IN THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THE WASHINGTON TRAVEL CLINIC, PLLC, *et al.*, **Plaintiffs,** **v.** **JOHN KANDRAC,** **Defendant.**	**Case No.: 2013 CA003233 B** **Judge Laura A. Cordero** **Next Court Date: Jan. 31, 2014** **Event: Initial Scheduling Conference**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR ATTORNEYS' FEES AND COSTS

Having prevailed on his special motion to dismiss Plaintiffs' defamation claim as to all but one statement, and Plaintiffs' tortious interference claim in its entirety, Defendant John Kandrac respectfully moves under the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5504, and D.C. Superior Court Rule 54(d) for his "costs of litigation, including reasonable attorney fees." D.C. Code § 16-5504(a) (authorizing such an award to "a moving party who prevails, in whole or in part," on a special motion to dismiss under the Anti-SLAPP Act). With respect to that portion of his fees and costs incurred in opposing Plaintiffs' Motion for Sanctions under Rule 11, which the Court denied in its entirety, Kandrac also seeks his "reasonable expenses and attorney's fees incurred in . . . opposing the motion" under D.C. Superior Court Rule 11(c)(1)(A).

In support of his motion, Kandrac submits this memorandum of law and an accompanying affidavit from his counsel, setting forth in detail the attorneys' fees and costs incurred.

BACKGROUND

Plaintiffs, a doctor and his clinic, filed this action against a patient for posting a Yelp review. Plaintiffs' Complaint challenged six statements in the review, asserted causes of action for defamation and tortious interference with prospective business advantage, and sought both injunctive relief and $2 million in damages. The action was originally filed under seal, ostensibly to comply with HIPAA. Although Kandrac advised Plaintiffs that he consented to the disclosure of his medical information, which merely involved inoculations for foreign travel, Kandrac was forced to litigate a contested motion to unseal the action, including so that his counsel could be granted access to the Court file. Despite Plaintiffs' opposition, the Court granted that motion in its entirety on July 31, 2013. *See* Order Granting Defendant's Expedited Motion to Unseal the Case at 5.

After Plaintiffs filed an Amended Complaint, which continued to challenge the same six statements and to assert the same causes of action, Kandrac filed a special motion to dismiss pursuant to the D.C. Anti-SLAPP Act, D.C. Code § 16-5501 *et seq.*, and D.C. Superior Court Rule of Civil Procedure 12(b)(6). This required substantial factual and legal research, as well as the preparation of a 32-page opening brief, a 27-page reply brief, and detailed affidavits including voluminous exhibits. In its December 16, 2013 Omnibus Order, the Court granted virtually all of Kandrac's special motion to dismiss under the Anti-SLAPP Act. Specifically, the Court dismissed in its entirety Plaintiffs' cause of action for tortious interference with prospective business advantage, Omnibus Order at 15-17, and dismissed Plaintiffs' cause of

action with respect to five of the six statements Plaintiffs challenged in their Amended Complaint, *id.* at 8-15.[1]

While Kandrac's Anti-SLAPP motion was pending, Plaintiffs also filed a Motion for Sanctions under Rule 11 against Kandrac and his counsel, even though each of the grounds asserted in Plaintiffs' Motion for Sanctions had already been addressed, in virtually identical language, in their Opposition to Kandrac's Special Motion to Dismiss. The filing of the Motion for Sanctions caused Kandrac and his counsel to expend additional attorneys' fees and costs opposing that motion. Specifically, it required, *inter alia*, conducting substantial research regarding Rule 11 motions, and the preparation of a detailed 17-page opposition. In its December 16 Omnibus Order at 17-23, the Court denied Plaintiffs' Motion for Sanctions under Rule 11 in its entirety.

Thus, for simply having published a routine review on Yelp, Kandrac and his counsel have incurred substantial sums defending this action, successfully litigating a Motion to Unseal, a Special Motion to Dismiss (save for one statement), and a Rule 11 Motion. Plaintiffs' conduct here is consistent with Dr. Akl's long history of asserting meritless claims for defamation and

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[1] Defendant subsequently moved for reconsideration with respect to the one remaining statement on the grounds that the Court's Omnibus Order did not address Plaintiffs' obligation under the Anti-SLAPP Act to demonstrate a likelihood of success on the merits of the damages element of their defamation claim. This is particularly significant because (a) the challenged statement was removed from Kandrac's Yelp review after only a matter of days, *see* Kandrac Aff. (filed July 15, 2013) ¶ 13, and (b) Plaintiffs submitted no evidence whatsoever with respect to their alleged damages, including evidence demonstrating that anyone other than Plaintiffs and their counsel saw that statement or thought less of Plaintiffs as a result. In that regard, the Court separately found in connection with Plaintiffs' tortious interference claim that "Plaintiffs have produced no evidence showing that they have suffered any damages as a result of Defendant's reviews, or that they will suffer harm in the future." Omnibus Order at 17. The fees and costs Kandrac seeks herein exclude amounts attributable to briefing that one statement in his special motion to dismiss; however, to the extent that the Court grants the motion for reconsideration, Kandrac also seeks those fees, which are separately enumerated in the Berlin Affidavit, at note 3, for the Court's convenience.

tortious interference in courts throughout the region. *See, e.g.*, Defendant's Special Motion to Dismiss (filed July 15, 2013) at 3-7 and Jones Aff. (filed July 15, 2013) Exs. 1-13 (documenting thirteen prior lawsuits, including multiple unsuccessful appeals).

Here, realizing that an individual like Kandrac could not – unless he were independently wealthy – afford competent counsel to defend against aggressive litigants like Plaintiffs, the undersigned counsel agreed to handle the matter on a contingent basis, with Kandrac paying out-of-pocket expenses, but with the undersigned's law firm otherwise agreeing to recover only those amounts awarded by the Court, if any. As explained below, the Anti-SLAPP Act's award of attorneys' fees and costs to moving parties who prevail in whole or in part incentivizes counsel like the undersigned to represent defendants in SLAPPs, thereby protecting the exercise of their right to freedom of speech.

Particularly given that posture, over the course of this litigation – including before Kandrac filed his special motion to dismiss and again before he filed his reply memorandum – counsel for Defendant approached Plaintiffs' counsel numerous times for the purposes of trying to resolve the matter informally, proposing that Plaintiffs' voluntarily dismiss the case with prejudice in exchange for Defendant's compromising fees and costs he might recover under the Anti-SLAPP Act, and inviting Plaintiffs to propose any alternative they might prefer. Even after issuance of this Court's Omnibus Order, undersigned counsel again proposed trying to resolve the matter (and also proposed extending the time for filing the instant attorneys' fees motion until after resolution of Kandrac's pending motion for reconsideration, *see* note 1 *supra*). At each of these junctures, Plaintiffs have steadfastly refused to discuss any resolution. Therefore, to comply with the deadline under Rule 54(d)(2)(B), Defendant has proceeded to file this motion. As explained below, Plaintiffs' refusals to engage in any attempt at resolution, which in turn

required Defendant to expend substantial additional fees and costs to defend himself, should be factored into the Court's assessment of this motion.

In sum, Kandrac should be awarded his reasonable attorneys' fees incurred in defending this action, less the fees incurred in connection with briefing the one statement on which Kandrac did not prevail.

ARGUMENT

I. THE COURT SHOULD AWARD ATTORNEYS' FEES AND COSTS.

The Court should award Kandrac his fees incurred in defending this action pursuant to the D.C. Anti-SLAPP Act, and pursuant to D.C. Superior Court Rule 11(c)(1)(A) for the portion of fees and costs incurred in opposing Plaintiffs' Rule 11 motion. As explained below, this case involves circumstances that make an award of the reasonable fees and expenses that Defendant seeks especially appropriate.

A. Kandrac Should Be Awarded His Attorneys' Fees and Costs Under the D.C. Anti-SLAPP Act.

The D.C. Anti-SLAPP Act provides substantive protection from lawsuits, such as this one, arising out of "act[s] in furtherance of the right of advocacy on issues of public interest," which a plaintiffs can overcome only by satisfying the heavy burden of demonstrating to this Court that they are "*likely* to succeed on the merits" of their claims. Pursuant to Section 16-5504 of the Anti-SLAPP Act, the Court is authorized to award "the costs of litigation, including reasonable attorney fees" to "a moving party who prevails, in whole or in part." *See also* D.C. Superior Court Rule 54(d)(2)(B) (setting forth procedure for seeking an award of attorneys' fees

and costs to a prevailing party).[2] As the D.C. Council's Committee on Public Safety and the Judiciary explained in the Committee Report, the Anti-SLAPP legislation

> reflect[s] a legislative judgment that SLAPPs . . . have been increasingly utilized over the past two decades as a means to muzzle speech . . . on issues of public interest. Such cases are often without merit, but achieve their filer's intention of publishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights. Further, defendants of a SLAPP must dedicate a substantial[] amount of money, time, and legal resources. The impact is not limited to named defendants['] willingness to speak out, but prevents others from voicing concerns as well.

See Boley v. Atlantic Monthly Grp., --- F. Supp. 2d ----, 2013 WL 3185154, at *3 (D.D.C. June 25, 2013) (quoting Committee Report at 1).[3]

As enacted, the D.C. Anti-SLAPP Act thus provides:

> The court may award a moving party who prevails, **in whole or in part**, on a motion brought under § 16-5502 or § 16-5503 the costs of litigation, including reasonable attorney fees.

D.C. Code § 16-5504(a) (emphasis added). As such, the statute operates similarly to California's statute, in which a defendant who prevails on a part of his anti-SLAPP motion is entitled to an award of the corresponding fees and costs. *See, e.g., Jackson v. Yarbray*, 179 Cal. App. 4th 75, 92, 101 Cal. Rptr. 3d 303, 317 (Cal. Ct. App. 2009) (noting under California anti-SLAPP statute that "even if the special motion to strike is granted only as to some claims, the partially successful defendant is entitled to attorney fees. The lack of success on other claims is relevant to the amount of, but not the right to, fees"). Because the express language of the Anti-SLAPP Act authorizes a successful movant to be awarded its full "costs of litigation," Kandrac should be

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[2] By contrast, a party responding to an Anti-SLAPP motion is entitled to an award of fees and costs "only if the court finds that [an anti-SLAPP] motion . . . is frivolous or is solely intended to cause unnecessary delay," which is obviously not the case here where the lion's share of the anti-SLAPP motion was granted. D.C. Code § 16-5504(b).

[3] The full Committee Report is also attached as Exhibit 17 to the Affidavit of Shaina D. Jones, filed July 15, 2013.

awarded his reasonable fees for, *inter alia*, (a) succeeding on his Motion to Unseal, (b) succeeding on virtually all of his special motion to dismiss, and (c) defeating Plaintiffs' Motion for Rule 11 Sanctions.

Furthermore, while the language of the Anti-SLAPP Act suggests that the award of litigation fees and costs is discretionary, in providing that the Court "may" award fees, the Act is analogous to numerous fee shifting statutes, most notably federal civil rights statutes, in which prevailing parties are presumptively entitled to an award of fees and costs. *See, e.g.*, 42 U.S.C. § 1988(b) ("the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee"); 42 U.S.C. § 2000e-5(k) (same). In construing the permissive language in those statutes, courts have recognized "'a presumption that successful civil rights litigants should ordinarily recover attorneys' fees unless special circumstances would render an award unjust.'" *David v. District of Columbia*, 489 F. Supp. 2d 45, 51 n.11 (D.D.C. 2007) (quoting *Raishevich v. Foster*, 247 F.3d 337, 344 (2d Cir. 2001)). A similar approach is warranted in the SLAPP context, where the claim is "often without merit," and the goal is "not to win . . . but to punish . . . and intimidate" the exercise of a civil right, namely, the defendant's exercise of freedom of speech. Committee Report at 4.

Plaintiffs' aggressive litigation of this case – including, for example, forcing Kandrac to litigate a contested motion to unseal, and the filing of a meritless Rule 11 motion – combined with Defendant's substantial success in defending this action, warrant an award of fees and costs to Defendant. Moreover, Mr. Kandrac is a private individual who did not choose to initiate litigation, and was compelled to engage counsel to defend this action with no guarantee that his counsel's fees would ultimately be reimbursed. Accordingly, an award of reasonable fees and expenses that Defendant seeks as the substantially prevailing party is appropriate here.

B. Kandrac Should Be Awarded His Fees and Costs for Successfully Opposing Plaintiffs' Motion for Rule 11 Sanctions Under D.C. Superior Court Rule 11(c)(1)(A).

While the D.C. Anti-SLAPP Act expressly provides for an award of *all* fees and costs incurred in the "litigation," which would include Defendant's motion to unseal the case, Defendant's anti-SLAPP motion, and Plaintiffs' Motion for Rule 11 Sanctions, Defendant is also separately entitled to the portion of the fees his counsel incurred in responding to Plaintiffs' Motion for Rule 11 Sanctions under D.C. Superior Court Rule 11(c)(1)(A). Specifically, that Rule authorizes the Court to award fees "to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in . . . opposing the motion." *See also Wilkins v. Bell*, 917 A.2d 1074, 1082 (D.C. 2007) ("The court was specifically authorized under [an analogous Domestic Relations Court version of] Rule 11 to award attorney's fees incurred in opposing a sanctions motion where it found that such an award was warranted.").

Such an award is particularly appropriate here, where Plaintiffs' response to Defendant's anti-SLAPP Motion was to continue exactly the kind of conduct the Anti-SLAPP Act was designed to address. Indeed, Plaintiffs' Rule 11 motion consisted of exactly the same arguments that Plaintiffs could have addressed – and in fact did address – in their opposition to Defendant's anti-SLAPP motion, thereby needlessly multiplying the motions practice in this case. Plaintiffs' Rule 11 Motion was wholly unnecessary, and was denied in its entirety by this Court. Omnibus Order at 17-23. As such, Plaintiffs and his counsel should be required to pay Kandrac's reasonable attorneys' fees and costs for opposing it. *See, e.g., Becker v. The Weinberg Grp., Inc.*, 554 F. Supp. 2d 9, 14 (D.D.C. 2008) ("Defendants raised the same substantive arguments in filing their Rule 11 Motion as they raised in their Motion to Dismiss. Consequently, Plaintiff is entitled to be compensated for her fees involved in opposing the Rule 11 Motion, as well as the Motion to Dismiss.").

II. THE ATTORNEYS' FEES AND COSTS SOUGHT ARE REASONABLE.

Turning to the reasonableness of the specific amounts requested, the starting point for courts in the District of Columbia for determining a reasonable award of attorneys' fees is the "lodestar method," which "'is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.'" *Campbell-Crane & Assocs. Inc. v. Stamenkovic*, 44 A.3d 924, 947 (D.C. 2012) (quoting *Fed. Mktg. Co. v. Virginia Impression Prods. Co.*, 823 A.2d 513, 530 (D.C. 2003)). *See also Heller v. District of Columbia*, 832 F. Supp. 2d 32, 38 (D.D.C. 2011) (same); *West v. Potter*, 405 U.S. App. D.C. 236, 717 F.3d 1030, 1034 (D.C. Cir. 2013) (same). A strong presumption exists that the "lodestar figure" represents a reasonable fee. *See D.L. v. District of Columbia*, 256 F.R.D. 239, 242 (D.D.C. 2009) (citing *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986)). Essentially two determinations are necessary under the lodestar method: "(1) what constitutes a 'reasonable hourly rate' for the services of [the party's] counsel; [and] (2) the number of hours that were reasonably expended on the litigation." *Heller*, 832 F. Supp. 2d at 38; *see also Campbell-Crane & Assocs. Inc.*, 44 A.3d at 947 (same).

A. The Hourly Rates Sought By Defendant Are Reasonable.

Defendant's motion seeks reimbursement of fees according to the hourly rates set forth in the *Laffey* Matrix. The *Laffey* Matrix, which has its origins in the case of *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C.1983), *rev'd in part on other grounds*, 241 U.S. App. D.C. 11, 746 F.2d 4 (D.C. Cir. 1984), is a chart compiled annually by the Civil Division of the United States Attorney's Office in the District of Columbia. *See* Berlin Aff. Ex. 2 (http://www.justice.gov/usao/dc/divisions/Laffey_Matrix_2003-2013.pdf). It provides a schedule of hourly rates prevailing in the Washington, D.C. area in each year dating back to 1981 for attorneys at various levels of experience, and is routinely referenced by courts in the

District of Columbia as one indicator of market rates. *Lively v. Flexible Packaging Ass'n*, 930 A.2d 984, 988-89 (D.C. 2007). These rates are "regularly used" in "this jurisdiction to determine attorneys' fees where, as here, there is a statutory entitlement." *Id.* (citing *Smith v. District of Columbia*, 466 F. Supp. 2d 151, 156 (D.D.C. 2006) ("In the District of Columbia, it has been traditional to apply the so-called *Laffey* Matrix.")).

As detailed in the accompanying Affidavit of Seth D. Berlin, the rates in the *Laffey* Matrix for 2012-2013 for the two attorneys and paralegals handling this matter are $505 for Mr. Berlin, who has twenty-two years of experience; $290 for Shaina Jones Ward (previously, "Ms. Jones," having just recently married), a fourth-year associate; and $145 for paralegals.[4] These rates, on which this fee application is based, are lower than the firm's standard hourly rates of $590 for Mr. Berlin, $435 for Ms. Ward, and $240 for paralegals. Berlin Aff. ¶ 11. The total value of the attorney and paralegal time requested in this application is $95,763.00. (By contrast, if Levine Sullivan's standard rates were applied, the total amount would have been $132,570.50. *Id.*)

Moreover, courts applying the *Laffey* Matrix permit reimbursement of amounts billed to clients for out-of-pocket expenses such as online research, copying and delivery charges, but such expenses are included in Levine Sullivan's hourly rates and Kandrac therefore does not seek reimbursement of such charges here. Thus, particularly given that Levine Sullivan conducted significant on-line legal research in litigating this action, its total fees and costs are

[4] There is also a separate "Updated *Laffey* Matrix," which employs a different calculation based on the Consumer Price Index for legal services (rather than the overall Consumer Price Index), and results in materially higher hourly rates: $771 for Mr. Berlin, $393 for Ms. Jones and $175 for paralegals. *See* Berlin Aff. Ex. 3 (http://laffeymatrix.com/see.html). Although the Updated *Laffey* Matrix has been approved in a number of cases, *see, e.g.*, *Smith*, 466 F. Supp. 2d at 156; *Salazar v. District of Columbia*, 123 F. Supp. 2d 8, 14 (D.D.C. 2000), Kandrac's request for fees and costs here is based on the lower rates in the original *Laffey* Matrix, one additional reason his requested hourly rates are presumptively reasonable.

actually meaningfully *lower* than a typical *Laffey*-based fee award and are presumptively reasonable. *See, e.g.*, *Brandywine Apartments, LLC v. McCaster*, 964 A.2d 162, 169-70 (D.C. 2009) (award for attorney fees based on successful claim alleging violation of Consumer Protection Procedures Act was supported by record; trial court approached issue of attorney fees in a careful manner, basing the award on reasonable amount of time spent on the case and the hourly rates in the *Laffey* Matrix).

B. Kandrac's Counsel Expended a Reasonable Number of Hours.

Once a reasonable hourly rate has been identified, the Court must determine "the number of hours reasonably expended on the litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). "Courts in the District of Columbia have never imposed a requirement of daily task-specific billing, even under statutes authorizing awards of 'reasonable attorneys' fees." *Jemison v. Nat'l Baptist Convention, USA, Inc.*, 720 A.2d 275, 287-88 (D.C. 1998). Thus, the fee application need not present "the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney." *Copeland v. Marshall*, 205 U.S. App. D.C. 390, 401, 641 F.2d 880, 891 (D.C. Cir. 1980) (quoting *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973)).

Rather, the application need only be sufficiently detailed to permit the Court to make an independent determination whether or not the hours claimed are justified. Indeed, "[t]he better practice is to prepare detailed summaries based on contemporaneous time records indicating the work performed by each attorney for whom fees are sought." *Nat'l Ass'n of Concerned Veterans v. Sec'y of Defense*, 219 U.S. App. D.C. 94, 102, 675 F.2d 1319, 1327 (D.C. Cir. 1982) (*per curiam*) (encouraging fee-seeking parties to support their request with "detailed *summaries* based on contemporaneous time records") (emphasis added); *Beck v. Test Masters Educ. Servs., Inc.*, 289 F.R.D. 374, 384 (D.D.C. 2013) ("in submitting the log of the hours for which they request

compensation, supported by a sworn declaration from the supervising attorney, plaintiffs have provided exactly the sort of evidence that courts normally consider in evaluating the reasonableness of a fee award") (citations omitted).

Here, the attorneys and paralegals defending this action in fact recorded their time on a daily basis in six minute increments, and those entries have been described in detail in the accompanying Berlin Affidavit. *See* Berlin Aff. ¶ 15 and Ex. 1. Defendant has broken down the type and amount of work performed by each attorney and paralegal on this matter by specific category and time spent. *Id.* Defendant has excluded from his request those fees incurred in connection with briefing the one statement on which the Court did not grant his anti-SLAPP motion (and has noted that amount should the Court grant his motion for reconsideration, *see* Berlin Aff. ¶ 13 and note 3). Furthermore, separate and apart from excluding fees related to that statement, counsel for Defendant has also reduced the amount actually sought in this motion by 26.30 hours, or a reduction of approximately eight percent ($8,704.50) of the total fees actually expended in defending this action. *Id.* at ¶ 13.

Finally, the motion seeks reimbursement of expenses totaling of $200.40, all of which were related to court costs and filing fees. *Id.* at ¶ 17.

In sum, Kandrac seeks a total of $95,763.00 in attorneys' fees and $200.40 in costs, as detailed in the accompanying Berlin Affidavit. Kandrac and his counsel are unaware of any fee awards under the D.C. Anti-SLAPP Act, given that it is a relatively new statute, and in some cases the unsuccessful plaintiff has resolved the matter prior to an award of fees, *see, e.g.*, *Boley*, 2013 WL 3185154. However, in California, which has much longer history of adjudicating anti-SLAPP motions and awarding fees to the successful movants, the amount requested here is well within the range of the reasonable attorneys' fees and costs for litigating such motions. *See, e.g.*,

Berlin Aff. ¶ 16 (describing a number of substantially larger awards for litigating anti-SLAPP motions). Such an award is particularly warranted here where Plaintiffs have repeatedly refused Kandrac's proposals to explore a negotiated resolution of the matter. *See, e.g.*, *Meister v. Regents of the Univ. of Cal.*, 67 Cal. App. 4th 437, 452, 78 Cal. Rptr. 2d 913, 923 (Cal. 1998) (court may take a party's rejection of settlement proposal into account as the court should "consider all of the facts and the entire procedural history of the case in setting the amount of a reasonable attorney's fee award").

CONCLUSION

Defendant Kandrac respectfully requests the Court to grant his motion, to award him attorneys' fees in the amount of $95,763.00 in fees and costs in the amount of $200.40, and to enter an order granting such relief in the form submitted herewith.[5]

Dated: December 24, 2013

Respectfully submitted,

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[5] Defendant reserves the right to seek fees and costs for all work performed on this case subsequent to this Court's decision granting the anti-SLAPP motion. This includes, but is not limited to, litigation of this fee motion, Kandrac's motion for reconsideration concerning the one remaining statement challenged in Plaintiffs' defamation claim (if granted), any appeal on the merits, and any other subsequent litigation.