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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JONATHAN BISSON-DATH and JENNIFER)	Case No. CV-08-1235 SC
BARRETTE-HERZOG,)	
)	ORDER DENYING DEFENDANTS'
Plaintiffs,)	RENEWED MOTION FOR ATTORNEY
)	<u>FEEES AND COSTS</u>
v.)	
)	
SONY COMPUTER ENTERTAINMENT)	
AMERICA INC., DAVID JAFFE, and)	
DOES 1 THROUGH 100, inclusive,)	
)	
Defendants.)	
)	

I. INTRODUCTION

Plaintiffs Jonathan Bissoon-Dath ("Bissoon-Dath") and Jennifer Dath¹ (collectively, "Plaintiffs") filed this action in February 2008, alleging that Defendant Sony Computer Entertainment America Inc. and its former employee David Jaffe (collectively, "Defendants") misappropriated Plaintiffs' original copyrighted works to develop the popular video game God of War. ECF No. 1. On March 9, 2010, the court granted Defendants' motion for summary judgment and dismissed Plaintiffs' claims in their entirety. ECF No. 133 ("SJ Order").² Defendants then timely moved for attorney

¹ Plaintiff Jennifer Barrette-Herzog avers that she changed her name to Jennifer B. Dath in 2008. ECF No. 85 ¶ 3.

1 fees and costs pursuant to 17 U.S.C. § 505. ECF No. 135 ("Mot.").
2 Plaintiffs filed an opposition and Defendants filed a reply. ECF
3 Nos. 145 ("Opp'n"), 149 ("Reply"). In the interim, Plaintiffs
4 appealed the Court's Summary Judgment Order to the Ninth Circuit.
5 ECF No. 142. In light of the pending appeal, the Court deferred
6 ruling on Defendants' motion for attorney fees. ECF No. 162.
7 After the Ninth Circuit adopted and affirmed the Court's Summary
8 Judgment Order, ECF No. 172,³ Defendants renewed their motion for
9 attorney's fees, relying on the memorandum of points and
10 authorities filed with their first motion, ECF No. 176 ("Renewed
11 Mot.").⁴ Plaintiffs then filed an opposition to the renewed
12 motion, raising new arguments related to their appeal, and
13 Defendants filed another reply. ECF Nos. 179 ("Opp'n to Renewed
14 Mot."), 182 ("Reply ISO Renewed Mot."). Pursuant to Civil Local
15 Rule 7-1(b), the Court finds this matter appropriate for resolution
16 without oral argument. As detailed below, Defendants' renewed
17 motion for attorney fees is DENIED.

18

19 **II. DISCUSSION**

20 The procedural history of this case is familiar to the parties
21 and the Court and, as such, will not be recounted here. Under 17
22 U.S.C. § 505, "the court may . . . award a reasonable attorney's

23 ² Bissoon-Dath v. Sony Computer Entm't Am., Inc., 694 F. Supp. 2d
24 1071 (N.D. Cal. 2010).

25 ³ The Ninth Circuit's order was filed on July 29, 2011. Dath v.
26 Sony Computer Entm't Am., Inc., 653 F.3d 898 (9th Cir. 2011). The
Mandate was issued by the Ninth Circuit on October 12, 2011, and
was filed in this Court on February 24, 2012. ECF No. 175.

27 ⁴ Defendants re-noticed their renewed motion on May 1, 2012. ECF
28 No. 180.

1 fee to the prevailing party" in actions brought under the Copyright
2 Act. Recovery of attorney fees is not automatic, and district
3 courts may exercise their equitable discretion in making such
4 determinations. Fogerty v. Fantasy, Inc., 510 U.S. 517, 534
5 (1994). The Supreme Court has enunciated a number of nonexclusive
6 factors that courts should consider when making these
7 determinations: "frivolousness, motivation, objective
8 unreasonableness (both in the factual and in the legal components
9 of the case) and the need in particular circumstances to advance
10 considerations of compensation and deterrence." Id. at 534 n.19.
11 Additionally, the Ninth Circuit has added additional
12 considerations: "the degree of success obtained, the purposes of
13 the Copyright Act, and whether the chilling effect of attorney's
14 fees may be too great or impose an inequitable burden on an
15 impecunious plaintiff." Ets-Hokin v. Skyy Spirits, Inc., 323 F.3d
16 763, 766 (9th Cir. 2003). The Court finds that these factors weigh
17 against awarding attorney fees in the instant action.⁵

18 Defendants argue that they are entitled to attorney fees
19 because they achieved complete success in defeating Plaintiffs'
20 claims. Mot. at 9. The Court agrees that this factor weighs in
21 favor of an attorney fee award, but it is not dispositive. If it
22 was, then prevailing parties would be entitled to attorney fees as
23 a matter of course. But that is not the law. See Fogerty, 510

24 ⁵ Plaintiffs argue that the Court need not reach these factors
25 since Defendants' renewed motion was untimely. Opp'n to Renewed
26 Mot. at 2. This argument lacks merit. Civil Local Rule 54-5(a)
27 requires that "motions for awards of attorney's fees by the Court
28 must be served and filed within 14 days of entry of judgment by the
District Court." Here, judgment was entered on March 9, 2010, ECF
No. 134, and Defendants moved for attorney's fees on March 23,
2010, ECF No. 135. Further, Defendants filed their renewed motion
soon after the Ninth Circuit's mandate was filed with the Court.

1 U.S. at 533. Accordingly, the Court proceeds to examine the other
2 non-exclusive factors.

3 The Court first finds that Plaintiffs' claims were not
4 objectively unreasonable or frivolous. "A frivolous claim is one
5 in which the factual contention is 'clearly baseless,' such as
6 factual claims that are 'fantastic or delusional scenarios.'" Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, C 04-00371 JW, 2005 WL
7 2007932, at *4 (N.D. Cal. Aug. 12, 2005) (quoting Neitzke v.
8 Williams, 490 U.S. 324, 325-328 (1989)). A claim is not frivolous
9 merely because it is unsuccessful. Defendants argue that
10 Plaintiffs knew or should have known that their claims were
11 baseless from a "simple reading" of the respective works at issue
12 in this case. Mot. at 11. While the Plaintiffs' claims lack
13 merit, the Court finds that they do not rise to the level of the
14 frivolous. As evidenced by the Court's Summary Judgment order, a
15 comparison of the various works at issue in this case is not
16 simple. Further, Plaintiffs performed their due diligence prior to
17 filing suit. See ECF No. 146 ("Bissoon-Dath Decl.") ¶¶ 3-4.
18 Defendants also argue that they warned Plaintiffs that their claims
19 lacked merit at the outset by sending Plaintiffs a letter which
20 outlined weaknesses in their case. Mot. at 11-12. But the fact
21 that Plaintiffs declined to voluntarily dismiss their case after
22 reviewing this correspondence does not support a finding of
23 frivolousness. It is not surprising or unusual for a party to
24 reject an adversary's assessment of its case. See Modular Arts,
25 Inc. v. Interlam Corp., C07-382Z, 2009 WL 151336, at *2 (W.D. Wash.
26 Jan. 20, 2009).

27 The Court also finds that Plaintiffs did not have an improper
28

1 motive for bringing this suit. Defendants argue that "[t]his is
2 another in the long line of cases where an aspiring writer comes
3 out of the woodwork with unsupported claims that a successful movie
4 or game copied his unpublished script, in hopes of forcing a
5 [d]efendant to pay a large settlement" Mot. at 13. There
6 is scant evidence to support this contention. Defendants' argument
7 hinges on the financial success of the God of War franchise and the
8 dismissal of Plaintiffs' claims. That is not enough. There is no
9 evidence that Plaintiffs sought to publicize the case to gain
10 attention for themselves or their works. Nor is there evidence
11 that they sought to enjoin distribution of Defendants' work in
12 order to extract a nuisance settlement. Additionally, the amount
13 of time and effort Plaintiffs devoted to this suit weighs against a
14 finding of bad faith. Bissoon-Dath declares that Plaintiffs spent
15 thousands of hours analyzing the record and incurred substantial
16 debt in connection with this action. Bissoon-Dath Decl. ¶ 4. It
17 is unlikely that Plaintiffs would have made such a personal
18 sacrifice if they believed their claims lacked merit.

19 Defendants also point to Plaintiffs' litigation tactics as
20 evidence of bad faith, arguing that Plaintiffs "did all they could
21 to delay and complicate the resolution of this case." Mot. at 15.
22 Defendants argue that Plaintiffs acted improperly when they made
23 "four unreasonably broad requests for extensions of time," filed a
24 flawed expert report, filed a "frivolous" motion to extend page
25 limits, and submitted "hundreds of pages of incomprehensible
26 interrogatory responses," among other things. Id. Plaintiffs
27 respond that Defendants were responsible for any unnecessary delay
28 or expense incurred by the parties, pointing to Defendants'

1 negotiation tactics and Defendants' production of "hundreds of
2 thousands of pages of documents[] in no discernable order." Opp'n
3 at 21-22. None of this conduct is so egregious as to rise to the
4 level of bad faith. Each party could have taken steps to reduce
5 the costs incurred by the other. That is the case in almost any
6 litigation. Significantly, neither party was sanctioned or
7 otherwise reprimanded for their conduct. The fact that both
8 parties aggressively pursued their claims through pre-trial motions
9 and discovery does not give rise to a finding of bad faith.

10 The Court also finds that awarding Defendants attorney fees
11 would not necessarily serve the purpose of the Copyright Act.
12 "[D]efendants who seek to advance a variety of meritorious
13 copyright defenses should be encouraged to litigate them to the
14 same extent that plaintiffs are encouraged to litigate meritorious
15 claims of infringement." Fogerty, 510 U.S. at 527. Here,
16 Defendants had ample incentive to vigorously defend its multi-
17 billion dollar God of War franchise against claims of infringement.
18 On the other hand, holding Plaintiffs liable for over a million
19 dollars in attorney fees could have chilling effect on suits that
20 could be brought under the Copyright Act. Individual plaintiffs
21 might be hesitant to bring meritorious infringement claims in the
22 future if they believe that such claims could lead to financial
23 ruin. Courts must consider whether an attorney fee award
24 "impose[s] an inequitable burden on an impecunious plaintiff."
25 Ets-Hokin, 323 F.3d at 766. Here, Plaintiffs declare that an award
26 of attorney fees would force them into bankruptcy. Dath Decl. ¶ 7.
27 Coupled with the fact that Plaintiffs brought this action in good
28 faith, such concerns clearly weigh against awarding Defendants

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attorney fees.⁶

III. CONCLUSION

For the reasons set forth above, the Court DENIES Defendants Sony Computer Entertainment America, Inc. and David Jaffe's motion for attorney fees.

IT IS SO ORDERED.

Dated: July 24, 2012


UNITED STATES DISTRICT JUDGE

⁶ The Court's reasoning is buttressed by the fact that the Ninth Circuit denied Defendants' motion for fees on appeal. Opp'n to Renewed Mot. Ex. 1.