffs are raising this argument now, it appears to be an improper motion for reconsideration in violation of Code of Civil Procedure § 1008. More significantly, the ruling on the anti-SLAPP motion itself *is presently on appeal*. Reconsideration of a matter that is presently pending on appeal risks interference with the appellate proceedings, and, without specific briefing on the scope of any automatic stays imposed by the appeal, this Court is reticent to issue rulings that would shift the proverbial ground underneath the legal issues that are on appeal.

Merits of Motion – Bad Faith

Plaintiffs argue that Senator Blakespear is unwilling to mediate in this case. They also argue that she filed cross claims *against* them before the election in order to make it look like she had valid claims during the election, but then dropped those cross claims after she was elected. Plaintiffs assert these arguments as a basis claiming that, under Vesquez v. State of California (2008) 45 Cal.4th 243, 258, it is appropriate for a court to consider whether a party seeking fees has attempted to resolve the matter informally. However, the Court's consideration of this factor does not weigh in Plaintiffs' favor. On the contrary, while the instant lawsuit may have larger *political* implications, the underlying claims themselves are rather small in nature. One is for \$5,000.00 – an amount which is below the jurisdiction of a small claims action. The other pertains to the *precise wording* of a public apology – not the fact of making a public apology at all, but the *words used* to make that apology. While the Court does not diminish the Plaintiffs' legal right to seek a remedy for the alleged breaches, mediation efforts in this case are not a factor that tips the scales. Said another way, there appears to be something political at the heart of this dispute and the fact that Senator Blakespear has decided to litigate fully rather than mediate or make concessions does not appear to be a factor that warrants diminishing the attorney fees

to which she is entitled under the anti-SLAPP law.

Merits of Motion – Scope of Senator Blakespear's "Win"

Plaintiffs argue that "Blakespear achieved very little with her anti-SLAPP motion which did not dismiss a single cause of action." (Opposition, p. 6:11-12.) Noting the analysis above regarding what is at stake in this lawsuit (\$5,000.00 and a public apology), analysis of the scope of Senator Blakespear's "achievement" via her anti-SLAPP lawsuit is somewhat difficult because, in some ways, there is not much at stake – a sum that is under the jurisdiction of small claims and the wording of a public apology. In that regard, given the overall scope of the litigation being relatively small in nature, even a small "win" in the anti-SLAPP motion has a large *relative* effect on the overall lawsuit.

On the other hand, diminishing the issues in this lawsuit is inappropriate given its underlying political nature and resonance in concerns about free speech. In this regard, the relatively "small" remedies of \$5,000.00 and/or changing the wording of a public apology punch way above their weight class. *However*, viewed from this more charged angle, Senator Blakespear's "win" in the anti-SLAPP motion was quite significant – she prevailed in resisting the efforts of Plaintiffs to force her to re-write her public apology using *their* chosen language. In the arena of free speech and politics, this is no small win.

Ultimately, whether viewing this case as small (in terms of its remedies) or large (in terms of its political and First Amendment implications), the Court rejects Plaintiffs' assertion that "Blakespear achieved very little with her anti-SLAPP motion..."

Merits of Motion – Grounds for Reduction

Plaintiffs assert numerous grounds for reducing the overall award of fees, including: (1) that Senator Blakespear has "commingled" fees associated with the anti-SLAPP motion with fees associated with the underlying merits of the motion, (2) that nine lawyers on the case was too many, (3) that Senator Blakespear was charged a discounted rate, but the present motion is seeking market rates, (4) that Senator Blakespear did not prevail *entirely* on her motion, and (5) that the amount of time spent by counsel is egregious in light of counsel's claimed skill in the arena of cases that involve politics and/or anti-SLAPP concerns.

Senator Blakespear effectively addresses the fees that Plaintiffs claim are "commingled." (Reply, p. 7:1113 ("...Mr. Rios' description of 'work devoted to the merits of this case' means work devoted to the anti-SLAPP motion, as he further explains in a paragraph Plaintiffs decline to cite.").)

Senator Blakespear also effectively addresses the minor additional work done by some of the attorney who add up to the "nine" total lawyers who worked on the case. (Reply, pp. 11:20-12:2.)

Senator Blakespear also effectively addresses that an award of attorney fees is to be based upon reasonable market rates, even if those exceed the rate that was actually charged. Pasternack v. McCullough (2021) 65 Cal.App.5th 1050, 1058.

As addressed above, though there were certain aspects of the motion that were denied (such as the claims of plaintiff Robert Nichols who *withdrew* his complaint prior to the hearing on the anti-SLAPP motion) or were confusing (such as the initial tentative ruling denying the motion as to any aspects of claims having to do with the \$5,000.00 payment, which, as it turned out, was not something that Senator Blakespear was even seeking to have stricken), those were ultimately very minor and/or contributed to the notion that the heart of the motion itself was meritorious. As such, the Court rejects the notion that Senator Blakespear did not prevail on her motion in its entirety, as even a denial as to plaintiff Robert Nichols was reflective of Senator Blakespear achieving the *purpose* of the motion – since Mr. Nichols *withdrew* his claims. Whether Senator Blakespear's "win" is more accurately characterized as 99% or 100% does not change the analysis in terms of the attorney fees to which she is entitled.

Where Plaintiff's arguments are at their strongest, however, is in reference to the overall amount sought in connection with the anti-SLAPP motion – an amount of \$73,279.00. The Court does not doubt the

reasonableness of the rates charged by the attorneys representing Senator Blakespear. Moreover, the Court also expressly **FINDS** the quality of the work produced by Senator Blakespear's counsel to be top-notch, very quality, easily readable, cogent, organized, and helpful to the Court in assessing the issues. That quality infuses the hourly rates with even more reasonableness than merely what a prevailing market rate might be – professionals who produce high-quality work are entitled to charge rates commensurate with their skill. There is, additionally, an argument about the reasonableness of the *time spent* drafting the anti-SLAPP motion. That time totals 52.1 hours. Plaintiffs persuasively cite the case of Maughan v. Google Tech., Inc. (2006) 143 Cal.App.4th 1242 for the proposition that counsel that is skilled in a particular area should not necessarily need to charge the same amount of time on a matter within the scope of their specialty. As a checkpoint against which to compare, however, Senator Blakespear notes that Plaintiffs' counsel took roughly *double* the amount of time to brief these issues. Notably, Plaintiffs' counsel only had to prepare a single opposition brief – not the double task of preparing both a motion and a reply brief. Regardless, Senator Blakespear's counsel spent about half the time that opposing counsel spent on the anti-SLAPP motion, and the quality of the work produced by Senator Blakespear's counsel is particularly high caliber. In other words, the *quality* that went into those 52.1 hours demonstrates good value for legal work. As such, the Court **FINDS** the straight lodestar amount of \$73,279.00 to be reasonable in this circumstance.

Additional Fees for Motion for Attorney Fees

Senator Blakespear additionally seeks attorney fees in connection with the work performed to bring the instant *Motion for Attorney Fees*. That attorney fee amount totals \$47,298.50. Senator Blakespear did not identify the amount of attorney fees she would be seeking as it relates to the *Motion for Attorney Fees* in her moving papers; instead, she merely indicated that she "seeks fees for work related to bringing the motion and will submit supplemental declarations with the reply briefing and in advance of the hearing for any additional work associated with this fee proceeding." This practice denies the opposing party any effective means to oppose what is being requested, as the opposing party cannot know the billing, the general amounts, or the breakdown when drafting the opposition brief. Though it is customary practice to not identify the amount of attorney fees that are anticipated in connection with preparing a *reply* brief (since such numbers would be speculative), failing to identify the amount of time that went into preparation of the *moving* papers is less excusable.

Moreover, the instant *Motion for Attorney Fees* is far less complicated than the underlying anti-SLAPP motion was, yet it appears to be costing about 65% (\$47,298.00 divided by \$73,279.00) of the amount that the anti-SLAPP motion cost. In total, these two motions add up to a whopping \$120,577.00 in attorney fees when motions for fees on top of an anti-SLAPP motion are generally of a somewhat derivative nature – i.e. having done the intense work of preparing the anti-SLAPP, the landscape of ancillary work to be done on the *Motion for Attorney Fees* is relatively well mapped-out. On the other hand, Plaintiffs' opposition to the *Motion for Attorney Fees* was extensive and raised just about every possible argument that could be thought up. As such, though the total number here is on the high side for the work that was done, the Court ultimately **FINDS** it to be within the realm of reasonable, particularly in light of the quality of the legal work and the extensive (and, at times, confusing) opposition arguments that were raised and needed to be sorted out.

RULING ON MOTION TO STAY

The *Motion to Stay Discovery and Further Proceedings* brought by Senator Blakespear is **GRANTED in part**. Further proceedings in this case are **stayed** until the end of the legislative session on September 15, 2023. Enforcement of any order granting attorney fees is likewise **stayed** until October 13, 2023.

The motion presently set for hearing on June 23, 2023 is continued to **Friday, October 13, 2023 at 1:30 p.m. in Department N-31.**

The discovery hearing presently set for hearing on June 23, 2023 is continued to **Friday, October 13, 2023 at 1:30 p.m. in Department N-31.**

The discovery hearing presently set for hearing on July 7, 2023 is continued to **Friday, October 13,**

2023 at 1:30 p.m. in Department N-31.

This matter is set for a Case Management Conference on **Friday, October 13, 2023 at 1:30 p.m. in Department N-31.**

Merits of Motion

Senator Blakespear is a sitting legislator. Under Code of Civil Procedure § 595:

*[t]he trial of any civil action, or proceeding in a court... irrespective of the date of the filing thereof or when it became at issue, or the hearing of any motion, demurrer, or other proceeding, shall be postponed to a date certain when it appears to the court...that either a party thereto, or any attorney of record therein..., or a principal witness, is a Member of the Legislature of this state and that the Legislature is in session or in recess (not exceeding a recess of forty (40) days) or that a legislative interim committee of which he is a duly appointed member is meeting, or is to meet within a period which the court finds does not exceed the time reasonably necessary to enable the member to reach the committee meeting by the ordinary mode of travel. When the Legislature is in session or in recess such action or proceeding shall not, without the consent of the attorney of record therein, be brought on for trial or hearing before the expiration of thirty (30) days next following final adjournment of the Legislature or the commencement of a recess of more than forty (40) days. If a date is available during recess, **continuance** shall be given if possible to such earlier date...*

*Granting of a **continuance** pursuant to this section is mandatory unless the court determines that such **continuance** would defeat or abridge a right of relief pendente lite in a paternity action or a right to invoke a provisional remedy such as pendente lite support in a domestic relations controversy, attachment and sale of perishable goods, receivership of a failing business, and temporary restraining order or preliminary injunction, and that the **continuance** should not be granted.*

(Emphasis added.) The parties' briefing discusses whether such imposition of a *stay*, when the statute at issue discusses things in terms of a *continuance* – i.e. continuance of certain hearing dates and/or of trial.

The parties also brief the issue of whether the mandate of Code of Civil Procedure § 595 is, in fact, a *mandate*, or merely a directive with some discretion involved. For constitutional reasons involving the independence of the judicial branch, it has been held that Code of Civil Procedure § 595 *cannot* be a mandate. Verio Healthcare, Inc. v. Superior Court (2016) 3 Cal.App.5th 1315, 1330 ("We conclude, therefore, that sections 595 and 1054.1 are unconstitutional to the extent they purport to be mandatory, and should continue to be treated as directory, subject to a trial court's discretion as set forth in [Thurmond v. Superior Court of City and County of San Francisco (1967) 66 Cal.2d 836].). In exercising such directive discretion, however, there is no precise limit to the number of factors to be considered:

*we conclude the court acted within its discretion in denying the stay. Thurmond identified three **nonexclusive** factors to guide a court's discretion: (1) 'the nature and urgency of the rights involved,' (2) 'whether the party seeking delay has or can secure other counsel to represent him for the particular step in the proceedings then before the court,' and (3) 'whether the attorney who is a member of the Legislature was employed for no other purpose than attempted delay.'*

Verio, supra, 3 Cal.App.5th at 1330, quoting Thurmond, supra, 66 Cal.2d at 840 (emphasis added). Since these factors are "nonexclusive," the Court will consider several other factors in addition.

With regard to the nature and urgency of the rights involved, as noted above, there is a bit of a dichotomy to the interests in this case in that they are relatively small in terms of actual wrongs (\$5,000.00 and the wording of an apology) but cast a big shadow so-to-speak in terms of addressing nuances of a political campaign (to the extent that an apology has an impact on the hearts and minds of voting constituents) and in terms of revealing campaign finance irregularities (if the \$5,000.00 was improperly paid out of a campaign fund). These are not concerns that are so urgent as the kinds of

things identified in the statute – such as paternity or remedial "emergency" relief that comes with a preliminary injunction – but they are also not the kinds of issues that can be delayed *ad infinitum* if a politician is able to remain in office for multiple repeated terms. In some ways, such delay risks making a mockery of campaign finance rules in that, once a candidate gets elected he or she could – theoretically – put off civil suit for any underlying improprieties *indefinitely* until after losing power. As such, this factor is not particularly strong in either direction – it does not favor bulldozing through litigation and ignoring the "directive" of Code of Civil Procedure § 595, but it also does not favor a series of repeated delays that go on for years.

With regard to whether the party seeking delay has or can secure other counsel, and, for that matter, whether the attorney who is a member of the Legislature was employed for no other purpose than attempted delay, neither of these factors really applies to this case. They are factors designed for the scenario in the Verio case where it was *an attorney* representing a client who was a Member of the Legislature requesting a continuance.

In terms of considering additional factors, the Court notes again that the statute speaks in terms of "continuance" – not in terms of a "stay." The Court also notes that the statute appears to be a fairly old one and, at multiple points, makes references to the Member of the Legislature's ability to "reach the committee meeting by the ordinary mode of travel." In modern context, the Court takes judicial notice of the fact that air travel between San Diego and the legislative seat in Sacramento takes roughly an hour of time and driving takes roughly 7-9 hours, such that it can be done in a day. As such, in many ways, the statute seems to be concerned with a Member of the Legislature's ability to be present and attend court hearings in a way that may be somewhat diminished in the modern era. Nonetheless, the statute remains on the books, and, to the extent that it is a somewhat discretionary directive, the aim and purpose of the statute seems to be to not overburden a Member of the Legislature with litigation in a way that would infringe upon that Member's ability to focus on doing the work of the people of California. In the modern era, this would seem to be achievable by professional counsel working together and extending professional courtesies (i.e. liberally granting discovery extensions, setting deposition dates at convenient times that do not interfere with the work of the Legislature, and stipulating to have motions heard on a briefing schedule that, again, does not infringe upon the work of the Legislature). Such options would be akin to the factor identified in Verio regarding concern for "whether the party seeking delay has or can secure other counsel to represent him for the particular step in the proceedings then before the court..." Verio, supra, 3 Cal.App.5th at 1330, quoting Thurmond, supra, 66 Cal.2d at 840. Were that an option in this case, the Court would be inclined to entertain that collegiality as a factor in declining to impose a formal lengthy *stay* and instead continue matters as needed to assist the parties in furthering the litigation while not hindering the Member of the Legislature with her work. However, having seen the litigation in this case first-hand via the anti-SLAPP motion, the Court finds that the nature of the dispute and the history of the litigation is not such that the parties are likely to work amicably to avoid hindering the work of the Member of the Legislature. Unlike other litigation – such as the paternity actions or provisional remedies referenced in the statute – the matters at issue in this case are *related to* Senator Blakespear's political campaign and, relatedly, her status as an elected official. For this reason, deferring to the collegiality of the parties and their counsel is insufficient to effect the intent of the statute. Indeed, there is some reference in the briefing to Plaintiffs having propounded discovery that would involve the text message communication of Senator Blakespear's staffers – a request that strikes the Court as cumbersome and time consuming and that casts a pall over the legislator's office while doing her legislative work. This kind of hamstringing or burdening of a legislative official appears to be the kind of thing that the statute is designed to prevent.

On the other hand, the statute appears to be designed to enable the Member of the Legislature to focus on the work of her constituents – not to obtain an unfair advantage in litigation. The Court is somewhat troubled by the manner in which the request for a continuance is being raised – only *after* making an anti-SLAPP motion *and* doing the work of bringing a *Motion for Attorney Fees*. In other words, Senator Blakespear did not seek to stop the instant litigation while she stood to win an award of attorney fees in excess of \$100,000.00, but, once she gets that enforceable order, she seeks to delay Plaintiffs from exercising their right to proceed with the rest of their case. In much the same way that *selecting* a

Member of the Legislator to serve as one's attorney can be "for no other purpose than attempted delay," selecting the timing of when to bring a motion of this nature can also be for a purpose of delay – or, more broadly, for the purpose of obtaining a litigation *advantage*.

The Court ultimately finds it necessary the thread a fine needle in this case, exercising its inherent power to impose a stay and/or a continuance, but without bringing down the hammer of delaying the litigation indefinitely. As such, because of concerns that the discovery in this case may be designed to hinder Senator Blakespear, the Court exercises its discretion and stays further discovery in this case until the legislative session ends on September 15, 2023. To provide time for necessary briefing after the end of the legislative session but before coming into court for hearings, the Court continues all pending hearings to October 13, 2023 with briefing to be due per code. *Correspondingly*, while the Court will rule on the *Motion for Attorney Fees* as set forth above, the Court expressly *stays enforcement* of any order granting such fees until October 13, 2023. Notably, any effort to collect on said fees by utilizing the debtor examination process is another use of civil procedure, and if court procedure is too much of a hinderance for Senator Blakespear while the Legislature is in session (to the extent that she cannot *defend or respond to discovery*), similarly putting effort into utilizing civil procedure to collect on an award should also be a hinderance taking attention away from the work of the people. Said another way, the Court is not inclined to take a "pick-and-choose" approach that allows Senator Blakespear to delay only those aspects of the litigation that are to her disadvantage while continuing to pursue those aspect of the litigation that are to her advantage. On the other hand, given the nature of the dispute and the tactics being employed by the parties, the Court will exercise discretion to ensure that the case moves forward only during those times that the Legislature is not in session.

Unless the ruling(s) above indicate that an appearance is necessary, parties who wish to submit, who are satisfied with the above tentative ruling(s), and/or who do not otherwise wish to argue the motion(s) are encouraged to give notice to the Court and each other of their intention not to appear.