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.

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

Defendants.

CASE NO.: 50-2019-CA-014681-XXXX-MB

DIVISION: AG

AMENDED RESPONSE AND MEMORANDUM OF LAW OF PLAINTIFF CA HOLDINGS, LLC IN OPPOSITION TO STATE ATTORNEY DAVE ARONBERG'S AMENDED MOTION FOR ATTORNEYS' FEES UNDER FLORIDA STATUTES SECTION 57.105

Plaintiff, CA Florida Holdings, LLC, publisher of *The Palm Beach Post* ("Plaintiff" or the "Newspaper") submits this Amended Response and Memorandum of Law in Opposition to State Attorney Dave Aronberg's ("Aronberg") November 9, 2020 Amended Motion for Attorneys' Fees under Florida Statutes Section 57.105 [DE 50] ("Amended Motion").[1] For the reasons set forth below, the Amended Motion should be denied, with prejudice.

INTRODUCTION

Aronberg's November 9, 2020 Amended Motion for sanctions is legally and factually insufficient to meet the requirements of Section 57.105, Florida Statutes.

[1] While the Amended Motion references Florida Rule of Civil Procedure 1.525 in the introductory paragraph, that Rule sets forth a deadline by which "[a]ny party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion[,]" but does not itself provide grounds to those fees or costs. Rather, the Amended Motion is based upon, and seeks relief of sanctions under, Florida Statutes Section 57.105.

First, as a crucial threshold matter, the Amended Motion fails as a matter of law because Aronberg did not comply with the strict 21-day safe harbor notice requirement set forth in Section 57.105(4) prior to filing his November 9, 2020 Amended Motion, which was materially different than, and raised new arguments and cited record evidence not included in his first Motion for Attorneys' Fees ("First Motion") served on June 8, 2020 and filed on July 1, 2020 [DE 35]. This technical failure alone requires the denial of the Amended Motion for sanctions.

Second, as to the merits, the Amended Motion should be denied because Aronberg, in his official capacity as the State Attorney, was a proper party defendant. The State Attorney was undisputedly an interested party to the Newspaper's action seeking access to grand jury records, and he would have had the right to intervene in the lawsuit had he not been named in the Complaint. The State Attorney was at the very least a nominal defendant. Sanctions are inappropriate under Section 57.105.

Third, the Amended Motion fails under Section 57.105 because Aronberg cannot meet the burden for sanctions under the statute and cannot demonstrate that Plaintiff's claim was so devoid of merit both on the facts and the law as to be completely untenable, as required to satisfy Section 57.105(1). Rather, the claim at issue, Count I of Plaintiff's First Amended Complaint, is exactly the type of claim specifically excepted from sanctions under Section 57.105(3)(a), as the Plaintiff's claim was presented to the Court as a good faith argument for the interpretation of existing law or, at least, the establishment of new law, as it applied to the material facts, with a reasonable expectation of success. In short, Plaintiff's claim was made and pursued in good faith and based on sufficient grounds, which insulates it from sanctions. Indeed, the Court's December 20, 2021 Final Judgment described Plaintiff's arguments as "sincere," "palatable and persuasive" and noted this was a case of "first impression" that "implicate[d] issues of constitutional import," in the

context of "genuine subjects of public interest and concern . . . ." *See, e.g.*, [DE 78, pp. 5, 11, 13]. Aronberg's continued position (which he has declined to withdraw) that the Plaintiff's claim was made in bad faith is squarely contradicted by the Court's Final Judgment and the record.

Fourth, even if Aronberg had met the technical 21-day safe harbor notice requirement and could satisfy the heavy burden under the statute, which he did not and cannot, the amount of fees sought by his counsel is not supported by Florida law. Specifically, the contingency risk multiplier that Aronberg's counsel seeks cannot be applied where, as here, the only basis for fees is Section 57.105.

As set forth in more detail below, the Amended Motion should be denied in its entirety.

BACKGROUND

1. On January 17, 2020, Plaintiff filed a First Amended Complaint [DE 17] ("Complaint") against State Attorney Aronberg and the Clerk and Comptroller of Palm Beach County, Florida, Sharon Bock (now Joseph Abruzzo) ("Clerk"), for declaratory relief (Count I) and relief under Florida Statutes Section 905.27 (Count II), seeking to obtain access to records from the grand jury proceeding and criminal prosecution of the late Jeffrey Epstein, a convicted sex offender, by former State Attorney Barry Krischer.

2. On January 24, 2020, Aronberg filed an Answer to Count I and a Motion to Dismiss Count II ("Aronberg Answer") [DE 22].[2]

3. In his Answer to Count I of the Complaint, Aronberg admitted that Plaintiff sought but Defendants "have refused to provide access to testimony, minutes, and other evidence presented in 2006" in the grand jury proceeding. Aronberg Answer, ¶ 72 [DE 2].

[2] The same day, the Clerk also filed an Answer to Count I and Motion to Dismiss Count II [DE 24].

4. On June 8, 2020, the Court entered an Order Granting the Defendants' Motions to Dismiss Count II of Plaintiff's First Amended Complaint With Prejudice [DE 33]. The Order specifically did not address the merits of Count I.

5. On July 1, 2020, Aronberg filed his First Motion seeking sanctions against Plaintiff under Florida Statutes Section 57.105. [DE 35].

6. On June 8, 2020, prior to filing his First Motion, Aronberg's attorney (Douglas A. Wyler, Esq.) served via email to Plaintiff's counsel an unfiled copy of the First Motion with an enclosure letter. The enclosure letter was not filed along with the First Motion [DE 35], which has no exhibits.[3]

7. The June 8, 2020 enclosure letter accompanying the First Motion (but not the First Motion itself) alleged in conclusory fashion that Aronberg did not have possession, custody, or control of the grand jury documents sought by Plaintiff. *See* [DE 45] at Ex. A. Importantly, however, there was no evidence in the record to confirm this allegation, and the First Motion did not refute or even address the State Attorney's ability to object to or impede attempts by the Plaintiff (or any other third party) to seek grand jury documents, whether through the Clerk or other means.

8. At the time of Aronberg's First Motion for sanctions, which he expressly admitted was a "place-marker" motion to the extent he ultimately prevailed on the merits,[4] no motions for summary judgment had been filed and Aronberg had not served any affidavit(s) or identified any evidence relating to this matter or any allegations in the Complaint.

[3] Aronberg later attached the June 8, 2020 enclosure letter as Exhibit A to his October 14, 2020 Response to Plaintiff's Memorandum of Law in Opposition to the State Attorney's Fla. Stat. Section 57.105 Motion ("Aronberg's October 14, 2020 Reply") [DE 45].
[4] *See* Aronberg's October 14, 2020 Reply [DE 45], at 5, 13.

9. On or about August 18, 2020, Aronberg filed a Motion for Summary Judgment [DE 38] and an affidavit [DE 39] averring that he did not have possession or control over the Epstein grand jury materials and had no authority to demand that the Clerk provide access to the materials. This was the first record evidence relating to Aronberg's lack of possession or control of the grand jury materials sought by Plaintiff. Notably, Aronberg's affidavit still did not refute or address the State Attorney's ability to object to or otherwise impede an attempt by Plaintiff to seek grand jury documents.

10. On October 21, 2020, Aronberg filed a motion to set a hearing on his Motion for Summary Judgment [DE 47]. On that same date, Plaintiff filed a Notice of Dropping Party as to Aronberg, dismissing him from the case [DE 48].

11. Nineteen days *after* Plaintiff dismissed Aronberg from the action by filing an October 21, 2020 notice dropping Aronberg as a party [DE 48], on November 9, 2020, Aronberg filed his Amended Motion [DE 50], seeking sanctions under Florida Statutes Section 57.105 against Plaintiff relating to all fees and costs incurred by Aronberg after June 8, 2020.

12. The Amended Motion, unlike his First "place-marker" Motion filed on July 1, 2020, referenced Aronberg's August 18, 2020 Motion for Summary Judgment and exhibits.

13. Importantly, unlike his First Motion, which was served via email upon Plaintiff's counsel 21 days before filing, Aronberg's Amended Motion was never served via any method of delivery before it was filed on November 9, 2020.

14. On August 12, 2021, Aronberg filed an Amended Memorandum of Law in Support of his Amended Motion for Attorneys' Fees. [DE 74].

15. As to the Plaintiff's remaining claim against the Clerk, on April 22, 2021, Plaintiff filed a motion for summary judgment against the Clerk as to Count I of the Complaint. [DE 58].

16. The hearing on the Plaintiff's motion for summary judgment against the Clerk as to Count I of the Complaint took place on October 22, 2021.

17. On December 20, 2021, the Court entered an order on Plaintiff's motion for summary judgment. Because the only other count of the Complaint, Count II, had been disposed of by Order filed June 7, 2020 [DE 33], the Court's December 20, 2021 order was a final judgment in the case ("Final Judgment"). [DE 78].

18. On January 27, 2022, Plaintiff filed a notice of appeal as to the Final Judgment. [DE 83].[5]

19. The evidentiary hearing on Aronberg's Amended Motion for sanctions is set on the Court's ten-week docket between March 14 and May 20, 2022. [DE 73].

MEMORANDUM OF LAW

I. LEGAL STANDARD

Under Section 57.105, Florida Statutes, the Court may award reasonable attorneys' fees only if it finds that a party or its attorney knew or should have known that a claim or defense when initially presented to the Court or at any time before trial was not supported by 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. To award sanctions, "the trial court must find that there were no justiciable issues of law or fact and that the losing party's attorney did not act in good faith based on the representations of his or her client." *Siegel v. Rowe*, 71 So. 3d 205, 211 (Fla. 2d DCA 2011) (quotation omitted).

Indeed, "[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,*

[5] Although the Clerk had previously filed a motion to amend the Final Judgment on January 3, 2022 [DE 81], the Clerk withdrew the motion to amend on January 26, 2022 [DE 89].

Inc., 228 So. 3d 147, 149 (Fla. 4th DCA 2017) (citing *Kowallek v. Rehm*, 189 So. 3d 262, 263–64 (Fla. 4th DCA 2016)) (emphasis added). Courts must apply Section 57.105 "with restraint to ensure that it serves its intended purpose of discouraging baseless claims without casting a chilling effect on use of the courts." *MacAlister v. Bevis Constr., Inc.*, 164 So. 3d 773, 776 (Fla. 2d DCA 2015).

Taking into account the amendments that broadened the statute after 1999, "Florida courts have continued to caution that section 57.105 must be carefully applied to ensure that it serves the purpose for which it was intended – to deter frivolous pleadings." *MC Liberty Express, Inc. v. All Points Servs., Inc.*, 252 So. 3d 397, 403 (Fla. 3d DCA 2018) ("Thus, an award of fees under section 57.105 requires more than the moving party succeeding in obtaining a dismissal of the action or the entry of a summary judgment in its favor, . . . and a party does not need to have conclusive evidence to prove its case at the time of filing in order to avoid sanctions. Where 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.") (internal citations omitted). Thus, a voluntary dismissal does not automatically equate to sanctionable conduct.

Before awarding sanctions, the trial court must make "***explicit findings***" that "the action was 'frivolous or so devoid of merit both on the facts and the law as to be completely untenable.' . . . ***This burden is a heavy one***." *Id.* (internal citations omitted) (emphasis added). Additionally, the trial court's findings "must be based on substantial competent evidence presented to the court at the hearing on attorney's fees or otherwise before the court and in the trial court record." *Trust Mortg., LLC v. Ferlanti*, 193 So. 3d 997, 1001 (Fla. 4th DCA 2016). 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 suit was filed." *See Chue v. Lehman*, 21 So. 3d 890, 891-92 (Fla. 4th DCA 2009).[6]

II. ARONBERG'S AMENDED MOTION MUST BE DENIED FOR FAILURE TO COMPLY WITH THE 21-DAY SAFE HARBOR PROVISION IN SECTION 57.105(4).

A. ARONBERG FAILED TO SERVE 21 DAYS PRIOR TO FILING THE AMENDED MOTION ASSERTING NEW ARGUMENTS, IN VIOLATION OF SECTION 57.105(4).

Aronberg's Amended Motion failed to comply with the 21-day notice provision set forth in Florida Statutes Section 57.105(4) and, as a result, the Amended Motion must be denied outright. Aronberg's Amended Motion raised arguments not raised in his First Motion, and cited evidence not in the record at the time the First Motion was filed, thus Aronberg was required to independently comply with the 21-day safe harbor provision of Section 57.105(4) as to the Amended Motion. *See Lago v. Kame By Design, LLC*, 120 So. 3d 73, 75 (Fla. 4th DCA 2013) ("We hold 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).").

Thus, Aronberg's failure to serve the Amended Motion on Plaintiff at any time prior to filing it, alone, requires denial of the Amended Motion. *See id.* As the Fourth District Court of Appeal noted in *Lago*, "[t]o hold otherwise would allow a party to raise a new ground for sanctions in a subsequent motion under section 57.105 without giving the other side the opportunity to withdraw the offending claim or defense within twenty-one days after receiving notice of the new

[6] There is at least one instance where Florida Epstein grand jury materials have been disclosed, though who did so, when and how they were disclosed is not presently known. The United States Department of Justice acknowledges that Florida Epstein grand jury materials are in its possession. *See* Plaintiff's Motion for Summary Judgment, ¶ 76 [DE 58].

ground for sanctions." 120 So. 3d at 75; *see also Moore v. Estate of Albee by Benzenhafer*, 239 So. 3d 192, 195, n.2 (Fla. 5th DCA 2018) (court could not consider amended motion for section 57.105 fees because it raised additional grounds for sanctions not raised in the defendant's prior motion for fees and there was "no indication that [defendant] complied with the twenty-one-day 'safe harbor' provision of section 57.105(4)") (citing *Lago*, 120 So. 3d at 75); *Phillips v. Garcia*, 147 So. 3d 569, 572 (Fla. 3d DCA 2014) (also citing *Lago*, and denying motion for section 57.105 fees on other grounds and "find[ing] it significant" that the defendant's motion for 57.105 fees did not allege qualified immunity—the defense which was successful on the merits—as a grounds for entitlement to an award of fees).

Because Aronberg's barebones First Motion did not include the substantive arguments nor cite any evidence later raised in the Amended Motion, Aronberg was required to serve the Amended Motion at least 21 days before filing same, in order to give Plaintiff the opportunity to withdraw the count that remained against Aronberg (Count I). The Amended Motion was filed in violation of Section 57.105(4) and should be denied.

B. THE COURT CANNOT CONSIDER THE AMENDED MOTION FOR SANCTIONS BECAUSE IT WAS FILED AFTER ARONBERG WAS DISMISSED AS A PARTY FROM THE ACTION.

On November 9, 2020, Aronberg filed the Amended Motion seeking sanctions against Plaintiff relating to Count I of the Complaint against him. However, the entire action, which necessarily included Count I, was dismissed as to Aronberg on October 21, 2020, *nineteen days before* Aronberg filed his Amended Motion. [DE 48, 50]. Because, at the time Aronberg filed the Amended Motion, Aronberg had already been dismissed as a party, the Court does not have jurisdiction over and cannot consider the later-filed Amended Motion. *See Sidlosca v. Olympus Ins. Co.*, 276 So. 3d 987, 989 (Fla. 3d DCA 2019) ("Because entitlement to fees was premised upon a motion for sanctions filed after the voluntary dismissal, and it is well-established that 'a

trial court has continuing jurisdiction to consider a section 57.105 motion for sanctions only where the motion for sanction was filed with the court before a voluntary dismissal, we are constrained to reverse and remand" the trial court's award of fees under section 57.105) (quoting *Lago*, 120 So. 3d at 74, where the court stated that "[b]ecause appellee's second motion for section 57.105 sanctions did not comply with the twenty-one-day 'safe harbor' provision of section 57.105(4), the trial court erred in granting that motion."); *see also Pino v. Bank of N.Y.*, 121 So. 3d 23, 42 (Fla. 2013) (in light of the 21-day safe harbor provision under Fed. R. Civ. P. 11, which is "nearly identical" to and interpreted as Fla. Stat. § 57.105(4), the motion for sanctions at issue must be submitted prior to dismissal of the claim for the court to have jurisdiction, as the safe harbor provision allows the party to withdraw the offending pleading).

Plaintiff's prior dismissal of Aronberg as a party means that the Court does not have jurisdiction to consider the later-filed Amended Motion for sanctions. As a result, the Amended Motion should be denied.

C. ARONBERG'S SELF-DESCRIBED "PLACE-MARKER" FIRST MOTION FOR SANCTIONS WAS INSUFFICIENT AND DID NOT ABSOLVE ARONBERG OF THE REQUIREMENT TO SERVE THE AMENDED MOTION PRIOR TO FILING.

Aronberg specifically admitted that his First Motion for sanctions under Florida Statutes Section 57.105 was filed as a "place-marker" to "notify Plaintiff of the State Attorney's intention to seek sanctions should he prevail on the merits at a future substantive hearing." *See* Aronberg's October 14, 2020 Reply [DE 45], at 5, 13 ("The 57.105 Motion was filed . . . to further put the Plaintiff on notice that the State Attorney would seek sanctions should he prevail on the merits of the lawsuit.").

The First Motion for sanctions was insufficient under Section 57.105 when filed – it set forth no substantive arguments as to why Count I of the Amended Complaint was insupportable based on material facts in the record or the application of existing law to those facts. Rather, at the

time the First Motion was filed, there was no evidence in the record supporting the statement by Aronberg's counsel that it was impossible for him or the State Attorney's Office to provide the documents sought in the Complaint.

Essentially, what Aronberg argued in his "place-marker" First Motion is that if he prevailed in defending the lawsuit, his attorneys' fees should be awarded as sanctions against Plaintiff in his favor.[7] There is no such mechanism as a "place-marker" motion for sanctions. Otherwise, any defendant could file a threadbare and conclusory "place-marker" notice of his intent to seek fees if he ultimately prevails, and then seek fees based on *later-filed* evidence and arguments. A motion for sanctions must be supported by the record evidence at the time it is filed. Because the First Motion was not so supported, it fails under the statute. Further, as explained above, service of the First Motion did not absolve Aronberg of his obligation to serve the Amended Motion on Plaintiff through counsel prior to filing the Amended Motion. The First Motion cannot be a "place-marker" for the mandated service of the Amended Motion under Section 57.105(4).

III. STATE ATTORNEY ARONBERG WAS A PROPER PARTY.

The material facts in the record at all times supported Plaintiff's claim against Aronberg. When Count I was filed, and throughout the litigation prior to Aronberg's dismissal, Plaintiff had a good faith basis for understanding that the State Attorney's Office had either access to, control over, or the ability to impinge, prevent, or thwart Plaintiff's attempts to obtain public access to the Epstein grand jury materials. *See*, *e.g.*, *Ferlanti*, 193 So. 3d at 1000 (reversing trial court's award of 57.105 fees for naming husband as defendant in mortgage foreclosure proceeding, even though husband was never a signatory to mortgage or note and plaintiff made no such allegations, but

[7] Aronberg's "place-marker" First Motion appeared to be based erroneously on a prevailing party standard (*see* Reply, at 5, 13), which is not the applicable standard for imposing sanctions expressly set forth in Section 57.105.

there was at least some triable set of facts under which defendant could have been liable); *see also Grove Key Marina, LLC v. Casamayor*, 166 So. 3d 879, 885-86 (Fla. 3d DCA 2015) (affirming denial of section 57.105 motion for fees even though lessees prevailed in defeating the county's claim against them for unpaid taxes, as the law at issue was a complicated matter, the county "simply covered its bases," and the county's position that it could take remedial action against the lessees even after it became clear that the city, not the lessees, owed the taxes, "while novel, [was] not completely unreasonable.").

Nowhere in the record did Aronberg ever refute his office's ability to object to or otherwise impede attempts by the Newspaper to seek grand jury materials. While Aronberg's August 18, 2020 affidavit filed with his Motion for Summary Judgment averred that he did not have possession or control over the Epstein grand jury materials, his affidavit was notably silent as to whether the State Attorney could or would seek to intervene in or object to the Newspaper's attempts to obtain the Epstein grand jury materials. *See* [DE 38, 39]. On October 21, 2020, when Aronberg filed a motion to set a hearing on his Motion for Summary Judgment, Plaintiff made the strategic decision to dismiss Aronberg as a party from the action, despite it still having a substantial good faith basis to keep Aronberg in the case even at that point. *See* [DE 47, 48].[8]

As State Attorney, Aronberg was not named in this action solely as a custodian of the grand jury records. Rather, he was a defendant in his official capacity because his office has "as its

[8] It is also worth noting that while Aronberg alleged in the June 8, 2020 enclosure letter to his First Motion that his office did not have physical possession of the Epstein grand jury materials, he nevertheless argued in that same letter, relying on Section 905.27, that the Clerk should not produce them. By taking a position against disclosure, Aronberg, in effect, asserted his right to the secrecy of the Epstein grand jury materials. Stated another way, Aronberg claimed the statutory right for the State Attorney's Office to *prevent* access to the Epstein grand jury materials, a position which actually supported the propriety of naming him, in his official capacity, as a party defendant in this action.

primary interest the protection of its grand jury system." *In re Grand Jury Proceedings*, 832 F. 2d 554, 559 (11th Cir. 1987) (italics in original). In that case, the federal government petitioned a Florida State Attorney to turn over state grand jury transcripts. In opposition, the Broward County State Attorney argued against their release, citing to Section 905.27. Later, a federal grand jury served a subpoena upon the same State Attorney seeking grand jury transcripts. The State Attorney advised the federal court that he would produce the transcripts, thereby demonstrating that irrespective of physical possession, he had legal authority to obtain and deliver them pursuant to the subpoena. For these same reasons, State Attorney Aronberg, in his official capacity, was a necessary party, at the very least as a nominal defendant.

Plaintiff had a legitimate and good faith basis to name Aronberg in his capacity as the State Attorney as a party defendant and to include him in the lawsuit. As the public official charged with protecting the grand jury process, the State Attorney was a necessary party, and he would have had the right to intervene as a defendant even if he was not named as a party in the Complaint. As the Court noted in the Final Judgment, the State Attorney had been dismissed and "there have been no attempts to intervene in this case to take a position against disclosure" of the grand jury materials. *See* [DE 78, pp. 2-3].

Further, even assuming the State Attorney did not have physical possession, Florida law does not prohibit his office from requesting the Epstein grand jury materials from the Clerk. Indeed, as the State Attorney is well aware, Florida Statutes Chapter 905 does not bar any State Attorney from accessing grand jury materials, even after a defendant has been convicted and sentenced.

IV. THE ISSUES RAISED IN COUNT I OF THE COMPLAINT WERE A MATTER OF FIRST IMPRESSION, WERE NOVEL AND COMPLEX AND PRESENTED A GOOD FAITH ARGUMENT FOR THE INTERPRETATION OF EXISTING LAW OR ESTABLISHMENT OF NEW LAW, THUS SANCTIONS ARE NOT APPROPRIATE.

A. ARONBERG CANNOT SATISFY THE REQUIREMENTS OF SECTION 57.105(1).

Sanctions are plainly inappropriate under Section 57.105(1) where, as here, a good faith basis exists for a proposed interpretation of the law applied to the material facts. *See* Fla. Stat. § 57.105(1). Nothing in the record supports Aronberg's position that the Newspaper's claim for declaratory relief in Count I lacked good faith and was unsupported by fact or law.[9] To the contrary, even the Court's Final Judgment described the Newspaper's arguments as "strong," "sincere," "palatable and persuasive," and noted that the Newspaper's position was supported by case law from other jurisdictions. *See, e.g.*, [DE 78], at p. 5, p. 7 ("The Newspaper makes strong arguments to advance its more expansive construction . . . ."), p. 9 ("The Newspaper provides several passages from state and federal cases . . . ."), p. 11 ("the court acknowledges the Newspaper's vibrant and sincere arguments"). The Court went so far as to "commen[d] both parties' attorneys for their exceptional oral and written presentations." *Id.* at p. 13.

Moreover, the Court noted this was a case of "first impression," which "implicate[d] issues of constitutional import regarding the historic tension between grand jury secrecy and the First Amendment," in the context of "genuine subjects of public interest and concern." *Id.* at p. 5. There

[9] Aronberg's November 9, 2020 Amended Motion appears to relate only to Count I of the Complaint (although, as set forth above, no count was pending against Aronberg as of October 21, 2020). While Count II alleged that the Newspaper has constitutional and statutory standing to overcome grand jury secrecy provisions "in furtherance of justice," Count I, in contrast, did not allege a Section 905.27 private right of action. Instead, Count I sought declaratory relief under the U.S. Constitution's First Amendment and the Florida Constitution's analogous provisions. As to Count II, Plaintiff presented various reasoned arguments why Section 905.27 creates a private right of action in favor of the media on both constitutional and statutory grounds. *See* Plaintiff's Opposition to Aronberg's Motion to Dismiss Count II of the First Amended Complaint, [DE 26] at pp. 10-15.

is no basis for Aronberg's position that Plaintiff's claim was devoid of merit both on the facts and law as to be completely untenable, in this case of first impression involving important constitutional issues. *See MC Liberty Express*, 252 So. 3d at 403. Where a claim presents novel and complex issues, such as here, sanctions under Section 57.105(1) are not appropriate. *See Grove Key Marina, LLC v. Casamayor*, 166 So. 3d 879, 885-86 (Fla. 3d DCA 2015). Requesting a ruling on an issue of first impression, by its very nature, is a good-faith effort to interpret or extend existing law—and is not baseless or unsupported. It is Aronberg's continued position seeking sanctions, not Plaintiff's claim, that is baseless.

Unlike the State Attorney or the Clerk, who did not cite to any case that previously resolved the issues presented relating to the media's implied private right of action under Florida Statutes Section 905.27 (as alleged in Count II) or for declaratory relief to obtain grand jury materials (as alleged in Count I), Plaintiff cited federal case and other state court cases in which the courts granted disclosure of grand jury materials like those sought here. Plaintiff appropriately relied upon such authorities in its prior filings in this matter to argue that the Constitutional provisions and interpretive case law, along with Florida Statutes Section 905.27, provided ample grounds for the Court to direct the release of the Epstein grand jury materials to the Newspaper as a surrogate for the public, or to require the Court to conduct an *in camera* examination of the same, to balance the public's right to know through a free media with Florida's qualified statutory interest in grand jury secrecy. *See*, *e.g.*, First Amended Complaint [DE 17], at 15-19; Plaintiff's Opposition to Aronberg's Motion to Dismiss Count II of the First Amended Complaint [DE 26], at 10-20; Plaintiff's Memorandum of Law in Opposition to Aronberg's First Motion [DE 43], at 5-7. In short, Plaintiff proposed a good faith interpretation of existing law in support of its declaratory relief claim in Count I.

B. THE EXCEPTION FROM SANCTIONS UNDER SECTION 57.105(3)(A) APPLIES HERE.

Even in the absence of supportive law properly relied upon by Plaintiff, "[a]n award of fees pursuant to section 57.105 is inappropriate when a party makes a good-faith effort to change an existing rule of law," and in such a circumstance, Section 57.105(3)(a) provides an explicit exception from sanctions. *See Cook v. Cook*, 602 So. 2d 644, 646 (Fla. 2d DCA 1999) (trial court abused its discretion in awarding fees against plaintiff's attorney who swore in an affidavit that he filed a subsequent action in a good-faith effort to change the law regarding the doctrine of interspousal immunity to argue the court should create an exception to the doctrine); *Key Biscayne Gateway Partners, Ltd. v. Village Council for Village of Key Biscayne*, 240 So. 3d 84, 87 (Fla. 3d DCA 2018) (reversing order of sanctions under 57.105 as good faith argument was presented for extension of existing law with reasonable expectation of success).

Specifically, Section 57.105(3)(a) mandates that monetary sanctions shall *not* be awarded

> 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) (emphasis added).

At the very least, Plaintiff provided a good-faith argument for the extension or modification of existing law or the establishment of new law, and thus sanctions are not appropriate under Section 57.105(3)(a). *See also* Final Judgment, pp. 12-13 ("Perhaps the circumstances presented above will induce the Legislature to amend section 905.27 to grant the courts additional authority or leeway in ruling on unique cases such as this one. . . . Until that time, this court is bound by the fundamental doctrines of statutory construction, separation of powers and *stare decisis* to rule according to het law as it exists today.").

The Amended Motion for sanctions should be denied based on the express provisions of Section 57.105(1)(a)-(b) and the exception set forth in Section 57.105(3)(a).

V. THE AMOUNT OF FEES SOUGHT, INCLUDING A MULTIPLIER, IS NOT APPROPRIATE.

No amount of fees may be awarded as sanctions under Section 57.105. Even assuming, *arguendo*, that Aronberg somehow met the technical 21-day safe harbor notice requirement and could satisfy the heavy burden under Section 57.105(1), which he did not and cannot, the contingency risk multiplier sought by his counsel cannot be applied as a matter of law.

The State Attorney's counsel, Douglas A. Wyler, Esq., was hired pursuant to a retainer agreement, which is attached as Exhibit G to the Amended Motion [DE 50]. The retainer agreement provided that fees would be paid to Mr. Wyler and his firm only if attorneys' fees were awarded to the State Attorney pursuant to a court order. [DE 50], at Ex. G ("You will not be liable or required to pay any monies to our office unless we are successful in our representation of you in the above-referenced litigation and receive a court order awarding attorneys' fees."). However, Aronberg did not file a counterclaim or any other affirmative claims seeking monetary damages in the litigation. And the causes of action in the Plaintiff's complaints (for declaratory judgment and for relief under Chapter 905, Florida Statutes) did not provide any basis for an award of attorneys' fees or the shifting of fees for a prevailing party. Thus, the only basis for attorneys' fees was through sanctions under Section 57.105, Florida Statutes.

It is well-settled under Florida law that a contingency risk multiplier, as sought by Aronberg's counsel here, cannot be applied where the only basis for fees is sanctions under Section 57.105. *See, e.g.*, *Swortz v. Southern Rainbow Corp.*, 603 So. 2d 107, 108 (Fla. 3d DCA 1992) ("[W]hen a case is so patently frivolous as to cause counsel to represent his or her client for a fee that is solely contingent upon a section 57.105 recovery, it cannot reasonably be treated as

involving a risk that would support a multiplier.") (citing *Transflorida Bank v. Miller*, 576 So. 2d 752, 754 (Fla. 4th DCA 1991)); *see also Richardson v. Merkle*, 646 So. 2d 289, 290 (Fla. 2d DCA 1994) (holding it was error to apply a contingency risk multiplier to an award of fees based on Section 57.105, and reversing as to the amount of the multiplier); *see also Wolfe v. Nazaire*, 758 So. 2d 730, 733 (Fla. 4th DCA 2000) (reversing and remanding trial court's award of fees where court did not explain its reasons for award using a multiplier, as the court is required to state the ground on which it justifies the enhancement or reduction of fees).

The multiplier sought by Aronberg's counsel cannot be awarded as a matter of law. Beyond that, Plaintiff objects to any and all amounts of fees sought by Aronberg's counsel and requires strict proof of the reasonableness of those fees at the evidentiary hearing. No fees are appropriate under Section 57.105.

CONCLUSION

Based on the foregoing, Plaintiff, CA Florida Holdings, LLC, publisher of *The Palm Beach Post*, respectfully requests that the Court deny State Attorney Dave Aronberg's Amended Motion for Attorneys' Fees in its entirety, with prejudice, and grant such other and further relief as the Court deems necessary or proper.

Respectfully submitted,

GREENBERG TRAURIG, P.A.
Attorneys for CA Florida Holdings, LLC, Publisher of The Palm Beach Post

/s/ Lauren Whetstone
LAUREN WHETSTONE
Florida Bar No. 45192
MARK F. BIDEAU
Florida Bar No. 564044
GREENBERG TRAURIG, P.A.
777 South Flagler Drive, Suite 300 East
West Palm Beach, FL 33401

Tel.: 561.650.7900
whetstonel@gtlaw.com
bideaum@gtlaw.com
sandra.famadas@gtlaw.com
thomasd@gtlaw.com
FLService@gtlaw.com

STEPHEN A. MENDELSOHN
Florida Bar No. 849324
GREENBERG TRAURIG, P.A.
401 East Las Olas Boulevard, Suite 2000
Fort Lauderdale, FL 33301
Tel.: 954.768.8225
mendelsohns@gtlaw.com
smithl@gtlaw.com

MICHAEL J. GRYGIEL
(Admitted *Pro Hac Vice*)
GREENBERG TRAURIG, P.A.
54 State Street, 6th Floor
Albany, NY 12207
Tel.: 518.689.1400
grygielm@gtlaw.com

NINA D. BOYAJIAN
(Admitted *Pro Hac Vice*)
GREENBERG TRAURIG, P.A.
1840 Century Park East, Suite 1900
Los Angeles, CA 90067
Tel.: 310.586.7700
boyajiann@gtlaw.com
riveraal@gtlaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of February, 2022, a true and correct copy of the foregoing has been filed with the Clerk of the Court using the State of Florida e-filing system, which will send a notice of electronic service for all parties of record herein.

/s/ Lauren Whetstone, Esq.
Lauren Whetstone, Esq.