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IN SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

LIGHTSPEED MEDIA CORPORATION, an Arizona Corporation, Plaintiff, v. ADAM SEKORA, Defendant.	CV2012-053194 **ADAM SEKORA'S REPLY IN SUPPORT OF HIS MOTION AND APPLICATION FOR ATTORNEYS' FEES AND COSTS** (Assigned to the Honorable Alfred Fenzel)

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Defendant Adam Sekora hereby submits his Reply in support of his Motion and Application for Attorneys' Fees and Costs. Defendant is entitled to an attorneys' fees award of $30,630[1], taxable costs in the amount of $259, non-taxable litigation expenses of $42.00, and respectfully requests the Court enter double damages up to $5,000. In sum, Mr. Sekora seeks a total award of **$35,931** because:

1. Mr. Sekora is the successful party under A.R.S. § 12-341.01 based on Plaintiff's voluntary dismissal of the breach of contract claim and unjust enrichment

[1] A supplemental declaration of undersigned counsel is attached as **Exhibit A** hereto.

claim, and the Court's dismissal of an inextricably interwoven CFAA claim for lack of prosecution.

2. Mr. Sekora incurred substantial attorneys fees defending against Plaintiff's lawsuit that was filed without substantial justification (based solely on an IP address) and primarily for purposes of harassing Mr. Sekora by coercing him into a settlement, which is part of Plaintiff and Prenda Law's overreaching and abusive litigation strategy.

3. The amount of the attorneys' fees were reasonably and necessarily incurred. Mr. Sekora was forced to protect his professional reputation from attack by a deep-pocketed corporate Plaintiff who asserted reckless and unfounded allegations that he was a computer hacker, made worse by Prenda Law's maliciousness in plastering Mr. Sekora's name on its website.

Mr. Sekora has the factual and legal support. Plaintiff has neither, and instead, merely asserts conclusory statements, unpersuasive arguments and continued attacks on undersigned counsel[2].

A. Plaintiff Fails To Distinguish a Voluntary Dismissal Under Rules 15(a) and 41(a).

Mr. Sekora was the successful party for purposes of § 12-341.01 because Plaintiff voluntarily dismissed the breach of contract and unjust enrichment claim. Whether a voluntary dismissal occurred under Rules 41(a) or 15(a) is immaterial because the reasoning expressed in the *Vicari* opinion applies equally to dismissals under both. Namely, Plaintiff's voluntary dismissal of claims does not act as a shield for an unfavorable attorneys' fees award. *Vicari v. Lake Havasu City*, 222 Ariz. 218, 224, 213 P.3d 367, 373 (App. 2009). There's nothing in Rule 15's plain language or legislative history that supports a dismissal by amended pleading should be treated any differently than Rule 41(a).

[2] Plaintiff' has demonstrated a pattern of attacking undersigned counsel. See Plaintiff's Response to Motion to Compel.

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Plaintiff failed to point out differences or reasons why its voluntary dismissal should be treated differently, because it's an unsupportable position. Instead, Plaintiff glosses over the fact it voluntary dismissed the breach of contract and unjust enrichment claim by amended pleadings, and desperately tries to shift the Court's focus that a successful party is not determined by an amended pleading. Plaintiff's position would have merit if its amended pleading still asserted claims for breach of contract and unjust enrichment claims, but it did not because Plaintiff voluntarily dismissed both claims. A voluntary dismissal is a voluntary dismissal. And Plaintiff's complete failure to distinguish *Vicari* on these grounds speaks volumes about its unsupportable legal position

Plaintiff attempts to distinguish Vicari on other grounds by claiming the dismissal was by court order. That's incorrect. In *Vicari* the focus was on a voluntary dismissal under Rule 41(a), wherein the court stated:

> The plain language of Rule 41(a)(1) permits a plaintiff to voluntarily dismiss his own case without court order if he files a notice of dismissal before the adverse party serves an answer or motion for summary judgment. Accordingly, ...our supreme court explained, It is now the well-settled rule that ... before [an] answer is filed the right to dismiss is absolute, self-executing, and accomplished automatically by plaintiff's filing a notice of dismissal. There need be no notice to defendant, no hearing on the matter, and no order of the court.

Id. at 222, 213 P.3d at 371. Further, the court stated that no order was necessary for the plaintiff's voluntary dismissal to take effect. *Id*.

Last, even if the reasoning in the Vicari opinion did not apply with equal force here, equitable and policy considerations favor a finding that Mr. Sekora was the successful party. A plaintiff decides to bring a lawsuit. A plaintiff decides what claims to include in the lawsuit. A defendant has no choice in the matter. Therefore, equitable and policy considerations should favor the party that has no choice in the matter. Plaintiff bears the risk for bringing dubious claims that implicate Arizona's attorneys' fees statute. And that risk, among others, deters (or should) unfounded breach of contract and unjust enrichment claims. Plaintiff's equitable arguments is precisely what

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Vicari was trying to prevent, namely, a plaintiff from using a voluntary dismissal as a shield to avoid an unfavorable attorneys' fees award.

B. The CFAA and Breach of Contract Claims are Inextricably Interwoven Because Both Depend on Unauthorized Access to Plaintiff's Website and Content.

The multi-claim scenario here is substantially similar to *Modular Min. Systems*. In *Modular Min. Systems*, the plaintiff asserted allegations of unauthorized access to and use of the plaintiff's trade secrets. *Modular Min. Systems v. Jigsaw Technologies*, 221 Ariz. 515, 522-523, 212 P.3d 853, 860-861, (Ariz. App., 2009). Here, Plaintiff asserted allegations of unauthorized to and use of Plaintiff's website and content. In both cases, the statutory claims were the focal point while the breach of contract were complimentary claims. But both the breach of contract and statutory claims are inextricably interwoven in *Modular Min. Systems* and here because Plaintiff's claims are dependent on the unauthorized access and subsequent use. Plaintiff cannot escape the strong parallels between this case and *Modular Min. Systems*. Indeed, Plaintiff employs a similar approach as above by failing to address how the CFAA and breach of contract claims are not inextricably interwoven, and instead makes a misplaced argument. Plaintiff's argues that its CFAA claim can independently exist outside a breach of contract setting, but this argument is from an inapplicable line of cases that dealt with whether particular claims "arose under contract." See *Id*. at 521, 212 P.3d at 859 (finding attorneys' fees award supportable because claims inextricably interwoven and no need to address the more difficult question of whether the trade secrets claim arose under contract).

C. <u>Plaintiff Fails to Rebut Sufficient Facts Supporting A Finding That Plaintiff Brought The Lawsuit Against Mr. Sekora Without Substantial Justification and For Purposes of Harassment</u>.

A.R.S. § 12-349 requires a court to award attorneys fees and expenses against and attorney or party (double damages up to $5,000 is discretionary) if a claim is brought without substantial justification, the claim is brought primarily for delay or harassment, unreasonably expands the proceeding <u>or</u> engages in abuse of discovery. Sufficient

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factual findings under one of the four prongs compels such an award. Mr. Sekora asserts there are sufficient facts supporting an award of attorneys' fees, expenses and discretionary double damages up to $5,000 under both the "without substantial justification" and "harassment" prongs. The term "without substantial justification" is expressly defined, but was revised effective January 1, 2013. Up through December 31, 2012, substantial justification was defined as "the claim or defense constitutes harassment, is groundless and not made in good faith. Effective January 1, 2013, "without substantial justification" was revised by eliminating "harassment" as a separate element. Nevertheless, there are sufficient facts supporting a finding of "without substantial justification" under both definitions.

1. Judge Wright's Sanction Order is Highly Relevant Factual Support For Findings of the Without Substantial Justification and Primarily Harassment Prongs

Plaintiff unpersuasively attempts to distance Judge Wright's order in *Ingenuity 13 v. John Doe* by claiming it involved other parties and dealt with very specific issues not relevant here. But Plaintiff avoids the more vexing problem by identifying those specific issues and how they are not relevant. Moreover, Plaintiff cannot distance itself from Judge Wright's sanction order because Plaintiff was a key component in Prenda Law's overreaching and abusive litigation strategy. (See the diagram in Exhibit 6 at 9:1-17, see also Exhibits 9 and 14). Judge Wright made factual findings concerning Prenda Law's abusive litigation strategy that directly bear on the "without substantial justification" and "harassment prongs." (*Id*. at 4:8-28). Plaintiff, through Prenda Law, executed its abusive litigation strategy the moment it ascertained Mr. Sekora's identity. Plaintiff, through Prenda Law, ratcheted up the pressure and coercion on Mr. Sekora to settle by bringing this unfounded lawsuit, plastering his name on the Internet, calling him with automated calls and threatening voice records, and tainting Internet searches of Mr. Sekora's name (See Exhibit 15). But once it became clear that Mr. Sekora intended on mounting an aggressive defense rather than caving into Plaintiff's coercive settlement demands, Plaintiff sought to cut-and run. Judge Wright's factual findings are spot on

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and highly relevant to support factual findings in this case.

Plaintiff's attempt to cast Judge Wright's sanction order as an outlier. But recently the District of Arizona, in response to Judge Wright's sanction order, has set its sights AF Holdings (a Prenda Law shell company that Judge Wright found Prenda Law principals - John Steele, Paul Hansmeier and Paul Duffy - owned and controlled) in an upcoming show cause hearing involving, among other things, serious questions into Prenda Law's settlement campaign. (See *AF Holdings v. David Harris*, D. Ariz., 2:12-cv-02144, ECF Doc No. 71, attached as **Exhibit B** hereto). Further this very morning, Magistrate Judge Franklin L. Noel with the District of Minnesota took the step at vacating Plaintiff AF Holdings' voluntary dismissals in light of Judge Wright's sanction order, demanded that Prenda Law's local counsel (Michael K. Dugas) produce a substantial volume of evidence and documentation concerning settlements (See *AF Holdings v. John Doe*, 0:12-cv-01445, at pg. 8, attached as **Exhibit C** hereto). These developments cast serious doubt on Plaintiff's claim that Judge Wright's sanction and factual findings is an outlier.

2. Plaintiff Absurdly Contends It Brought A Legitimate Claim Against Mr. Sekora Based On Nothing More Than An IP Address.

Plaintiff's absurdly contends it brought a legitimate claim against Mr. Sekora after he hacked onto Plaintiff's website. Where is the evidence that Mr. Sekora hacked? It certainly was never disclosed. Plaintiff entire case against Mr. Sekora was based solely on an IP address. It unmistakably admits this. An IP address is not evidence that Mr. Sekora hacked onto Plaintiff's website. Plaintiff cannot point to a single case, authority, or even instance of expert testimony that an IP address in and of itself establishes infringing or hacking activity. Instead Plaintiff relies on authority that courts have allowed Plaintiff and others similarly situated to use an IP address as a starting point to unmask the infringer or hacker. Plaintiff's reliance is misplaced and flawed. There is a fundamental and substantial difference between using an IP address as a starting point in a bona fide attempt to identify an infringer or hacker, and naming a subscriber in a

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lawsuit accusing him of being a computer hacker based on the IP address alone when coupled with incessant and abusive attempts to coerce settlement dollars out of him. In *Malibu Media, LLC v. John Does 1-11,* a case Mr. Sekora cited and attached as an exhibit, the Court granted plaintiff leave to subpoena Internet Service Providers to ascertain the identity of the subscriber[3], but the Court stated that:

> [p]laintiff shall ensure it has sufficient factual basis for any assertion made. By permitting this discovery, the Court is not finding that Plaintiff may rely solely on the fact that the person identified as the subscriber is associated with the internet protocol address to prove that such a person engaged in the conduct alleged in Plaintiff's complaint.

(See Exhibit 8). Plaintiff did what the court in Malibu Media strongly inferred, using an IP address, without more, is an insufficient factual basis to establish the subscriber infringed (or hacked). If Plaintiff or Prenda Law truly cared about identifying the actual infringer or hacker, which it does not, neither Plaintiff nor Prenda Law would be neck deep in hot water. Instead, Plaintiff and Prenda Law are driven purely by greed, and will do what it takes to coerce and leverage settlements, including bringing lawsuits with unfounded, but damaging allegations, and then plastering it all over the Internet. Plaintiff even has the audacity to claim Courts favor compromises. But it's clear that the Central District of California and District of Arizona, among others, are fed up with Prenda Law, its clients (which Plaintiff is/was, and Prenda Law shell companies) from using the courts as a tool to leverage massive settlements and "plunder the citizenry." (quoting Judge Wright in Exhibit 6 at 2:4-5).

3. Plaintiff's Resources Through Arcadia Security Renders Its Lack of Investigation Even More Unjustified, Unreasonable and Alarming.

Plaintiff points to Arcadia Security that Mr. Sekora's name was not pulled out of a hat. But what evidence did Arcadia gather apart from harvesting an IP address? Plaintiff certainly never disclosed the fruits of its purported thorough and substantial investigation. The record clearly and unequivocally supports a finding that Plaintiff

[3] Plaintiff ascertained Mr. Sekora's identity in connection with a subpoena issued out of the Lightspeed Media Corporation v. John Doe filed in St. Clair County, Illinois.

made a giant and unsupportable leap from IP address to suing Mr. Sekora for computer hacking. Given the fact that Plaintiff's President, Steve Jones, has a substantial IT background, and owns Arcadia Security, its failure to conduct any subsequent investigation before bringing the lawsuit is unjustified, unreasonable and even more alarming. And only lends further support that the aim of the lawsuit was primarily designed and intended to harass Mr. Sekora by ratcheting up the pressure to coerce him into a settlement.

In sum, Plaintiff's lawsuit against Mr. Sekora was without substantial justification and primarily intended for purposes of harassment. Plaintiff lacked any evidence that Mr. Sekora hacked onto its computer system. An IP address is not evidence of hacking. But Plaintiff did not care because it never intended to fully litigate its case against Mr. Sekora (which explains the lack of prosecution), but rather, the lawsuit was filed primarily for purposes of harassing him by coercing him into a settlement. Judge Wright found that Prenda Law and its clients "engaged in vexatious litigation designed to coerce settlements," "based on a modicum of evidence, calculated to maximize settlement profits by minimizing costs and efforts. (Exhibit 6 at 4:22-25). This is exactly what occurred here. And Plaintiff's (through Prenda Law) conduct in plastering Mr. Sekora's name on its website, tainting internet searches of Mr. Sekora's name, sending demand letter, e-mails, incessant calls and automated voice recordings (including after undersigned counsel filed an answer) were all done primarily for purposes of harassment to coerce and leverage Mr. Sekora into a settlement.

D. Mr. Sekora Was Forced to Incur Substantial Attorneys' Fees And The Amount Sought Is Not Excessive and Justified by Plaintiff's Conduct.

Mr. Sekora is not seeking a windfall. He had no choice but to aggressively defend against Plaintiff's claims and alleged damages in excess of $100,000. And it was necessary to protect his professional reputation from unfounded accusations that he was a computer hacker. Further Plaintiff is not only a deep-pocketed corporation, but also had the luxury of a contingency fee agreement with its lawyers. (See attached

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screenshot from gfy.com, attached as **Exhibit D** hereto). Plaintiff's contingency fee agreement exponentially increased the inherent unfairness between individual and deep-pocketed corporation.

Pursuant to § 12-341.01, Mr. Sekora should be awarded all his attorneys' fees incurred up through January 7, 2013. Mr. Sekora incurred substantial attorneys' fees for bringing a motion to compel disclosure, which included Plaintiff's inextricably interwoven claims of CFAA and breach of contract claims. Plaintiff did not begin attempting to dismiss the breach of contract and unjust enrichment claims until after Mr. Sekora filed the motion to compel. Therefore, all work performed toward obtaining an order compelling disclosure was for both claims and the litigation in general. This amount totals $24,492.

Pursuant to § 12-349, Mr. Sekora should be awarded all his attorneys' fees incurred through May 7, 2013 based on the above facts overwhelmingly in support of Plaintiff bringing this lawsuit without substantial justification and primarily for harassment. This amount totals $26,310 ($24,492 + $1,818[4])

And pursuant to §§ 12-341.01 and/or 12-349, Mr. Sekora is entitled to attorneys' fees incurred in moving for a fee award in his favor. The complexity and need to develop sufficient facts justify the time incurred. This amount totals $4,320.

Therefore, the total attorneys' fees sought is $30,630 ($26,310 + $4,320). Mr. Sekora is also entitled to his costs and litigation expenses and in the Court's discretion, up to $5,000 in double damages. Mr. Sekora seeks a total award of **$35,931.**

Anything less is a windfall to Plaintiff given the bad faith nature of its conduct and the turmoil Mr. Sekora has been put through. Notably, Plaintiff doesn't argue that undersigned counsel's hourly rate is excessive (which was discounted from $225 to $180 per hour) nor that any particular task was excessive. Instead, Plaintiff's makes the same misplaced argument using authority from an inapplicable line of cases that the CFAA

[4] 10.1 hours at $180 per hour was incurred between January 7, 2013 and May 7, 2013

claim does not arise under contract and therefore the breach of contract claim was never litigated. But again, both claims are inextricably interwoven because both claims depend on unauthorized access. Nevertheless, the overwhelming facts in support of an attorneys' fees award under § 12-349 render parsing attorneys' fees between the CFAA and breach of contract/unjust enrichment claims unnecessary.

E. Conclusion.

Based on the foregoing, Mr. Sekora respectfully requests that the Court award a total fee and cost award in his favor and against Plaintiff in the amount of **$35,931**.

RESPECTFULLY submitted this 21st day of June, 2013.

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