IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CA FLORIDA HOLDINGS, LLC,
Publisher of *THE PALM BEACH POST*,

Plaintiff,

v.

CASE NO.: 2019-CA-014681
DIVISION: AG

DAVE ARONBERG, as State Attorney of Palm Beach County, Florida; SHARON R. BOCK, as Clerk and Comptroller of Palm Beach County, Florida.

Defendants.
_____/

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT DAVE ARONBERG'S AMENDED MOTION FOR ATTORNEYS' FEES

Defendant, DAVE ARONBERG, as State Attorney of Palm Beach County, Florida, (hereinafter the "State Attorney"), by and through counsel below, hereby submits the following Memorandum of Law in Support of his Amended Motion for Attorneys' Fees, filed November 9, 2020, ("Amended Motion"), and in support thereof states as follows:

TIMELINE & BACKGROUND

1. On November 14, 2019, Plaintiff filed its original Complaint that sought to create a private right of action under Fla. Stat. § 905.27, in the interest of "furthering justice", to compel disclosure of the testimony, minutes, and other evidence presented in 2006 to the Palm Beach County grand jury, as to Jeffrey Epstein, (the "Requested Materials").

2. On November 26, 2019, the State Attorney and his office received an engagement letter and attorney-client contract from the undersigned counsel and his law firm and later executed said contract. **[Def.Ex.1].**

3. On December 6, 2019, the State Attorney filed his Motion to Dismiss Plaintiff's Complaint. Notably, this filing put Plaintiff on notice that "Despite Plaintiff's allegations to the contrary, Defendant Aronberg is not in custody or control of the records sought and is therefore not a proper party to this action." On December 13, 2019, the Clerk also filed a Motion to Dismiss.

4. On January 17, 2020, Plaintiff filed its First Amended Complaint, which in addition to its original claim under § 905.27 Fla. Stat., ("Count II"), added a claim for Declaratory Relief, ("Count I"), that sought an order declaring that the State Attorney and the Clerk disclose the Requested Materials so Plaintiff could use those materials for the purpose of informing the public.

5. On January 24, 2019, the State Attorney and the Clerk each filed an Answer to Count I of the First Amended Complaint and a Motion to Dismiss Count II ("Answer/Motion to Dismiss). This filing by the State Attorney again notified Plaintiff that:

> It is significant to emphasize that despite Plaintiff's allegations to the contrary, Defendant Aronberg and the Office of the State Attorney for the Fifteenth Judicial Circuit are not in custody or control of the records sought herein, and therefore Defendant Aronberg is not a proper party to this action. In fact, Defendant, Sharon R. Bock, as Clerk and Comptroller of Palm Beach County, Florida, admits that it is the custodian in possession of the documents that are the subject of this action.

[See, Aronberg Answer/Motion to Dismiss Count II, p. 12]

6. On June 3, 2020, Chief Judge Marx held a hearing on the State Attorney's and Clerk's Motions to Dismiss Count II. **[Def.Ex.2].**

7. On June 8, 2020, the Court entered its Order Granting Defendants' Motions to Dismiss Count II of Plaintiff's First Amended Complaint with Prejudice ("Order"). **[Def.Ex.3].**

8. Immediately following the Court's Order, on June 8, 2020, the State Attorney, through the undersigned counsel, served Plaintiff with a demand pursuant to § 57.105 Fla. Stat., to voluntarily dismiss/withdraw the First Amended Complaint and the claims against the State Attorney, along with a Motion for Attorneys' Fees ("§ 57.105 Demand"). **[Def.Ex.4].** As a result

of the Order, only Count I of Plaintiff's First Amended Complaint remained, which sought Declaratory Relief under § 86.011, Fla. Stat.

9. In serving his § 57.105 Demand on Plaintiff, the State Attorney properly put Plaintiff on notice that he would seek sanctions by filing the § 57.105 Motion for Attorneys' Fees if Plaintiff failed to dismiss the remainder of its First Amended Complaint within 21 days of service of the § 57.105 Demand.

10. Likewise, the State Attorney's § 57.105 Demand specifically informed Plaintiff that:

> First and foremost, the [First Amended] Complaint is not supported by the material facts necessary to establish the claims asserted because neither Defendant Aronberg, nor The Office of the State Attorney for the Fifteenth Judicial Circuit is in custody or control of the 2006 grand jury materials sought therein. Simply put, the declaratory relief sought by the Plaintiff seeks records from my client that are impossible for him or his office to produce. Accordingly, Defendant Aronberg is not a proper party to this action because no matter what, he and his office do not have possession, custody, or control of the Requested Materials.
>
> Moreover, even if the Plaintiff were to prevail in the declaratory action, Mr. Aronberg would be unable to comply with any court order granting disclosure of the requested documents because neither Mr. Aronberg nor The Office of the State Attorney for the Fifteenth Judicial Circuit have possession, custody, or control of the 2006 Epstein grand jury records.

11. On June 23, 2020, Plaintiff's counsel sent a response to the § 57.105 Demand refusing to withdraw the remainder of the First Amended Complaint as to the State Attorney. **[Def.Ex.5].**

12. After receiving Plaintiff's June 23, 2020, response refusing to withdraw the remainder of the First Amended Complaint and waiting the prerequisite "21 days after service of the motion" the State Attorney's § 57.105 Motion for Attorneys' Fees was filed with this Court on July 1, 2020, (hereinafter "First Motion for Attorneys' Fees"). **[Def.Ex.6].**

13. Thereafter, on August 18, 2020, the State Attorney filed his Motion for Summary Judgment, which included the Affidavit of the State Attorney ("Affidavit"), **[Def.Ex.7],** and proceeded, on October 21, 2020, to file a Motion to Set Hearing on the State Attorney's Motion for Summary Judgment after it became clear that there would be no resolution of this matter without the Court's intervention.

14. Nonetheless, later the same day, October 21, 2020, rather than setting and participating in a hearing on the merits as to State Attorney's Motion for Summary Judgment, Plaintiff filed its Notice of Dropping the State Attorney from the instant case, pursuant to Rule 1.250(b), Florida Rules of Civil Procedure. **[Def.Ex.8].**

15. As the filing of Plaintiff's Notice of Dropping the State Attorney operates as an adjudication on the merits as to the State Attorney, the Amended Motion for Attorneys' Fees, ("Amended Motion"), was filed November 9, 2020 to include the entirety of the State Attorney's legal fees up to that date. **[Def.Ex.9].**

MEMORANDUM OF LAW

I. LEGAL STANDARD

"The central purpose of § 57.105, Fla. Stat., is, and always has been, to deter meritless filings and thus streamline the administration and procedure of the courts. Thus, the post-1999 version of § 57.105 has expanded the circumstances where fees should be awarded and the purpose is to deter meritless filings." *Davis v. Bailynson*, 268 So. 3d 762, 769 (Fla. 4th DCA 2019); *See Bionetics Corp. v. Kenniasty*, 69 So. 3d 943, 948 (Fla. 2011). Accordingly, § 57.105, Fla. Stat. provides the following language authorizing the award of attorneys' fees as sanctions in actions such as the present litigation:

> (1) Upon the court's initiative or motion of any party, *the court shall award a reasonable attorney's fee*, including prejudgment interest, to be paid to the

> prevailing party in equal amounts by the losing party and the losing party's attorney *on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial*:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
>
> (b) Would not be supported by the application of then-existing law to those material facts.

Fla. Stat. § 57.105 (1).

Hence, in addition to a motion by any party, "Section 57.105(1) clearly and explicitly confers upon the trial court the authority to award attorney's fees to the prevailing party upon the court's initiative, if the court finds that the losing party . . . knew or should have known that a claim or defense when initially presented to the court *or at any time before trial . . . [w]as not supported by the material facts necessary to establish the claim or defense*" or would not be supported by the application of then-existing law to those material facts. *Koch v. Koch*, 47 So. 3d 320, 324 (Fla. 2d DCA 2010).

Moreover, "[u]nder [§ 57.105, Fla. Stat.] the legislature has expressed its unequivocal intent that where a party files a meritless claim, suit or appeal, the party who is wrongfully required to expend funds for attorneys' fees is entitled to recoup those fees." *Martin County Conservation Alliance v. Martin County*, 73 So. 3d 856, 857 (Fla. 1st DCA 2011) (finding that "Courts are not at liberty to disregard the legislative mandate that courts *shall impose sanctions* in cases without foundation in material fact or law. The word "shall" in § 57.105, Fla. Stat., evidences the legislative intent to impose a *mandatory penalty* to discourage baseless claims, by placing a price tag on losing parties who engage in these activities. Section 57.105 expressly states courts "shall" assess attorney's fees for bringing, or failing to dismiss, baseless claims or defenses.").

Additionally, "[s]ection 57.105 does not require a finding of frivolousness to justify sanctions, but only a finding that the claim lacked a basis in fact or law" and "does not require a party to show complete absence of a justiciable issue of fact or law." *Martin County Conservation Alliance v. Martin County*, 73 So. 3d 856, 865 (Fla. 1st DCA 2011). However, "[w]here there is an arguable basis in law and fact for a party's claim, a trial court may not sanction that party under section 57.105." *Minto PBLH, LLC v. 1000 Friends of Florida, Inc.*, 228 So. 3d 147, 149 (Fla. 4th DCA 2017).

Finally, in determining an award of sanctions under § 57.105, *the trial court's findings "must be based on substantial competent evidence" and the trial court "must make an inquiry into what the losing party knew or should have known during the fact-establishment process, both before and after the suit was filed."* *See Trust Mortg., LLC c. Ferlanti*, 193 So. 3d 997, 1001 (Fla. 4th DCA 2016); *See also Chue v. Lehman*, 21 So. 3d 890, 891-92 (Fla. 4th DCA 2009).

II. THE STATE ATTORNEY'S AMENDED MOTION IS NEITHER IN VIOLATION OF THE 21-DAY SAFE HARBOR PROVISION IN FLA. STAT. § 57.105(4), NOR WAS THE AMENDED MOTION MOOT UPON FILING.

A. The Amended Motion does not violate the 21-day safe harbor provision because Plaintiff dropped the State Attorney from the action prior to the filing of the Amended Motion.

"Section 57.105(4), Florida Statutes creates an opportunity to avoid the sanction of attorney's fees by creating a safe period for withdrawal or amendment of meritless allegations and claims." *Davis v. Bailynson*, 268 So. 3d 762, 769 (Fla. 4th DCA 2019). Specifically, the relevant portion of the Statute states:

> A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

Fla. Stat. § 57.105(4). Likewise, "[t]he primary purpose of the safe harbor provision of §

57.105(4), Fla. Stat., is to provide the recipient of a motion for an award of costs and attorney's fees with notice and the opportunity to withdraw or abandon a frivolous claim before sanctions are sought." *MC Liberty Express, Inc. v. All Points Servs.*, 252 So. 3d 397, 404 (Fla. 3d DCA 2018).

Here, Plaintiff contends that the State Attorney "did not serve his Amended Motion at any time before filing it, and thus failed to comply with the 21-day notice provision...." **[Def.Ex.10, p. 6].** Plaintiff claims that for this reason alone the Amended Motion should be denied and cites in support of their argument *Lago v. Kame By Design, LLC*, 120 So. 3d 73, 75 (Fla. 4th DCA 2013) (holding that "if a party files a subsequent or amended motion for sanctions under section 57.105 and raises an argument that was not raised in the original motion for section 57.105 sanctions, the subsequent motion must independently comply with the twenty-one-day 'safe harbor' provision of Section 57.105(4).").

Despite Plaintiff's assertion, the instant case is distinguishable from *Lago*, as the rule set forth therein does not apply based on the facts and timeline of this action. In *Lago*, the plaintiff served its § 57.105 demand and accompanying motion for attorneys' fees on June 30, 2011. After waiting for the requisite 21-day safe harbor period to pass, the plaintiff filed its motion for attorneys' fees with the court on July 29, 2011. The plaintiff then filed an amended motion for attorneys' fees with the court on September 20, 2011. The court entered an order granting the plaintiff's motion for § 57.105 attorneys' fees on October 25, 2011. The defendant filed a motion for rehearing and on September 5, 2012, the court reheard the argument for attorneys' fees, ultimately upholding its October 25, 2011 order. Significantly, during the September 5, 2012 rehearing, the defendant withdrew its offending motion that triggered the plaintiff's § 57.105

demand and motion for attorneys' fees. Eventually, on August 7, 2013, the trial court's order was remanded by the 4th DCA based on the rule set forth above.[1]

Thus, in *Lago*, because the case was still active when the plaintiff's amended motion for attorneys' fees was filed and was not served on the defendant in compliance with the 21-day safe harbor provision before it was filed with the court, pursuant to § 57.105, the defendant was entitled to notice and an opportunity to change its position and withdraw its offending motion before being sanctioned.

The timeline of events in the instant action stands in stark contrast to that of *Lago* and accordingly necessitates a different result. Here, Plaintiff was served with the State Attorney's § 57.105 Demand and its accompanying First Motion for Attorneys' Fees on June 8, 2020. On June 23, 2020, Plaintiff's counsel sent a letter in response indicating Plaintiff's refusal to drop the Count I of the First Amended Complaint against the State Attorney. After waiting for the requisite 21-day safe harbor period to pass, the State Attorney's First Motion for Attorneys' Fees was properly filed with the Court. Over 4-months later, after settlement negotiations failed and after the State Attorney's Motion for Summary Judgment was filed, Plaintiff dropped the State Attorney as a party. **[Def.Ex.8].** Significantly, only after Plaintiff dropped the State Attorney as a party, and thus had no ability to change its position, was the Amended Motion filed. Based on this fact pattern, the *Lago* rule does not apply here.

Despite Plaintiff's decision to drop the State Attorney as a party, the Florida Rules of Civil Procedure and the courts of Florida are clear. Because Rule 1.250 specifies that a party is dropped "in the manner provided for voluntary dismissal in Rule 1.420(a)(1)," dropping a party therefore

[1] Notably, the court in *Lago v. Kame By Design, LLC*, 120 So. 3d 73, 75 (Fla. 4th DCA 2013), despite finding that the plaintiff's amended motion for attorneys' fees was improper, the trial court was instructed to rule as to the plaintiff's original motion for attorneys' fees as it was properly served and filed pursuant to § 57.105, Fla. Stat.

"operates as an adjudication on the merits." See, Siboni v. Allen, 52 So. 3d 779, 781 (Fla. 5th DCA 2010); Rule 1.420(a)(1) Fla. R. Civ. P. Notably, Plaintiff admits that "the entire action, which necessarily included Count I [of the First Amended Complaint], was dismissed as to [the State Attorney] on October 21, 2020. [Def.Ex.10, p.7]. Nonetheless, as a result of dropping the State Attorney from the case, Plaintiff not only effectively made an admission that its allegations against the State Attorney have no basis in fact or law, but also concluded the case as to the State Attorney and thereby became the losing party in this action.

Consequently, unlike the fact scenario and timeline in *Lago*, because Plaintiff concluded the instant litigation by dropping the State Attorney from the action before the filing of the Amended Motion, it was impossible to give Plaintiff an opportunity to respond and withdraw its Count I of the First Amended Complaint since Plaintiff had already done so, and therefore there can be no violation of the 21-day safe harbor provision set forth in Fla. Stat. § 57.105(4).

Based on the foregoing, the State Attorney's Amended Motion does not violate the 21-day safe harbor provision because Plaintiff dropped him from the action prior to the filing of the Amended Motion, and therefore Plaintiff was not prejudiced by the filing of the Amended Motion. Accordingly, as further set forth below, Plaintiff has exposed itself to § 57.105 attorneys' fees as sanctions for failing to drop the State Attorney as a party within the 21-day safe harbor period.

B. The State Attorney's Amended Motion was not moot upon filing, but rather was properly filed at the conclusion of the litigation to fully incorporate the entirety of the State Attorney's legal fees to date.

Oddly, Plaintiff also contends that because the State Attorney was dropped from the action nineteen days before the State Attorney's Amended Motion was filed, the Amended Motion is somehow moot. **[Def.Ex.10].** Not only does Plaintiff fail to provide any authority in support of this position, taking such a position lacks any logical reasoning or common sense. To be clear, the

State Attorney's First Motion for Attorneys' Fees was properly served and later filed pursuant to the statutory instructions set forth in § 57.105. When Plaintiff failed to withdraw its remaining claim against the State Attorney within the 21-day safe harbor period it exposed itself to sanctions under the Statute despite eventually dropping the State Attorney more than 4-months after the § 57.105 Demand was made. As set forth at length above, Plaintiff's dropping of the State Attorney as a party acted as an adjudication on the merits against Plaintiff. Thus, at that time the safe harbor provision of § 57.105(4) no longer applied to Plaintiff because it acquiesced to the State Attorney's demand, albeit late, no longer had any opportunity to respond, and was unable to change its position or react to the Amended Motion as the State Attorney was no longer an active party in the lawsuit.

Furthermore, the Amended Motion was not moot at the time of filing because when it was filed it incorporated the entirety of the State Attorney's fees from the time of serving the § 57.105 Demand through the time that the State Attorney was dropped from the case and the action concluded. There is nothing improper about the Amended Motion or any argument or authority offered by Plaintiff that would make the Amended Motion moot. Likewise, amended motions for attorneys' fees are filed consistently as a matter of course to include the entirety of fees in a lawsuit. Here, the State Attorney's total legal fees were able to be calculated and submitted at the time of filing the Amended Motion.

C. The State Attorney's First Motion for Attorneys' Fees is not insufficient and was properly filed in accordance with the procedures set forth in § 57.105.

Plaintiff argues that the State Attorney's First Motion for Attorneys' Fees "was insufficient under Fla. Stat. § 57.105 when filed [because] it set forth no substantive arguments as to why Count I of the Amended Complaint was [un]supportable based on material facts in the record or the application of existing law to those facts." **[Def.Ex.10, p. 8]**. Despite Plaintiff's contention,

Fla. Stat. § 57.105 has no such requirement regarding the contents of a motion for attorneys' fees served in conjunction with a § 57.105 demand. In fact, regarding § 57.105 motions for attorneys' fees the Statute is limited to the following language regarding the safe harbor provision:

> A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

Fla. Stat. § 57.105(4). Moreover, the State Attorney's June 8, 2020 § 57.105 Demand specifically sets forth the reasons why Count I of the First Amended Complaint had no basis in fact or law. Likewise, the State Attorney's First Motion for Attorneys' Fees specifically states that:

> [O]n June 8, 2020, Plaintiff was served with a copy of this Motion, together with a letter from the undersigned attorney, in accordance with subsection (4) of the above Statute, demanding dismissal of the [First Amended] Complaint, at least 21 days prior to the filing of this Motion. In said letter, Defendant's attorney advised Plaintiff of the facts which establish that the [First Amended] Complaint is without support of the facts or the law.

[Def.Ex.6]. Accordingly, the State Attorney properly put Plaintiff on notice that he would seek attorneys' fees as sanctions under § 57.105 if the First Amended Complaint was not withdrawn during the 21-day safe harbor period. Hence, regardless of the length or breadth of the First Motion for Attorneys' Fees, it was filed properly within the statutory procedures set forth in § 57.105 and cannot be considered insufficient despite Plaintiff's contention.

In addition, Plaintiff asserts that "[a] motion for sanctions must be supported by the record evidence at the time it is filed" [and] "[b]ecause the First Motion was not so supported, it fails under the [S]tatute." **[Def.Ex.10, p. 8]**. In support of this argument, Plaintiff asserts that there was no record evidence supporting the State Attorney's statement from the § 57.105 Demand that it was impossible for him to provide the Requested Materials because he has no possession, custody, or control of them.

Despite Plaintiff's argument here, Plaintiff has failed to provide any supporting authority whatsoever and there is no statutory requirement or language in § 57.105 that supporting record evidence must exist to properly serve a § 57.105 demand and motion for attorneys' fees. "The central purpose of § 57.105, Fla. Stat., is, and always has been, to deter meritless filings and thus streamline the administration and procedure of the courts." *Davis v. Bailynson*, 268 So. 3d 762, 769 (Fla. 4th DCA 2019). In this vein, a § 57.105 demand and accompanying motion for attorneys' fees can be filed at any time after a lawsuit is initiated, hence even directly in response to the filing of a complaint, regardless of whether any record evidence exists at the time in support of the § 57.105 demand. In fact, § 57.105(1) specifically states in pertinent part that:

> [T]he court ***shall*** award a reasonable attorney's fee ... on any claim or defense ***at any time*** during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense ***when initially presented to the court or at any time before trial***:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
>
> (b) Would not be supported by the application of then-existing law to those material facts.

Fla. Stat. § 57.105(1).

Consequently, the foregoing indicates that the State Attorney's First Motion for Attorney's Fees, as served and filed, is sufficient under § 57.105 to seek sanctions from Plaintiff for its failure to drop the State Attorney from the instant lawsuit within the 21-day safe harbor provision after being notified why its First Amended Complaint had no basis in fact or law. Furthermore, as set forth at length above, despite Plaintiff's contention, the State Attorney had no obligation to serve his Amended Motion prior to filing it with the Court as Plaintiff had already dropped him from the case when it was filed.

III. THE COMPETENT, SUBSTANTIAL EVIDENCE ON THE RECORD SHOWS THAT THERE IS NO ARGUABLE BASIS IN LAW OR FACT FOR THE ISSUES RAISED IN PLAINTIFF'S COUNT I, WHICH NOT ONLY LACK A GOOD FAITH ARGUMENT FOR THE INTERPRETATION OF EXISTING LAW OR ESTABLISHMENT OF A NEW LAW WITH A REASONABLE EXPECTATION OF SUCCESS, BUT ALSO ARE NEITHER NOVEL OR COMPLEX.

In determining an award of sanctions under § 57.105, the trial court's findings "must be based on substantial competent evidence" and the trial court "must make an inquiry into what the losing party knew or should have known during the fact-establishment process, both before and after the suit was filed." *See Trust Mortg., LLC c. Ferlanti*, 193 So. 3d 997, 1001 (Fla. 4th DCA 2016); *See also Chue v. Lehman*, 21 So. 3d 890, 891-92 (Fla. 4th DCA 2009).

Here Plaintiff relies on § 57.105(3)(a), which sets forth a scenario where sanctions are improper under the Statute:

> 3) Notwithstanding subsections (1) and (2), monetary sanctions may not be awarded:
>
> (a) Under paragraph *(1)(b)* if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, *as it applied to the material facts, with a reasonable expectation of success*.

Fla. Stat. § 57.105(3)(a).

In support of its position, Plaintiff unpersuasively relies on the court's determination in *MC Liberty Express, Inc. v. All Points Servs., Inc.*, 252 So. 3d 397, 403 (Fla. 3d DCA 2018) (finding that "[w]here a party reasonably believes the factual basis for its claim exists, it is entitled to proceed with its claims and seek to prove those facts. If attempts to prove those facts are fruitless, that is still not cause for sanctions where the party's initial belief was well founded." Likewise, Plaintiff asserts that "even in absence of existing supportive law, if the claim at issue was presented as a good-faith argument for the extension or modification of existing law or the establishment of new law, *with a reasonable expectation of success*, the Court cannot sanction the party or its

attorney." *See Key Biscayne Gateway Partners, Ltd. v. Village Council for Village of Key Biscayne*, 240 So. 3d 84, 87 (Fla. 3d DCA 2018).

A. The defense to the issuance of sanctions under § 57.105(3)(a) does not protect Plaintiff because as applied to the material facts, Plaintiff has failed to provide a good faith argument with a reasonable expectation of success.

Notably, Plaintiff's arguments exclude the limitation that the § 57.105(3)(a) defense only applies to demands made under § 57.105(1)(b). Accordingly, Plaintiff's attempt to prevent an award of sanctions here only applies to whether Plaintiff or Plaintiff's attorney "knew or should have known" that the First Amended Complaint "when initially presented to the court or at any time before trial ... (b) *would not be supported by the application of then-existing law to those material facts necessary to establish their claim*." [*See, § 57.105(1)(b)*].

Despite Plaintiff's argument that sanctions pursuant to § 57.105(1)(b) are unjustified based on the defense provided under § 57.105(3)(a), Plaintiff's argument fails as there is no arguable basis in law that the State Attorney provide the Requested Materials. In determining an award of sanctions under § 57.105, the trial court "*must make an inquiry into what the losing party knew or should have known during the fact-establishment process, both before and after the suit was filed*." *See Trust Mortg., LLC c. Ferlanti*, 193 So. 3d 997, 1001 (Fla. 4th DCA 2016); *See also Chue v. Lehman*, 21 So. 3d 890, 891-92 (Fla. 4th DCA 2009). Here, Plaintiff's fact-establishment process began before either of its original Complaint or First Amended Complaint were filed. Notably, both pleadings revolved around Plaintiff's arguments for a private right of action under Fla. Stat. § 905.27 and whether *The Palm Beach Post* had constitutional and statutory standing to overcome grand jury secrecy provisions "in furtherance of justice."

As Plaintiff researched § 905, Fla. Stat. it would seem reasonable that Plaintiff would have encountered § 905.17, Fla. Stat. during its fact-establishment process. Notably, regarding the disclosure of grand jury materials, § 905.17(1) states:

> *The notes, records, and transcriptions are confidential* and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution *and shall be released by the clerk only* on request by a grand jury for use by the grand jury or *on order of the court* pursuant to s. 905.27.

Accordingly, based on the clear, unambiguous statutory language set forth in § 57.105.17(1), only the Clerk, not the State Attorney, may release grand jury materials pursuant to an order of the court. Thus, it is apparent that the State Attorney and his office lack the legal authority to obtain and deliver the Requested Materials demanded by Plaintiff in Count I of the First Amended Complaint.

Regardless of whether Plaintiff actually knew of the controlling provision set forth in § 905.17(1) during its fact-establishment process, Plaintiff was not only on constructive notice of said statutory provision, Plaintiff was specifically informed of this provision in several instances prior to the State Attorney being dropped as a party. Nonetheless, based on Plaintiff's own research, statutory constructive notice, the State Attorney's affidavit, all of the pleadings and correspondence in this matter as well as through the State Attorney's office press release and social media accounts, and Chief Judge Marx's statements during the June 3, 2020 hearing, Plaintiff should have known that Count I of the Amended Complaint "would not be supported by the application of then-existing law to [the] material facts" in this action. *See § 57.105(1)(b).*

B. Sanctions against Plaintiff are appropriate under § 57.105(1)(a) as Plaintiff knew or should have known that Count I was not supported by the material facts necessary to establish the claim or defense.

Even if Plaintiff were somehow successful in defending against sanctions based on a good faith argument for a reasonable expectation of success pursuant to § 57.105(1)(b), sanctions would

still be appropriate against Plaintiff pursuant to § 57.105(a) regardless of Plaintiff's alleged "good faith belief" or "reasonable expectation of success." Section 57.105(1)(a) states that "the court *shall* award a reasonable attorney's fee ... on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial ... (a) *was not supported by the material facts necessary to establish the claim or defense*."

As to § 57.105(1)(a), the material facts showing that Plaintiff's claim has no reasonable expectation of success have been open, obvious, and apparent to everyone involved in this matter from the start. Specifically, the State Attorney's position has been consistent: neither he nor his office has possession, custody, or control of the Requested Materials and therefore the declaratory relief sought by Plaintiff seeks materials that are impossible for the State Attorney or his office to produce and he is not a proper party to this action. **[Def.Ex.7, ¶¶ 3-4]**. Again, these material facts negating Plaintiff's claim against the State Attorney were not only set forth in the June 8, 2020, § 57.105 Demand Letter, but have been the basis for the State Attorney's defense in every pleading, filing, and/or correspondence in this matter.

Plaintiff should have known from the initiation of the case that the First Amended Complaint was not supported by the material facts necessary to establish their claim for declaratory relief; and, at the very least, Plaintiff should have known that its First Amended Complaint was not supported by the material facts after Judge Marx's statements during the June 3, 2020 hearing on Defendant's Motion to Dismiss Plaintiff's Count II. During that hearing, Chief Judge Marx drew a bright line as to when Plaintiff knew or should have known that Count I of the Amended Complaint had no basis in fact or law since the relief sought thereby is impossible for the State

Attorney to perform. Specifically, Chief Judge Marx made the following statements putting Plaintiff on notice if they weren't already:

> "I must look at the four corners of the motion, which alleges that the State Attorney, Dave Aronberg, and the clerk and comptroller, Sharon Bock, actually have custody and control of these grand jury proceeding. Whether that is true or not is not for this court to determine because I'm looking simply at the four corners of the complaint. But, not for nothing, I think we all know that they don't have control and custody of the records." [June 8, 2020 Hearing Transcript, p. 3:18 – 4:1].
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> "I think we can all agree ... that the state attorney doesn't have these records." [June 8, 2020 Hearing Transcript, p. 5:17-19].
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> "I'm asking you, how are the clerk and the state attorney the proper defendants?" [June 8, 2020 Hearing Transcript, p. 8:4-6].
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> "I'm puzzled by the procedural posturing of this case naming the state attorney. And, you know, I'm further stymied by the fact that you allege in your complaint that they have – particularly David Aronberg the State Attorney – that he has these records." [June 8, 2020 Hearing Transcript, p. 8:8-14].
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> "[O]kay, let's run this all the way out. Let's say you win and you get a judgment against the State Attorney Dave Aronberg. What's he supposed to do with it? He can't release the grand jury testimony. He has no authority whatsoever to do that." [June 8, 2020 Hearing Transcript, p. 8:18-22].
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> "And the only thing we're here today about is why should the clerk and the state attorney have to defend a civil action when it's a [im]possibility of performance? They – even if you were to win and get a judgment against them, they cannot give you what they don't have." [June 8, 2020 Hearing Transcript, p. 10:21 – 11:1].
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> "I'm simply saying why should these two entities have to defend this lawsuit when even down the road if [you] win they can't give you what they don't have?" [June 8, 2020 Hearing Transcript, p. 11:12-15].
>
> "And, you know, really, I want you to boil it down for me as to this – let's take it all the way down the road. You win. You get a judgment against the clerk and the state attorney. I know there's other reasons why you might have filed it this way. But I'm just simply puzzled because I do hear what the clerk and the state attorney are saying, and that is, performance is impossible. They don't have the records and cannot – absolutely. There's not even an inch of wiggle room – that they could release the records even if you got a judgment. It is solely a determination for the court. I, frankly, think, you know, there's ways to get to your records. There's ways to get confidential records. But it isn't by suing the state attorney and the clerk." [June 8, 2020 Hearing Transcript, p. 16:12 – 17:3].

> "Even assuming arguendo that they have the records – we know they don't – you were to get a judgment against them, how would you expect them to perform?" [June 8, 2020 Hearing Transcript, p. 17:6-9].
>
> "What do you mean? What do you mean? They're not trying to block it. They're saying that despite the fact – let's just talk about the clerk, because we all know the state attorney doesn't have it." [June 8, 2020 Hearing Transcript, p. 17:23 – 18:2].

In fact, during the Motion to Dismiss hearing, Plaintiff's counsel, Ms. Boyagian, acknowledged on the record the State Attorney's assertion that he does not have possession, custody, or control of the Requested Materials:

> "My understanding is that the state attorney has asserted that he does not have possession. It's not my understanding that the clerk has taken that position. So the clerk may indeed be the – someone who does have possession, custody, and control." [June 8, 2020 Hearing Transcript, p. 9:1-6].
>
> "Two points, your Honor: One is that, again, the clerk did not assert in her papers that she does not have control. That is a position that the State Attorney's Office has asserted." [June 8, 2020 Hearing Transcript, p. 17:10 - 13].

Consequently, following the June 3, 2020 Motion to Dismiss Hearing, at the very least, Plaintiff knew or should have known under § 57.105(1)(a) that Count I of the Amended Complaint "was not supported by the material facts necessary" to establish their claim. *See Fla. Stat. § 57.105(1)(a)*. In fact, later the same day that Chief Judge Marx entered her Order Granting Defendants' Motions to Dismiss Count II with Prejudice, the State Attorney's § 57.105 Demand and accompanying First Motion for Attorneys' Fees was served on Plaintiff explaining the impossibility of the State Attorney being able to provide the Requested Materials. Accordingly, the foregoing not only shows that § 57.105 sanctions are justified against Plaintiff, but also that there is no arguable basis in fact that the State Attorney provide the Requested Materials.

C. Plaintiff's Count I is neither novel nor complex as it merely seeks declaratory relief and because the State Attorney's lack of possession, custody, or control of the Requested Materials creates an impossibility of performance.

Plaintiff also argues that "Where an issue is novel and complex, sanctions under Section

57.105(a) may not be imposed." *Grove Key Marina, LLC v. Casamayor*, 166 So. 3d 879 (Fla. 3d DCA 2015). However, despite Plaintiff's reliance on *Casamayor*, there is nothing in the court's opinion that stands for the proposition that Plaintiff asserts. Nonetheless, the Fist District Court of Appeal in Martin County Conservation Alliance v. Martin County, 73 So. 3d 856, 864 (Fla. 1st DCA 2011), stated that "[w]ere we to determine that complex cases are immune from *sanctions* under *section 57.105*, we would be abdicating our duty and violating *Article II, section 3 of the Florida Constitution*." Moreover, while Plaintiff's Count II may fall into the category of being "novel" since it sought a private right of action under § 905.27; however, Plaintiff's Count I does not rise to such a level as it merely seeks declaratory relief. Regardless, Plaintiff's arguments in support of Count I have no good faith basis or reasonable expectation of success as further set forth below.

Here, it is apparent that Plaintiff's Count I for declaratory relief is neither novel or complex. All of the available facts since the initiation of the case and thereafter have stood in stark contrast to Plaintiff's alleged "well-founded belief" and "good faith" argument in support of Count I. Oddly, in arguing for novelty and complexity, Plaintiff heavily relies on its Count II for a private right of action under § 905.27, Fla. Stat. and whether *The Palm Beach Post* had constitutional and statutory standing to overcome grand jury secrecy provisions "in furtherance of justice." *See, § 905.27*.[2] Notably, Chief Judge Marx's June 8, 2020 Order Dismissing Count II with Prejudice already dispensed of any further argument on this matter, but nonetheless Plaintiff seems compelled to continually attempt to raise the issue. Nonetheless, based on the dismissal with

[2] Although Plaintiff makes an attempt to continually argue Count II after it was dismissed with prejudice it is significant to note that ""if an action asserts a theory of liability using more than one, but separate, factual scenarios in support of the theory, and one of the factual scenarios meets the criteria for a 57.105(1) fee sanction because it is not supported by law, the sanction must be ordered." *Davis v. Bailynson*, 268 So. 3d 762, 769 (Fla. 4th DCA 2019).

prejudice of Count II, the only matter remaining before the Court is Plaintiff's Count I for declaratory relief.

Here, Plaintiff's argument for novelty and complexity fails as to Count I, regardless of Plaintiff's reliance on "Constitutional provisions and interpretive case law, along with Fla. Stat. § 905.27" ... "to propose a good faith interpretation of existing law in support of its declaratory relief claim in Count I." [Def.Ex.10, p. 10]. The simple fact of the matter is that Count I is neither novel or complex because Count I merely seeks declaratory relief and the State Attorney's lack of possession, custody, or control creates an impossibility of performance as to Count I, which greatly simplifies the determination of whether the State Attorney is liable here.

Additionally, Plaintiff was on notice and should have known that the State Attorney had no possession, custody, or control of the Requested Materials as of November 26, 2019, at the earliest, when the State Attorney's Motion to Dismiss was filed in response to Plaintiff's original Complaint. That filing specifically stated that "despite Plaintiff's allegations to the contrary, Defendant Aronberg is not in custody or control of the records sought and is therefore not a proper party to this action." Beyond this initial notice, as set forth above, based on Plaintiff's own research, statutory constructive notice, the State Attorney's affidavit, all the pleadings and correspondence in this matter as well as through the State Attorney's office press release and social media accounts, and Chief Judge Marx's extremely significant statements, Plaintiff should have known that Count I of the Amended Complaint "(a) was not supported by the material facts necessary to establish the claim or defense; and/or (b) would not be supported by the application of then-existing law to those material facts." *See § 57.105(1)(a) and (b).* Finally, it is important to note that in Plaintiff's Count I for declaratory relief, the court's role is not to create an "extension, modification, or reversal of existing law or the establishment of a new law," but rather

is to provide an interpretation of existing law that clears up any ambiguity. Here, § 905.17(1) is abundantly clear that only the Clerk can release grand jury materials pursuant to a court order; and, it is likewise clear that not only has the State Attorney never had possession, custody, or control of the Requested Materials, but he also lacks any legal authority to obtain and deliver the Requested Materials.

Furthermore, as set forth in detail above and despite Plaintiff's contentions, there is no arguable "good faith" basis in law and/or fact, under § 57.105(1)(a) or (b), or any reasonable expectation of success as to Plaintiff's Count I; and therefore, sanctions against Plaintiff are appropriate under § 57.105. *See, Minto PBLH, LLC v. 1000 Friends of Florida, Inc.*, 228 So. 3d 147, 149 (Fla. 4th DCA 2017). Moreover, under no set of facts did Plaintiff have a reasonable expectation of success against the State Attorney in obtaining the sought after documents because at no time did the State Attorney have possession, custody, or control over said documents. In fact, Plaintiff acknowledged, admitted, and acquiesced to the impossibility of the State Attorney providing the Requested Materials when Plaintiff dropped the State Attorney from the action on October 21, 2020.

IV. THE RECORD EVIDENCE INDICATES THAT PLAINTIFF KNEW OR SHOULD HAVE KNOWN THE STATE ATTORNEY WAS NOT A PROPER PARTY, THAT THERE WAS NO BASIS IN FACT OR LAW AS TO COUNT I, AND THAT THERE WAS NO REASONABLE EXPECTATION OF SUCCESS.

Based on the foregoing arguments and record evidence set forth at length above, it is apparent that at no time did the State Attorney have possession, custody, or control of the Requested Materials and has no legal authority to produce or disclose the Requested Materials. These facts were constantly and continually communicated to Plaintiff via the State Attorney and even through Chief Judge Marx. Further, there is no rule or authority mandating that record evidence eixist in support of a § 57.105 demand when it is made. Thus, the State Attorney is

rendered an improper party in this action based on the foregoing and the impossibility of the State Attorney producing or having the legal authority to produce the Requested Materials.

CONCLUSION

As set forth at length above, Defendant, Dave Aronberg, as State Attorney of Palm Beach County, Florida, respectfully requests that the Court enter an order granting the State Attorney's Amended Motion for Attorneys' Fees in its entirety and grant such other and further relief as the Court deems necessary or proper.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of July, 2021, a copy of the foregoing has been electronically filed with the Florida E-File Portal for e-service on all parties of record herein.

/s/ Douglas A. Wyler