In the

Court of Appeal

of the

State of California

FIFTH APPELLATE DISTRICT

F084879

MARIO DELIS,

Plaintiff-Appellant,

v.

JEFFREY D. THORN, JCM AG MANAGEMENT, LLC, and
CANA ROSE REALTY HOLDINGS, LLC,

Defendants-Respondents.

APPEAL FROM THE SUPERIOR COURT OF KERN COUNTY
HONORABLE THOMAS S. CLARK · NO. BCV-21-102152

APPELLANT'S OPENING BRIEF

JOHN M. RUSHING (331273)
RYAN P. MCCARL (302206)*
DAVIT AVAGYAN (336350)
RUSHING MCCARL LLP
2219 Main Street, No. 144
Santa Monica, California 90405
(310) 896-5082 Telephone
john.rushing@rushingmccarl.com
ryan.mccarl@rushingmccarl.com
davit.avagyan@rushingmccarl.com

Attorneys for Appellant
Mario Delis

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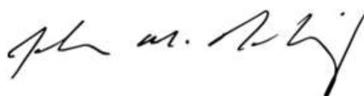
CERTIFICATE OF INTERESTED PARTIES

Appellant certifies that to the best of Appellant's knowledge, there are no parties other than Appellant and Respondents with a financial interest in the outcome of this appeal.

Dated: May 9, 2023

Respectfully submitted,



John Mayfield Rushing
(Cal. SBN 331273)

Ryan McCarl
(Cal. SBN 302206)

and Davit Avagyan (Cal. SBN 336350)

Rushing McCarl LLP
2219 Main St. No. 144 | Santa Monica, CA 90405
T: (310) 896-5082 | E: info@rushingmccarl.com

Attorneys for Appellant Mario Delis

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Appellant Mario Delis' Opening Brief

I. Introduction

After appellant Mario Delis sued his former business partner Jeffrey Thorn, Thorn and two companies he owns (collectively "Thorn") responded by filing a cross-complaint. Delis moved to strike under the anti-SLAPP statute, and Thorn offered to amend the cross-complaint if Delis withdrew the motion. Delis declined.

The trial court granted Delis' motion — striking claims alleging $15 million in damages, including all claims seeking monetary relief against Delis — and Delis moved for attorney's fees and costs.

This appeal arises out of the trial court's order granting Delis fees only for some hours spent on the initial motion to strike (not the reply filings or hearing) as well as an unexplained number of hours on the fee motion. The court suggested that Delis should have compromised with Thorn rather than pursuing Delis' rights under the anti-SLAPP statute, so it awarded Delis only 18% of his requested fees.[1] That was error. A trial court's preference for compromise is not grounds to abridge a party's statutory rights, and the court needed to calculate the fee award by applying the legal rules established by the statute and precedent.

The trial court also made other downward adjustments that are supported neither by the record nor any articulated rationale. For example, the court refused to apply lodestar rates that were undisputed and supported by uncontested evidence.

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[1] *See* AA389–90 (order awarding $15,523 in fees and no costs).

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Thorn's attorney admitted that Appellant Mario Delis' motion to strike was "well-taken"[2] but opposed it anyway, requiring Delis' attorneys to prepare another ten filings (comprising hundreds of pages) and argue at three hearings to vindicate Delis' rights under the anti-SLAPP statute.[3]

By leaving Delis uncompensated for most of this work, the trial court's fee award furthered the strategic aim underlying Thorn's SLAPP Cross-Complaint, which was to financially intimidate Delis and run up his costs. This outcome conflicts with the public policies underlying the anti-SLAPP statute and its fee provision, as the court shifted the financial burden imposed by Thorn's baseless claims to Delis.

This Court should reverse and instruct the trial court to enter a new award reimbursing Delis for the fees Thorn imposed.

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2 *See* AA214, ¶ 6.

3 *See* AA61 (motion to strike); AA147 and AA164 (motion-to-strike reply filings); AA193, AA211 (fee motion and attorney's declaration); AA242 (reply in support of fee motion); AA263 (court-ordered supplemental declaration in support of fee motion); AA309, AA317, AA335, AA355 (filings responding to Thorn's supplemental opposition filings). *See also* AA191 (order granting motion to strike); AA259 (order following initial hearing on fee motion); AA389, AA391 (minute order and order following second hearing on fee motion).

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II. Statement of Facts and Statement of the Case

A. Thorn files a cross-complaint whose central allegation is that Delis had sued Thorn. Delis moves to strike under the anti-SLAPP law.

Soon after Delis sued, Thorn filed a cross-complaint seeking $15 million in damages against Delis and Delis' company.[4] Thorn's Cross-Complaint included four causes of action alleging breach of various contracts plus a declaratory relief claim based on the same contracts.[5]

Delis moved under California's anti-SLAPP statute[6] to strike the Cross-Complaint's second through fifth causes of action and a portion of the first cause of action.[7]

B. Thorn's attorney admits that the motion to strike is meritorious but opposes it anyway.

After Delis moved to strike, Thorn's attorney Craig Lynch contacted Delis' attorney. Lynch admitted that the motion to strike was "well-taken" and offered to stipulate striking some

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4 *See* AA8 (Thorn's Cross-Complaint).

5 See id.

6 Civ. Proc. Code § 425.16(b)(1).

7 *See* AA61 (Delis' motion to strike).

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provisions of the Cross-Complaint in exchange for Delis withdrawing the motion to strike.[8]

In response, Delis' attorneys pointed out that if the motion to strike were granted, Delis would have a right to permanent dismissal of the challenged claims, attorney fees, and a bar on amending the Cross-Complaint.[9] They declined to waive these rights, but offered a stipulated resolution of the motion that would give Delis the benefit of the rights while conserving the parties' resources.[10] Delis asked Thorn to dismiss the challenged cross-claims with prejudice (other than the first cause of action)[11] and reimburse Delis for $12,332 in fees in exchange for Delis withdrawing the anti-SLAPP motion.[12]

Thorn refused that offer and chose instead to oppose the motion even though his attorney had conceded its merit.[13]

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[8] *See* AA288. The challenged portion of the First Cause of Action is treated as an independent claim for purposes of the anti-SLAPP statute, so Delis technically moved to strike five claims. *See Baral v. Schnitt*, 1 Cal. 5th 376, 395 (2016).

[9] *See* AA294.

[10] *See* AA294, AA298.

[11] *See* AA300 ("A dismissal with prejudice of all claims other than the First Cause of Action would suffice (in addition to reimbursement of the fees).").

[12] *See* AA294, AA298. Delis' attorneys were inadvertently offering Thorn a discount, as they had forgotten to include roughly $8,000 of fees incurred in 2021. *See* AA254, n.21.

[13] *See* AA290.

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C. The trial court grants Delis' motion to strike.

The trial court granted Delis' motion to strike to all the challenged claims except a declaratory relief claim that is based on the same contracts as the stricken claims.[14] All Thorn's cross-claims seeking damages against Delis were permanently stricken, and Thorn was prevented from amending his claims to evade the anti-SLAPP statute.

Thorn at first appealed the court's ruling, then dropped the appeal and dismissed his remaining claims against Delis' company.[15]

D. Delis moves for fees, submitting unrebutted evidence of the lodestar rate and detailed attorney declarations.

Delis then moved for fees and costs as the prevailing party on his motion to strike. He submitted unrebutted evidence that the appropriate lodestar rate for his attorneys was $550/hour for partners and $385/hour for associates,[16] and Thorn did not contest those numbers.[17] Delis also requested a 1.5x

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[14] *See* AA191–92 (order granting anti-SLAPP motion); AA8 (Thorn's Cross-Complaint); AA248 (Delis' reply brief explaining why the survival of the declaratory relief claim is irrelevant to Delis' fee motion).

[15] *See* AA222 (Thorn's Notice of Appeal) and Appellant Mario Delis' Request for Judicial Notice Exs. A–C.

[16] AA217.

[17] *See* AA303 (showing that Thorn's purported expert applied rather than challenged the proposed $550/hour lodestar rate).

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enhancement on a portion of the fees to account for contingency risk,[18] and Thorn made no arguments contesting the enhancement.[19] Instead of introducing evidence challenging the lodestar rate or hours, Thorn's opposition brief argued that Delis' attorneys should have compromised their client's rights under the anti-SLAPP statute.[20]

In its initial hearing on the fee motion, the trial court acknowledged that Thorn had failed to "provide declarations or other evidence expressly challenging the hours and hourly rates claimed."[21] Even so, the court *sua sponte* ordered Delis' attorneys to provide a more detailed declaration describing the hours spent in connection with the motions.[22]

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[18] Because they were representing Delis on a hybrid-contingency basis and would not be fully compensated without an enhancement, Delis' attorneys also sought a $21,909.30 enhancement (i.e., multiplier) on the portion of the fees that related to the initial motion to strike. *See* AA269, ¶ 10 (McCarl Decl.); AA206–07 (Delis Br. in Support of Fee Mot.); *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132–39 (2001) (explaining the legal considerations for determining when a multiplier or fee enhancement is warranted).

[19] Thorn merely asked why the enhancement was being requested. *See* AA229 ("[W]hy is DELIS claiming a large amount for a fee enhancement when DELIS' attorneys are charging the standard rates of the law firm Rushing McCarl?").

[20] *See* AA224–38 (Thorn Opp. Br. and Lynch Decl.).

[21] AA260.

[22] *See* AA260.

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Delis' attorneys filed a supplemental declaration as ordered. It showed that by that point, Delis had incurred over $63,000 (not including the requested enhancement) in pursuing the motions.[23]

Thorn then filed another set of opposition papers to the fee motion, adding new arguments, evidentiary objections, and purported expert testimony.[24] As before, Thorn did not dispute Delis' lodestar rates.[25] Indeed, Thorn and his expert adopted the $550/hour partner rate in their own calculations.[26]

Thorn's submission of a second opposition brief, evidentiary objections, and purported expert testimony required a response, so in the days before the second fee hearing, Delis submitted over 60 pages of new filings.[27] None of this last-minute briefing was accounted for in Delis' pending fee request.[28]

Altogether, Delis' attorneys had to argue at three hearings and prepare eleven substantive filings to vindicate Delis' rights

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[23] *See* AA263–269.

[24] *See* AA302–03 (Heller Decl.); AA337 (Delis' objections to Heller and Lynch Declarations); Section V.C.7.

[25] *See* AA276–87 (Cross-Compl. Resp. to Suppl. Fee Decl.).

[26] *See* AA286 (stating that Thorn's purported expert had used the $550/hour figure in calculating what he opined to be a reasonable fee).

[27] *See* AA317 (Delis' supplemental reply brief), AA335 (Delis' objections to evidence), and AA354 (Delis' responses to evidentiary objections).

[28] *See* AA271, ¶ 13 (noting that the Supplemental McCarl Declaration did not account for fees incurred in preparing that declaration "or any fees that may be incurred afterwards").

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under the anti-SLAPP statute.[29] Delis submitted evidence documenting over $63,000 in legal fees (setting aside the requested enhancement and costs):[30]

	Initial anti-SLAPP motion	**Anti-SLAPP reply filings and related work defeating Thorn's opposition**	**Fee motion and initial fee reply**
Partners ($550/hour)	$11,754 (21.37 hours x $550)	$14,317 (26.03 hours x $550)	$8,811 (16.02 hours x $550)
Associates ($385/hour)	$6,687 (17.37 hours x $385)	$10,083 (26.19 hours x $385)	$9,895 (25.7 hours x $385)
Supervised law clerks ($150/hour)	$1,059 (7.06 hours x $150)	$0	$825 (5.5 hours x $150)
Totals	$19,500 (45.8 hours)	$24,400 (52.2 hours)	$19,513 (47.22 hours)

These numbers do not include compensation for Delis' court-ordered supplemental fee declaration or the additional work

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[29] *See* AA266–71.

[30] *See* AA269–71.

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caused by Thorn's decision to submit four more opposition filings shortly before the second fee hearing.[31]

E. The trial court awards Delis only 18% of the amount requested on the grounds that Delis should have compromised with Thorn.

At the second hearing on Delis' fee motion, the trial court issued an oral ruling awarding Delis no costs; $12,323 in fees for work relating to the anti-SLAPP motion; and $3,200 in fees for work relating to the fee motion.[32] The resulting sum of $15,523 amounted to approximately 18% of what Delis requested.

The trial court blamed Delis' attorneys for Thorn's decision to oppose the motion to strike, implying that Delis should have waived his rights under the anti-SLAPP statute:

> The supplemental opposition points out that once the anti-SLAPP motion was filed, Cross-Complainant's counsel wrote to moving Cross-Defendants' counsel proposing that the motion be taken off calendar in exchange for Cross-Complainant's stipulation to strike the provisions that are the subject of the motion. . . . [M]oving Cross-Defendant's counsel offered to accept a dismissal with prejudice as to all claims other than the first cause of action, but

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[31] *See* AA276–316 (Thorn's new round of opposition filings); AA321 ("Thorn, interpreting the Court's April 13 Minute Order as a license to relitigate the entire fee motion, has submitted a new 24-page opposition filing in which Thorn introduces new arguments and purported evidence that he could have raised earlier.").

[32] June 29, 2022 Tr. 6–7.

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> indicated that it sounded like a stipulation will not be possible, wherefore counsel reserved an explanation of the fees for future motions seeking fees.
>
> This conduct by moving counsel unnecessarily increased the time and expense on the anti-SLAPP motion as well as this fee motion.[33]

The trial court therefore awarded, for work relating to the anti-SLAPP motion, $12,323 — the amount Delis' attorneys "claimed [in a February 9 letter to Thorn's attorneys] after filing the anti-SLAPP motion,"[34] rather than an amount corresponding to the time Delis' attorneys had to spend on all phases of defeating Thorn's opposition to the motion.

The number $12,323 originated in Thorn's opposition filings, which stated that Delis' attorneys had offered to withdraw the anti-SLAPP motion as part of a compromise that would have included Thorn paying $12,323 in fees.[35] Thorn rejected the offer and opposed the motion to strike,[36] but the court nevertheless adopted the number as the basis of its fee calculation.

The court added that the "$12,323 claimed after filing the anti-SLAPP motion equates to 30.81 hours at an hourly rate of

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[33] AA390.

[34] *See id.*

[35] *See* AA284. Delis' actual offer was $12,332 (*see* AA238). The number $12,323, used in Thorn's brief (AA284) and adopted in the Court's opinion (AA390), was a typo.

[36] *See* Section II.B.

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$400 per hour, which appears on its face to the Court, to be reasonable."[37]

The court thus awarded less than the fees Delis incurred up through the filing of his initial motion to strike — not including that motion's reply or evidentiary filings — along with another eight hours for the contested fee motion.[38] The court gave no explanation for compensating Delis for only 8 of the more than 47 hours spent litigating the latter motion.[39]

III. Statement of Appealability

An order granting fees after an anti-SLAPP motion to strike cross-claims is an immediately appealable collateral order.[40] Such an order "is substantially the same as a final judgment in an independent proceeding, in that it leaves the court no further

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[37] June 29, 2022 Tr. 6–7.

[38] AA390.

[39] *See* Section V.C.3.

[40] *See City of Colton v. Singletary*, 206 Cal. App. 4th 751, 781–82 (2012) (holding that a fee order was separately appealable as a collateral order); *see also Krikorian Premiere Theatres, LLC v. Westminster Central, LLC,* 193 Cal. App. 4th 1075, 1078 (2011) (holding that an order taxing costs is appealable under the collateral order doctrine). Appealability issues are discussed at greater length in Delis' brief opposing Thorn's motion to dismiss the appeal.

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action to take on a matter which is severable from the general subject of the litigation."[41]

The trial court's order on Delis' fee request "has [nothing] to do with the main causes of action in the case; rather, it is an ancillary issue growing out of the anti-SLAPP motion."[42] The fee award is therefore an appealable collateral order.

A rule allowing collateral anti-SLAPP fee awards arising out of stricken cross-claims to be appealed only after a final judgment in the underlying action would be unworkable and contrary to the public policies underlying the anti-SLAPP statute, which calls for quickly disposing of baseless claims and compensating those against whom they are filed.[43] Making Delis wait until his underlying lawsuit is resolved before appealing the fee order would shift the cost of the anti-SLAPP motion to Delis for the rest of the years-long litigation — rewarding Thorn's SLAPP gambit by furthering its strategic aim of running up Delis' costs.

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[41] *City of Colton*, 206 Cal. App. 4th at 781 (2012). *See also In re Marriage of Skelley*, 18 Cal. 3d 365, 368 (1976) ("When a court renders an interlocutory order collateral to the main issue, dispositive of the rights of the parties in relation to the collateral matter, and directing payment of money or performance of an act, direct appeal may be taken.").

[42] *City of Colton*, 206 Cal. App. 4th at 781. The SLAPP order and fee award are both unrelated to Delis' claims in the underlying lawsuit. Thorn's stricken cross-claims sought relief based only on Delis' litigation-privileged act of filing a lawsuit.

[43] *See Simmons v. Allstate Ins. Co.,* 92 Cal. App. 4th 1068, 1073–74 (2001).

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IV. Standard of Review

The usual standard of review for an award of attorney fees is abuse of discretion, but legal issues are reviewed de novo.[44]

Whether a trial court's stated grounds for reducing a fee award are legally sound is reviewed de novo.[45] Whether the trial court correctly interprets the fee statute when it imposes conditions on the award is also reviewed de novo.[46]

To the extent a trial court correctly interprets the fee statute and applies the correct legal standards, the court's calculation of reasonable attorney fees and decision whether to award an

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[44] *Connerly v. State Pers. Bd.*, 37 Cal. 4th 1169, 1175–76 (2006).

[45] *See, e.g.*, *Mountain Air Enters., LLC v. Sundowner Towers, LLC*, 3 Cal. 5th 744, 751 (2017) ("[A] determination of the legal basis for an attorney fee award is a question of law to be reviewed de novo.").

[46] *See, e.g.*, *Connerly*, 37 Cal. 4th at 1175 (stating that "de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law"); *Graciano v. Robinson Ford Sales, Inc.*, 144 Cal. App. 4th 140, 149 (2006) (stating that even in the context of reviewing an attorney-fee award, questions of statutory interpretation are reviewed de novo).

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enhancement are reviewed for abuse of discretion.[47] The scope of the trial court's discretion is determined by the applicable principles of law, and judicial actions inconsistent with those principles constitute an abuse of discretion.[48] Failure to perform the requisite legal analysis or consider legally relevant factors is also an abuse of discretion.[49]

If the trial court's stated grounds for decision align with the law, the question under abuse-of-discretion review is whether the court's application of the law to the facts is within the range of discretion conferred by the applicable statute, read in light of its purposes and policy.[50]

V. Argument

Rather than require Thorn to pay for the fees and costs his baseless cross-claims imposed, the trial court designed its fee award to fit Thorn's theory that Delis needed to compromise and

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[47] *Cf. Ketchum*, 24 Cal. 4th at 1130 (applying an abuse-of-discretion standard to a trial court's determination of the fees and enhancement awarded to a prevailing anti-SLAPP defendant, and holding that the court had abused its discretion); *City of Sacramento v. Drew*, 207 Cal. App. 3d 1287, 1298 (1989) (suggesting that an abuse-of-discretion analysis applies only if "the grounds given by the [trial] court … are consistent with the substantive law").

[48] *See Graciano*, 144 Cal. App. 4th at 148–49; *City of Sacramento*, 207 Cal. App. 3d at 1298.

[49] *See, e.g.*, *Dickson, Carlson & Campillo v. Pole*, 83 Cal. App. 4th 436, 449 (2000).

[50] *City of Sacramento*, 207 Cal. App. 3d at 1298.

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waive his rights under the anti-SLAPP statute. By performing a results-oriented fee calculation rather than applying the fee statute as written using principles established by precedent, the trial court "transgresse[d] the confines of the applicable principles of law" and therefore abused its discretion.[51]

A. Fee awards are mandatory for prevailing anti-SLAPP defendants and should compensate them for all hours reasonably spent.

Trial courts have no discretion to deny a fee award where a statutory fee provision mandates fees to a prevailing party.[52] Nor may they impose non-statutory requirements on fee awards,[53] use unauthorized methods of calculating fees,[54] or reduce mandatory fee awards based on any discretionary determination of the equities.[55] Additionally, courts must begin their analysis with

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[51] *See Graciano*, 144 Cal. App. 4th at 153 (2006).

[52] *Id.* at 160.

[53] *Id.* at 153 (reversing a fee award where the trial court reduced the award due to a factor not required by the relevant statute). *See also Elkins v. Superior Court*, 41 Cal. 4th 1337, 1351 (2007) ("A trial court is without authority to adopt local rules or procedures that conflict with statutes or with rules of court adopted by the Judicial Council, or that are inconsistent with the California Constitution or case law.").

[54] *See, e.g., Frym v. 601 Main St.*, 82 Cal. App. 5th 613, 621 (2022) (reversing an anti-SLAPP fee award where the trial court failed to perform a lodestar analysis).

[55] *See Graciano*, 144 Cal. App. 4th at 153.

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"the total number of hours counsel have actually spent on the case."[56]

Fee awards are mandatory for litigants who successfully move to strike claims under California's anti-SLAPP statute.[57] Code of Civil Procedure § 425.16(c)(1) provides that "a prevailing party on a special motion to strike *shall* be entitled to recover his or her attorney fees and costs."[58] As the prevailing defendant, Delis is entitled to reimbursement for "*all* the hours reasonably spent"[59] in prosecuting the anti-SLAPP motion and any related fee motions and appeals. "In setting attorney's fees, the basis for the trial court's calculation *must be* the actual hours counsel has devoted to the case, less those that result from inefficient or duplicative use of time."[60]

As discussed below, the trial court failed to apply these legal principles and instead designed the award to align with Thorn's theory that Delis should have negotiated more and compromised his statutory rights.

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[56] *Roe v. Halbig*, 29 Cal. App. 5th 286, 311 (2018).

[57] *See, e.g., Mallard v. Progressive Choice Ins. Co.*, 188 Cal. App. 4th 531, 544 (2010).

[58] Emphasis added.

[59] *Frym*, 82 Cal. App. 5th at 619 (emphasis in original).

[60] *Halbig*, 29 Cal. App. 5th at 311 (alterations omitted and emphasis added).

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B. The trial court improperly based its fee award on a rejected compromise offer and failed to compensate Delis for work done after the initial motion to strike was filed.

The court set the portion of the fee award relating to the motion to strike to match an early compromise offer of $12,323 — the amount Delis' counsel "claimed after filing the anti-SLAPP motion"[61] in a letter to opposing counsel — then arbitrarily tacked on $3,200 for the fee motion.[62]

1. Delis was not required to waive his statutory rights, so the trial court erred by reducing Delis' fees on the grounds that he should have compromised with Thorn.

The trial court's ruling suggests that Delis' attorneys should have relieved Thorn of the consequences of filing a SLAPP suit. But compromise offers play no role in the legal framework governing anti-SLAPP fees. As the Court of Appeals has made clear in *Graciano v. Robinson Ford Sales, Inc.*[63] and elsewhere, trial courts may not reduce a fee award due to a factor not

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[61] AA389. The actual amount referred to in the letter was $12,332. *See supra* n.35.

[62] The trial court said that its award included costs relating to the anti-SLAPP motion, but the calculation the court described did not include costs. *See* June 29, 2022 Tr. 5–7.

[63] 144 Cal. App. 4th 140, 153 (2006).

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required by the relevant statute.[64] The *Graciano* court reversed a fee award on those grounds, and this Court should do the same.

Additionally, the trial court's order violated the principle that parties need not sacrifice important legal rights in the service of judicial economy[65] — an especially important principle when it comes to a litigant's right to defend themselves from a frivolous lawsuit, as Delis was doing here.

Courts have rejected arguments that fee awards should be reduced because the prevailing party could have negotiated more or bargained away their legal rights.

In *Goglin v. BMW of N. Am., LLC*,[66] for example, the Court of Appeals rejected an argument that a fee award should be reduced because the plaintiff could have obtained their objectives through an early settlement. The offered settlement had included a general release and confidentiality clause, neither of which was required by the applicable law, and the litigant had a right to pursue her legal rights without accepting those compromises.[67]

Similarly, in *McKenzie v. Ford Motor Co.,*[68] the Court of Appeals held that a trial court had abused its discretion by failing to award fees incurred after a rejected compromise offer

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[64] *Id.*

[65] *Cf. Goglin v. BMW of N. Am., LLC*, 4 Cal. App. 5th 462, 472 (2016).

[66] *Id.*

[67] *See id.* at 472.

[68] 238 Cal. App. 4th 695 (2015).

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because the offer contained terms that the plaintiff reasonably found unacceptable.[69]

Where there is "statutory and case law supporting" a party's position, the party need not compromise its legal rights through an early settlement.[70] A party's refusal to compromise is, therefore, not grounds for reducing a fee award. And, indeed, Delis offered to compromise on the motion to strike despite having no obligation to do so. Thorn rejected the offer.[71]

Thorn had every right to contest the anti-SLAPP motion, but doing so made him responsible for paying the resulting fees if he lost.[72] Delis likewise had a right to pursue his motion, including by seeking to have the cross-claims permanently stricken and seeking reimbursement for his fees.[73] The trial court's decision that Delis was to blame for fees caused by Thorn's opposition to Delis' motions[74] is indefensible and contrary to law.

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69 *See id.* at 705.

70 *See Goglin*, 4 Cal. App. 5th at 472.

71 *See* Section II.B.

72 AA234.

73 *Cf. Caro v. Smith*, 59 Cal. App. 4th 725, 739 (1997) ("Lawyers in an adversarial system are free to inflict hard blows on their opponents as part of their responsibility to zealously guard the interests of their clients.").

74 June 29, 2022 Tr. 6.

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2. The trial court's order thwarted the policies underlying the anti-SLAPP statute.

By punishing Delis for not compromising his rights under the anti-SLAPP statute, the trial court's order thwarted the statute's aims. Instead of permanently extinguishing Thorn's cross-claims seeking $15 million in damages, a compromise would have allowed Thorn to concoct new legal theories while saddling Delis with the attorney fees Thorn imposed in his effort to financially intimidate Delis through baseless cross-claims.

The anti-SLAPP statute is liberally construed in favor of quickly dispatching meritless claims such as Thorn's.[75] The statute does not require any meeting-and-conferring, and any such requirement would undermine the law.[76]

Anti-SLAPP motions are intended to prevent a party from having repeated chances to harass an opponent with a meritless suit. Allowing a SLAPP plaintiff to amend would "completely undermine the statute by providing the pleader a ready escape"

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[75] *See* Civ. Proc. Code § 425.16; *Trinity Risk Mgmt., LLC v. Simplified Labor Staffing Sols., Inc.*, 59 Cal. App. 5th 995, 1008 (2021).

[76] In fact, even where a litigant voluntarily withdraws a SLAPP suit, they remain liable for fees. *See Halbig*, 29 Cal. App. 5th at 304.

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by allowing the complainant to replead.[77] As the Court of Appeals has explained:

> Instead of having to show a probability of success on the merits, the SLAPP plaintiff would be able to go back to the drawing board with a second opportunity to disguise the vexatious nature of the suit through more artful pleading . . . . By the time the moving party would be able to dig out of this procedural quagmire, the SLAPP plaintiff will have succeeded in his goal of delay and distraction and running up the costs of his opponent.[78]

In sum, the trial court's order ignored the legal framework for determining fee awards and instead reverse-engineered an award fitting Thorn's theory that Delis should have compromised his statutory rights. In so doing, the court improperly penalized Delis for Thorn's decision to contest Delis' motions.

3. The fee award did not compensate Delis for work necessitated by Thorn's opposition to the motion to strike.

Trial courts may not base their fee awards on what the prevailing party's attorneys spent drafting an initial motion and ignore other work — such as reply briefs, objections, and oral arguments — made necessary by the opponent's opposition to the

[77] *Simmons,* 92 Cal. App. 4th at 1073–74.

[78] *Id.*

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motion. Doing so is, as the Court of Appeals held in *Roe v. Halbig*, an abuse of discretion.[79]

Because the trial court's award was based on an amount Delis' attorneys "claimed [in a letter to Thorn's attorneys] after filing the anti-SLAPP motion"[80] but before Thorn filed his opposition brief, it did not compensate Delis for the work caused by Thorn's decision to reject Delis' compromise offer and oppose the motion to strike. Thorn alone is responsible for the fees caused by his choice to oppose a motion that his attorney admitted was "well-taken."[81] A party "cannot litigate tenaciously and then be heard to complain about the time necessarily spent" in response.[82]

C. The trial court's result-oriented fee award disregarded the rules governing anti-SLAPP fee motions.

This appeal, like that considered in *Graciano*,[83] arises out of a trial court's failure to calculate a fee award using the bottom-up legal standards established by precedent. Instead, as discussed above, the trial court calculated the fee award to arrive at a

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79 *See* 29 Cal. App. 5th at 311 ("Roe suggests that perhaps the trial court awarded an amount equal to the time his attorneys spent on the initial motion to quash. If the trial court's fee award were based on this metric, it would constitute an abuse of discretion.").

80 AA390.

81 *See* AA214, ¶ 6.

82 *Serrano*, 32 Cal. 3d at 638.

83 144 Cal. App. 4th 140 (2006).

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number the court believed appropriate. Here, the target number was $12,323, based on a compromise offer sent by Delis' counsel to Thorn's after Delis moved to strike.[84]

The trial court's award contained numerous other departures from the law that demand reversal.

1. The trial court arbitrarily reduced the lodestar rate to $400, even though the requested rates were uncontested and supported by unrebutted evidence.

The proposed lodestar rates were uncontested, and the only party who submitted evidence on that issue was Delis. But the trial court selected a lower rate of $400 per hour.[85] No party proposed that rate, and the trial court pointed to no evidence supporting it.[86] The court's unexplained selection of a lower rate was an abuse of discretion.[87] "[S]ome identified, legally justifiable

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[84] *See* AA390 (referring to $12,323 as the number Delis' attorneys "claimed after filing the anti-SLAPP motion"); AA284 (a page from Thorn's opposition brief making an argument about this correspondence between counsel); *supra* n.35.

[85] *See* AA390.

[86] *See id.*

[87] *See,* e.g., *Anderson v. Nextel Retail Stores, LLC*, Civ. Action No. 07-4480, 2010 U.S. Dist. LEXIS 71598, at *5 (C.D. Cal. June 30, 2010) (citing cases).

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circumstance must exist in support of a decision to diverge from the lodestar,"[88] and no such circumstances existed here.

As in *Graciano*, the "sole evidence before the court" showed that the moving party's requested rates were reasonable, and "there [was] no indication that in ascertaining the reasonable hourly rate, the court engaged in the relevant objective analysis."[89] The trial court's arbitrary selection of a lodestar rate is grounds for reversal.

2. The trial court did not give Delis' attorney's declarations a presumption of accuracy.

A trial court must "begin any calculation of reasonable attorney fees with the total number of hours counsel have actually spent on the case."[90] Delis' attorneys filed a declaration describing the hours worked and the task performed by each attorney, and stating that a partner had reviewed the time entries and subtracted any that appeared duplicative or excessive.[91] They then filed a supplemental declaration after the trial court asked for more details.[92]

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88 *Rogel v. Lynwood Redevelopment Agency*, 194 Cal. App. 4th 1319, 1330 (2011).

89 *Graciano*, 144 Cal. App. 4th at 155–56.

90 *Halbig*, 29 Cal. App. 5th at 311.

91 *See* AA211 and AA263.

92 *See* AA263.

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Time statements that have been verified by an attorney should be considered reliable and trustworthy, absent clear evidence that the records are incorrect.[93]

The trial court seemingly gave no weight to Delis' attorney's declarations despite not identifying any errors in those documents. When Delis' counsel asked the court to clarify what concerns it had about the supplemental fee declaration, the court did not identify any.[94] Instead, the court said to "disregard" what it had said on that point (but did not adjust its ruling).[95]

Far from beginning its analysis with the declarations filed by Delis' attorneys, the trial court gave those declarations no weight. As shown above,[96] the court based its award not on the number of hours Delis' attorneys had spent, but on a rejected compromised offer plus another $3,200 for the fee motion.[97] Under *Horsford v.*

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[93] *See Pasternack v. McCullough*, 65 Cal. App. 5th 1050, 1059 (2021); *Horsford v. Bd. of Trs. of Cal. State Univ.*, 132 Cal. App. 4th 359, 396 (2005).

[94] *See* June 29, 2022 Tr. 12:13–19.

[95] *See id.*; *see also id.* at 11 (the trial court, addressing Delis' counsel: "You said something to the effect of – you were characterizing my comments as holding your declaration to be deficient. I don't think that I said anything to that regard."). The tentative opinion's unsubstantiated assertion that the attorney's declaration was "vague" and contained "padding" appeared in the minute order despite the court's instruction to disregard these comments. See AA390.

[96] *See* Sections II.E and V.B.

[97] June 29, 2022 Tr. 6–7.

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Bd. of Trs.,[98] a trial court's wholesale rejection of an attorney's verified time records is an abuse of discretion.[99]

3. The trial court arbitrarily awarded fees for only eight of the hours Delis' attorneys spent on the fee motion.

A court's discretionary action is "subject to reversal on appeal where no reasonable basis for the action is shown."[100] The trial court's unexplained conclusion that Delis' attorneys should be compensated for only eight hours of work on the contested fee motion — which ultimately required Delis' attorneys to prepare seven substantive filings (totaling 131 pages) and argue at two hearings — was arbitrary and unaccompanied by any analysis. The court stated only that it "will award an additional 8 hours at a reasonable $400 per hour for time spent on this fee motion, for an additional $3,200.00."[101]

In arriving at this decision, the court again ignored the declarations filed by Delis' attorneys, which showed that they had to spend over 47 hours of legal work in seeking Delis' fees *even before the trial court ordered them to prepare a supplemental*

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[98] *Horsford v. Bd. of Trs. of Cal. State Univ.*, 132 Cal. App. 4th 359, 396 (2005).

[99] *See id.* at 396.

[100] *See Graciano*, 144 Cal. App. 4th at 153 (2006).

[101] AA390.

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declaration and argue at another fee-related hearing.[102] And then, once Delis' attorneys submitted the supplemental declaration as instructed, Thorn's attorneys filed another 39 pages of opposition briefing, requiring many more hours of legal work that were not accounted for in Delis' pending fee request.[103]

The trial court's arbitrary decision to compensate Delis' attorneys for only eight hours of work on the fee motion flouted the legal principles discussed above: a trial court's calculation of the award must start with all hours spent on the case,[104] and in determining those hours, the attorney's declaration is presumptively entitled to credence.[105]

An award of attorney fees must be capable of rationalization to be affirmed on appeal.[106] When "there is no apparent reasonable basis for the award in the record, the award itself is evidence that

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[102] *See* AA266–71, AA271 ¶ 13 ("The tables above do not include approximately $2,500 for attorney time spent preparing this supplemental declaration or any fees that may be incurred afterwards.").

[103] *See* AA276–316 (Thorn's new round of opposition filings); AA321 ("Thorn, interpreting the Court's April 13 Minute Order as a license to relitigate the entire fee motion, has submitted a new 24-page opposition filing in which Thorn introduces new arguments and purported evidence that he could have raised earlier.").

[104] *Halbig*, 29 Cal. App. 5th at 311 (citing *Ketchum*, 24 Cal. 4th at 1131–32).

[105] *See Horsford*, 132 Cal. App. 4th at 396.

[106] *Halbig*, 29 Cal. App. 5th at 312.

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it resulted from an arbitrary determination."[107] Here, nothing in the court's order, the transcript, or the record sheds any light on how the court arrived at eight hours as the reasonable number of hours to spend on a contested fee motion that ultimately required Delis to file hundreds of pages of briefing and argue at two hearings.[108] The court's selection of eight hours was arbitrary and untethered to the actual number of hours Delis' attorneys spent.

4. The trial court erroneously stated that the survival of a redundant cross-claim for declaratory relief justified reducing Delis' fees.

The trial court stated, without analysis, that its reduced award was based in part on the fact that Delis' anti-SLAPP motion was partially denied.[109] But where the stricken and unstricken claims are based on a common core of facts or related legal theories, courts may not reduce fee awards to account for the unstricken claims.[110]

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[107] *Id.*.

[108] *See supra* n.3.

[109] *See* AA390 (stating that the anti-SLAPP motion was "denied in part").

[110] *See Drouin v. Fleetwood Enters.*, 163 Cal. App. 3d 486, 493 (1985); *see also Reynolds Metals Co. v. Alperson*, 25 Cal. 3d 124, 129–30 (1979) ("Attorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed."). *See also* discussion in Delis' fee motion reply brief at AA248–49.

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Delis' anti-SLAPP motion was granted with respect to four claims, including all causes of action seeking monetary relief against Delis.[111] It was denied only for a declaratory relief claim based on the same contracts alleged in the stricken claims.

The trial court appears not to have considered that the surviving declaratory relief cross-claim was redundant and based on the same contracts alleged in the stricken claims[112] — meaning that the claim's survival provides no grounds for reducing the award.[113] A trial court's failure to apply a relevant rule (or even analyze the issue) is an abuse of discretion.[114] Once again, *Graciano* is on point: the trial court was held to have abused its discretion by failing to "address the issue of apportionment [by] applying the [applicable] standards."[115]

Moreover, because Thorn's cross-claims were intertwined, the court should have considered the overall relief obtained through

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[111] *See supra* n.8.

[112] *See* AA189. The issue was briefed (*see* AA247–49).

[113] *See supra n.*110. *See also, e.g., Hogar Dulce Hogar v. Cmty. Dev. Comm'n*, 157 Cal. App. 4th 1358, 1369 (2007) ("It is only when a plaintiff has achieved limited success, or has failed with respect to distinct and unrelated claims, that a reduction from the lodestar is appropriate.").

[114] As courts sometimes put it, a "failure to exercise discretion is an abuse of discretion." *Dickson, Carlson & Campillo v. Pole*, 83 Cal. App. 4th 436, 449 (2000) (holding that the trial court abused its discretion where it failed to undertake the relevant analysis for applying an equitable defense).

[115] *Graciano*, 144 Cal. App. 4th at 159.

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the motion to strike.[116] When an anti-SLAPP motion is granted in part, the fee should "be commensurate with the extent to which the motion changed the nature and character of the lawsuit in a practical way."[117]

Here, Delis' motion struck $15 million in cross-claims (including all claims seeking damages against Delis), unquestionably changing the character of the lawsuit. Meanwhile, Thorn's declaratory relief claim, along with being unintelligible and based on the same allegations as his stricken claims, is redundant with his general denial and does not affect the lawsuit.[118] The trial court did not analyze these issues or correctly apply the law.

5. The trial court did not analyze whether an enhancement was needed to compensate Delis' attorneys for contingency risk.

As with other aspects of fee awards, the California Supreme Court has instructed lower courts about the factors they must consider when deciding whether to apply an enhancement.[119]

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[116] *Hensley v. Eckerhart*, 461 U.S. 424, 433–40 (1983).

[117] *Mann v. Quality Old Time Serv., Inc.*, 139 Cal. App. 4th 328, 345 (2006).

[118] Thorn's declaratory relief claim seeks a judicial determination that the contracts alleged in Thorn's stricken causes of action "comprise a unified set of written and oral agreements governing the operation of the business." *See* AA15–16 (Cross-Compl. ¶¶ 34–37); AA247–49.

[119] *See Ketchum*, 24 Cal. 4th at 1132–33.

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Here, Thorn made no arguments against Delis' requested enhancement, but the trial court denied the request without analyzing it under the California Supreme Court's *Ketchum* factors.[120]

Just as a fee award is "not a gift" but rather "just compensation for expenses actually incurred in vindicating a public right,"[121] a fee enhancement represents "earned compensation" rather than an arbitrary windfall.[122] As the Supreme Court explained:

> Under our precedents, the unadorned lodestar . . . does not include any compensation for contingent risk, extraordinary skill, or any other factors . . . . The adjustment to the lodestar figure, e.g., to provide a fee enhancement reflecting the risk that the attorney will not receive payment if the suit does not succeed, constitutes earned compensation; unlike a windfall, it is neither unexpected nor fortuitous. Rather, it is intended to approximate market-level compensation for such services, which typically includes a premium for the risk of nonpayment or delay in payment of attorney fees.[123]

As discussed previously, a trial court's failure to consider the legally relevant factors in deciding an issue is an abuse of

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[120] June 29, 2022 Tr. 7.

[121] *City of Sacramento*, 207 Cal. App. 3d at 1304.

[122] *Ketchum*, 24 Cal. 4th at 1138.

[123] *Id.*

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discretion.[124] The trial court seemingly ignored the *Ketchum* factors. It gave no explanation for its refusal to provide the requested enhancement other than by stating that the court had already considered factors relevant to an enhancement in selecting the lodestar rate.[125] (This statement shows that the court's analysis was improperly duplicative as to those factors, which is itself grounds for reversal.)[126]

This Court should require the trial court to analyze this issue along with the others in accordance with the applicable law.

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[124] As courts sometimes put it, a "failure to exercise discretion is an abuse of discretion." *Dickson*, 83 Cal. App. 4th at 449 (holding that the trial court abused its discretion where it failed to undertake the relevant analysis for applying an equitable defense).

[125] *See* AA390 ("In approving these fees, the court has already taken into account the skill and experience of counsel, the complexity of the case and other relevant factors that might warrant a multiplier. Accordingly, these factors are already absorbed and do not warrant an additional multiplier.").

[126] This is the reverse of the situation analyzed in *Graciano*, 144 Cal. App. 4th at 156, where the court stated: "If the court had decided that a lesser hourly rate should apply because of the lack of novelty or complexity of issues, then its reduction would be improperly duplicative, since the court had already considered and declined to apply a positive multiplier for those factors." *See also Ketchum*, 24 Cal. 4th at 1142 (stating that the trial court had improperly double-counted the same factors in analyzing the hourly rate and multiplier).

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6. The trial court did not award mandatory costs.

A prevailing defendant on an anti-SLAPP motion is entitled to recover both attorney fees and costs.[127] But the calculation described in the trial court's opinion shows that the court did not include costs in its $15,523 award.[128]

The court's failure to award the costs to which Delis is entitled by statute provides another standalone basis for reversal.

7. The trial court erroneously overruled, without explanation, Delis' objections to declarations submitted by Thorn's attorneys.

Finally, the trial court erred by overruling, without explanation, Delis' objections to declarations submitted by Thorn's attorneys Craig Lynch and Lawrence Heller in opposition to Delis' fee motion.[129]

The Lynch Declaration offered only irrelevant evidence pertaining to negotiations between counsel, but, as discussed above, the anti-SLAPP statute does not include a meet-and-confer requirement.[130] The trial court improperly relied on the

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[127] Civ. Proc. Code § 425.16(c)(1).

[128] *See* Section II.E. The trial court said in the hearing that its award included costs relating to the anti-SLAPP motion, but the calculation the court described did not include costs. See June 29, 2022 Tr. 5–7.

[129] *See* AA232 and 288 (Lynch declarations); AA301–02 (Heller declaration); A337 (Delis' objections to Heller and Lynch Declarations).

[130] *See supra n.*75.

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Lynch Declaration in sharply reducing Delis' award to align with the compromise offer discussed in that Declaration's exhibits.[131]

The Heller Declaration introduced purported expert testimony from an attorney who, two days after the second hearing on the fee motion, revealed himself to be Thorn's counsel.[132] Heller did not claim to have any special expertise or knowledge relating to attorney fees or anti-SLAPP fee motions, so he had no basis to opine on these matters.[133] Heller's expert qualifications consisted of being "somewhat familiar with this litigation" as well as "involved with" or "associated with law firms respecting" anti-SLAPP motions "approximately a dozen times."[134] Far from establishing any expertise, these qualifications are similar to those of most California litigators.

Heller's opinion, which stated his belief that there is such a thing as a "stock" motion to strike,[135] could not conceivably assist the trial court in applying the law governing Delis' fee motion.

Notwithstanding Heller's opinion that Delis' attorneys should have spent only "minimal" time moving to strike Thorn's cross-

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[131] *See supra n.*84; AA288 (Lynch Decl.).

[132] *See* AA302–03 (Heller Decl.); A336 (Delis' objections to Heller and Lynch Declarations); AA415 (reflecting a July 1, 2022 appearance of new counsel for Thorn and his entities).

[133] Evid. Code § 720 (requiring "special knowledge, skill, experience, training, or education" to qualify as an expert"); *see* AA302 (Heller Decl.).

[134] *See* AA302, ¶¶ 3–4.

[135] *See* AA303 ¶ 6.

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claims,[136] Delis' motion to strike was high-stakes because Thorn was seeking ruinous damages. Delis did not need to pinch pennies or have his attorneys do substandard work in defeating Thorn's claims. Litigants may hire attorneys of their choice and have them do the work necessary to defeat baseless lawsuits. Had Thorn wished to conserve resources, he could have refrained from filing a SLAPP suit or dismissed his claims.

The trial court erred by allowing the Heller and Lynch Declarations into evidence and should be instructed to disregard them on remand.

VI. Conclusion

The trial court's $400/hour lodestar figure and hours calculation for the motion to strike — which included a conclusion that the number of hours that was reasonable for Delis' attorneys to invest in the motion to strike was precisely 30.81 hours[137] — were selected to arrive at the number $12,323, a legally irrelevant sum, because Thorn's attorneys said that Delis had offered to compromise for that amount after Delis filed his initial motion to strike.[138] Thorn rejected the offer, causing Delis' attorneys to have to prepare another ten filings and argue at three hearings to vindicate Delis' rights.[139] And, in any event,

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[136] *See* AA303 ¶ 6.

[137] AA390.

[138] *See supra* Section V.B.

[139] *See supra* n.3.

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rejected compromise offers play no role in the legal framework governing anti-SLAPP fee awards.

The trial court's order implicitly imposed a new requirement for litigants harassed by an opponent's SLAPP suit: they must meet-and-confer with the opponent and waive their rights if doing so would reduce the "time and expense of the anti-SLAPP motion."[140] This imposition of legal requirements lacking any statutory basis was another an abuse of discretion.[141] The trial court's order thwarts the purposes of the anti-SLAPP statute by suggesting that victims of a SLAPP suit must allow defendants to circumvent the anti-SLAPP statute by repleading.

This Court should reverse and instruct the trial court to enter a new fee award consistent with the legal rules discussed in this brief. The fee award should be based on the uncontested lodestar rates and the verified declarations of Delis' attorneys. Delis' request for a fee enhancement should be analyzed using the factors set forth in *Ketchum*. No consideration should be given to the declarations submitted by Thorn's attorneys. And, above all, there should be no downward adjustment for Delis' decision not to compromise his rights. Thorn alone is responsible for the costs and fees his SLAPP suit imposed.

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[140] June 29, 2022 Tr. 6.

[141] *See Halbig*, 29 Cal. App. 5th at 311 ("Roe suggests that perhaps the trial court awarded an amount equal to the time his attorneys spent on the initial motion to quash. If the trial court's fee award were based on this metric, it would constitute an abuse of discretion.").

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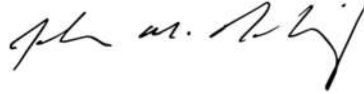
Dated: May 9, 2023

Respectfully submitted,



John Mayfield Rushing
(Cal. SBN 331273)

Ryan McCarl
(Cal. SBN 302206)

and Davit Avagyan (Cal. SBN 336350)

Rushing McCarl LLP
2219 Main St. No. 144 | Santa Monica, CA 90405
T: (310) 896-5082 | E: info@rushingmccarl.com

Attorneys for Appellant Mario Delis

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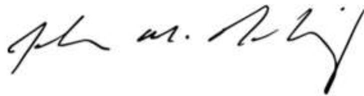
Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.504(d)(1) of the California Rules of Court, the enclosed Appellant's Opening Brief is produced using 13-point or greater Roman type, including footnotes, and contains 7,863 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: May 9, 2023

Respectfully submitted,



John Mayfield Rushing (Cal. SBN 331273)

Ryan McCarl (Cal. SBN 302206)

and Davit Avagyan (Cal. SBN 336350)

Rushing McCarl LLP
2219 Main St. No. 144 | Santa Monica, CA 90405
T: (310) 896-5082 | E: info@rushingmccarl.com

Attorneys for Appellant Mario Delis

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I, Kirstin Largent, declare that I am not a party to the action, am over 18 years of age and my business address is: 626 Wilshire Blvd., Suite 820, Los Angeles, California 90017; ca@counselpress.com

On 5/9/2023 declarant served the within: Appellant's Opening Brief
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Craig M. Lynch
Lynch & Lynch
1200 Truxtun Avenue, Suite 200
Bakersfield, California 93301
clynch@lynchandlynchlawfirm.com

Attorney for Respondents

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Lawrence Eric Heller
Heller & Edwards
21650 Oxnard Street Suite 1580
Woodland Hills, California 91367-5098
lheller@hellerandedwards.com

Attorney for Respondents

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