**SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA**
**CIVIL DIVISION**

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| SUSAN L. BURKE, | ) | |
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| Plaintiff, | ) | Civil Action No. 2012 CA 7525 B |
| | ) | |
| v. | ) | Judge Maurice A. Ross |
| | ) | |
| JOHN DOE No. 1 (using the name "Zujua") et al., | ) | |
| | ) | |
| | ) | |
| Defendants. | ) | |

## OPINION AND ORDER

This matter comes before the court on Defendant John Doe No. 1's Motion for Attorneys' Fees, and the Opposition thereto. Upon consideration of the pleadings and arguments advanced at a hearing on the matter, and for the reasons set forth herein, Defendant's Motion is denied.

## I. BACKGROUND

The factual background of this case is set out in considerable detail in the Court of Appeals ruling remanding this matter. *See John Doe No. 1 v. Burke*, 91 A.3d 1031 (D.C. 2014). The Court will recite the relevant background here.

Suspecting that incorrect additions to her Wikipedia page were the product of a deliberate scheme by Blackwater to discredit her, on September 19, 2012, Plaintiff filed suit in D.C. Superior Court alleging defamation, tortious interference in prospective business advantage, and false light invasion of privacy. Plaintiff named several anonymous defendants who she asserted had colluded to defame her: Defendant Zujua (John Doe No. 1), CapBasics359 (John Doe No. 2), and eight alleged Blackwater employees or agents (John Does 3-10). As Plaintiff did not know the real names of the

Wikipedia users Zujua and CapBasics359, she was unable to serve them. Plaintiff therefore issued a subpoena to obtain Wikipedia's user data so that she could obtain the anonymous posters' identifying information.

Defendant, represented by the Center for Individual Rights, moved to quash the subpoena pursuant to the D.C. Anti-Strategic Lawsuits Against Public Participation Act's ("Anti-SLAPP Act") 'special motion to quash' provision, D.C. Code § 16-5503. In the alternative, he sought a protective order preventing the discovery of his identity. On January 30, 2013, this Court denied Defendant's Motion to Quash, concluding that Defendant was not entitled to the protection of the Anti-SLAPP Act because he had not established that he had spoken about 'an issue of public interest' within the meaning of the statute. This Court also concluded that Defendant had both failed to make an affirmative showing that Plaintiff was a general- or limited-purpose public figure and failed to disprove that his speech was commercially motivated. In addition, this Court ruled that even if Defendant's speech was about an issue of public interest, he was not entitled to quash the subpoena because Plaintiff had demonstrated a likelihood of success on the merits of her defamation claim. The Court also denied Defendant's request for a protective order noting that Defendant had provided no authority for such a request. Defendant appealed the ruling.

On May 29, 2014, the Court of Appeals reversed this Court's decision, holding that Plaintiff was a limited purpose public figure, and that Defendant had spoken on an issue of public interest and was thus entitled to protection under the Anti-SLAPP Act. The Court of Appeals concluded that Defendant established a prima facie case under the D.C. Anti-SLAPP Act that was not rebutted by a showing of a likelihood of success on

Plaintiff's underlying claim of defamation. The matter was remanded with instructions to this Court to quash Plaintiff's subpoena. This Court subsequently quashed Plaintiff's subpoena by oral order on the record in a status hearing on September 26, 2014.

On October 8, 2014, Defendant filed a Motion for Attorneys' Fees pursuant to D.C. Code § 16-5504(a). Counsel submitted affidavits from the three attorneys who worked on Defendant's case, stating the number of hours each devoted to defending against Plaintiff's subpoena. Counsel also submitted a memorandum of points and authorities in support of Defendant's position and summaries detailing the experience and legal background of all participating attorneys and the novelty of the case. In all, Counsel claimed approximately 713 hours, and requested $186,537.00 in fees (Def.'s Mem., Ex. 5, Lodestar Calculation of Individual Time Records; *see also* Def.'s Mem., Ex. 6, Affidavit of Michael Rosman at 3).

On February 13, 2015, the Court held a hearing on Defendant's Motion for Attorneys' Fees. Defendant advanced three key arguments in support of the motion. First, Defendant argued that §16-5504(a) was intended to create a presumption in favor of awarding fees similar to the federal civil rights statutes. Defendant further contended that Plaintiff's lawsuit was a classic SLAPP suit and the litigation developed into an important civil right's case garnering national attention. Furthermore, Defendant maintained the time and labor required, the novelty and difficulty of the issues, coupled with the requisite skill to adeptly represent Defendant entitled counsel to an award of fees.

Plaintiff countered that Defendant's motion for attorneys' fees should be denied because the purpose of the Anti-SLAPP Act was not served in this case, and Plaintiff's

suit was not meritless or frivolous. Furthermore, Plaintiff maintained that this case is distinguishable from a civil rights case. Plaintiff argued that she acted in good faith prior to, and after bringing the suit, and articulated specific actions reflecting this posture. Before bringing this suit, Plaintiff maintains she corrected the false statements Defendant posted to Wikipedia. Plaintiff contends that even after filing her complaint, she was willing to dismiss the suit when Defendant's counsel claimed that his client did not act for others when he posted erroneous information to Plaintiff's Wikipedia page. Plaintiff maintained she proposed that Defendant not reveal his identity, but instead provide the Court a signed statement under penalty of perjury attesting that he had not been asked or retained to add falsehoods to the Wikipedia page regarding Plaintiff. Plaintiff argued that although counsel for Defendant reemphasized that Defendant did not have a commercial motivation to defame Plaintiff, Defendant declined the settlement offer, and Defendant did not sign a statement under penalty of perjury to that effect. Defendant's counsel did not object to Plaintiff's representations regarding the nature of the settlement offer.

## II. ANALYSIS

This jurisdiction follows the American Rule with respect to attorneys' fees. Thus, generally "every party to a case shoulders its own attorneys' fees, and recovers from other litigants only in the presence of statutory authority, a contractual arrangement, or certain narrowly-defined common law exceptions . . . ." *Psaromatis v. English Holdings I, L.L.C.*, 944 A.2d 472, 490 (D.C. 2008) (quoting *Oliver T. Carr Co. v. United Techs. Commc'ns Co.*, 604 A.2d 881, 883 (D.C. 1992)). Therefore, a court will not award a prevailing party attorneys' fees unless one of the three recognized exceptions are met. *Malik Corp. v. Tenacity Group, LLC*, 961 A.2d 1057, 1063 (D.C. 2008). The exception

most relevant here is applicable when a legislature has made "specific and explicit provisions for the allowance of attorneys' fees under selected statutes." *Launay v. Launay, Inc.*, 497 A.2d 443, 450 (D.C. 1985). The District of Columbia Anti-SLAPP Act has codified an attorneys' fee provision in D.C. Code § 16-5504. The Code gives the Court discretion when awarding attorneys' fees stating that "the court *may* award a moving party who prevails, in whole or in part, on a motion brought under . . . § 16-5503 [providing for a special motion to quash] the costs of litigation, including reasonable attorney fees." D.C. Code § 16 - 5504(a) (emphasis added); *see generally In re Langon*, 663 A.2d 1248, 1250 (D.C. 1995) ("Use of the word 'may' in a statute ordinarily denotes discretion."); *In re J.D.C.*, 594 A.2d 70, 75 (D.C. 1991) (" '[M]ay' . . . is quintessentially permissive.").

The issues before the Court are whether Plaintiff filed a classic SLAPP suit, the nature of the discretion the attorneys' fee provision in § 16 - 5504 (a) affords the Court, and the reasonableness of awarding the attorneys' fees Defendant has requested. The Court will discuss each in turn.

**a. The Classic SLAPP Suit**

In exercising its discretion, this Court must first determine whether Plaintiff in fact filed a SLAPP suit within the meaning of the D.C. statute. Defendant argues Plaintiff's lawsuit is the sort of action the Anti-SLAPP Act, as reflected in its legislative history, was designed to check. Specifically, Defendant contends Plaintiff's suit was based on flimsy speculation and had the effect of a classic SLAPP, intimidating those bold enough to comment about Plaintiff, by making them believe that they, like Doe No. 1, would face losing their anonymity and going to court. On the contrary, Plaintiff

maintains the suit was not based on flimsy speculation and was not intended to inflict costly litigation fees on Defendant as a means to stifle speech. Furthermore, Plaintiff contends the manner in which she conducted herself during litigation weighs against viewing this suit as a SLAPP.

The Court agrees with the Plaintiff, finding overwhelming support for Plaintiff's position in the statute and the record. The D.C. Anti-SLAPP Act provides:

> A person whose personal identifying information is sought, pursuant to a discovery order, request, or subpoena, in connection with a claim arising from an act in furtherance of the right of advocacy on issues of public interest may make a special motion to quash the discovery order, request, or subpoena . . . If a person bringing a special motion to quash under this section makes a prima facie showing that the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the party seeking his or her personal identifying information demonstrates that the underlying claim is likely to succeed on the merits, in which case the motion shall be denied.

D.C. Code § 16-5503. As highlighted in Defendant's pleadings, the legislative history of the statute provides further illumination. In its Committee Report on the Anti-SLAPP Act, The Committee on Public Safety and the Judiciary of the District of Columbia Council explained the purpose of the bill as follows:

> [SLAPP] cases are often without merit, but achieve their filer's intention of punishing 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. To remedy this [the Bill] follows the model set forth in a number of other jurisdictions, and mirrors language found in federal law, by incorporating substantive rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP.

Rep. of the D.C. Comm. on Pub. Safety and the Judiciary on Bill 18-893 (Nov. 19,

2010) ("Comm. Report") at 1). Mr. Arthur Spitzer ("Mr. Spitzer"), Legal Counsel for the American Civil Liberties Union ("ACLU"), provided additional clarity on SLAPPs in testimony he made before the D.C. City Council explaining that "a SLAPP plaintiff's real goal is not to win the lawsuit but to punish his opponents, and intimidate them and others into silence. Litigation itself is the appellee's weapon of choice; a long and costly lawsuit is a victory for the appellee even if it ends in a formal victory for the defendant." *See* Def.'s Mem. at 4 (citing Comm. Report, Testimony of Arthur Spitzer ("Spitzer Testimony") at 3). Mr. Spitzer went on to stress that anti-SLAPP legislation is needed "to enable a defendant to bring a SLAPP to an end quickly and economically." Def.'s Mem. at 4 (citing Spitzer Testimony at 3).

Here, Plaintiff's claim can hardly be seen as frivolous or seeking to chill or muzzle Defendant's speech through costly litigation. *See Boley v. Atl. Monthly Grp.*, 950 F. Supp. 2d 249, 255 (D.C. Cir. 2013) (citing Comm. Report at 1.) ("SLAPPs . . . have been increasingly utilized over the past two decades as a means to muzzle speech or efforts to petition the government on issues of public interest"). "The first remedy of any victim of defamation is self-help using available opportunities to contradict the lie or correct and thereby minimize the adverse impact on reputation." *Gertz v. Robert Welch, Inc*, 418 U.S. 323, 344 (1974). Before bringing this suit, Plaintiff saw and removed the false information Defendant posted to her Wikipedia page. After Plaintiff commenced the suit, Defendant's counsel informed Plaintiff's counsel that Defendant was not acting for others when Defendant posted erroneous information. Plaintiff was thus willing to dismiss the lawsuit regarding Defendant and proposed a settlement that would not require Defendant to reveal his identity. Counsel for Defendant continually denied that

Defendant had a commercial motivation to defame Plaintiff but turned down the settlement offer. In addition, Defendant remained unwilling to sign a statement under penalty of perjury to that effect. Plaintiff's offer to dismiss the lawsuit did not require Defendant to reveal his identity, but only to attest under penalty of perjury to the statements being made by his counsel on record. To date, Plaintiff has been unable to determine whether Defendant was acting for others, or if Defendant posted erroneous information to her page under another pseudonym.

That Plaintiff lost Defendant's Motion to Quash her subpoena on appeal does not mean Plaintiff's suit against Defendant was meritless or frivolous. The Court of Appeals assumed that Defendant's edits to Plaintiff's page would constitute a false and defamatory statement of fact, although it ultimately concluded there was no good evidence that Defendant acted with malice when posting. *See Burke*, 91 A.3d at 1045. Additionally, the Court of Appeals acknowledged in its opinion that while not impossible, "the task of demonstrating malice is difficult for a plaintiff who does not know the identity of the defamatory speaker and cannot argue malice based on the identity and motivations of her alleged defamer." *Id.* Thus, Plaintiff was in a quandary. The Court of Appeals was clear that Defendant's right to anonymous speech was broad, but also emphasized the right was not limitless. *See id.* (explaining that Plaintiff may not be defamed freely, but must satisfy the heightened standard of showing actual malice when a plaintiff is a limited public figure). Plaintiff, whom the Court of Appeals deemed a limited public figure, was therefore unable to succeed in obtaining the subpoena.

Even though she may not be able to prove actual malice, Plaintiff set forth a plausible argument that she had reason to believe Defendant was acting as an agent for

Blackwater. Plaintiff has repeatedly asserted that Blackwater founder Erik Prince threatened her personally. Furthermore, Plaintiff learned that Mr. Prince "spends substantial sums paying people to go on the Internet . . . and post negative information about persons who have angered him." Burke Affidavit at 1. Indeed, as a result of the defamatory statements posted to her Wikipedia page, Plaintiff lost a potential client who was not comfortable retaining Plaintiff because a federal judge purportedly sanctioned Plaintiff. *Id.* Based on the foregoing, it is not unreasonable to surmise that Plaintiff filed what she believed to be a meritorious suit to recover for the harm caused by the false statements made via anonymous Wikipedia edits.

**b. The Court's Discretion under D.C. Code § 16 - 5504(a)**

Defendant contends the provision for attorneys' fees in D.C. Code § 16 - 5504(a) was intended to create a presumption in favor of awarding fees. Plaintiff counters, arguing that fees are not presumed or mandatory, but are only awardable in the Court's discretion. Specifically, Plaintiff contends the Court must consider whether there is evidentiary support for Defendant's contention that Plaintiff filed a SLAPP, and if Plaintiff filed a frivolous suit with an intent to inflict costly litigation fees as a means to stifle speech. The Court agrees, finding that under D.C. Code § 16 - 5504(a), attorneys' fees are not presumed, but instead are discretionary, requiring a weighing of the equities.

The provision for attorneys' fees under the D.C. Anti-SLAPP Act states "the court *may* award a moving party who prevails, in whole or in part, on a motion brought under . . . § 16 - 5503 [providing for a special motion to quash] the costs of litigation, including reasonable attorney fees." D.C. Code § 16 - 5504(a) (emphasis added). It is important to note that the applicable statute does not on its face mandate the imposition of costs and

attorneys' fees. Rather it gives the court discretion by using language such as 'the court may award attorneys' fees. Such language necessarily implies that attorneys' fees are not automatic in every situation in which a claim is raised. *See Ungar v. District of Columbia Rental Housing Com.*, 535 A.2d 887, 892 (D.C. 1987) (concluding that although a statutory provision for attorneys' fees created a presumptive award to the prevailing party, the court had the discretion to withhold fees); *FOP v. District of Columbia*, No. 2010 CA 003447 B, 2011 D.C. Super. LEXIS 11, * 24 (D.C. Super. Ct. Sept. 6, 2011) (noting that the D.C. Freedom of Information Act's ("D.C. FOIA") attorneys' fee provision [which employs nearly identical language to § 16-5504(a)] does not mandate an award of fees for prevailing parties).[1]

Defendant contends that the Council's rationale for using permissive language in § 16-5504(a), was to "bring the anti-SLAPP statute into line with federal civil rights statutes that courts had routinely held effectively mandated reasonable fee awards, despite 'permissive' language." Def.'s Mem. at 7 (citing Spitzer Statement, ¶ 2). However, even under the federal civil rights statutes, such fees are not automatic. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (noting that "one who succeeds in obtaining an injunction under [Title II of the Civil Rights Act of 1964] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.") Although the discretionary language in the fee-shifting provisions in the civil rights statutes is similar to that in the D.C. Anti-SLAPP Act attorneys' fees provision, there are fundamental differences. *Cf. Eddy v. Colonial Life Ins. Co. of America*, 59 F.3d 201, 204-05 (D.C. Cir. 1995) (noting that although the

[1] The D.C. FOIA attorneys' fee provision provides, "If a person . . . prevails in whole or in part in [a FOIA] suit, he or she may be awarded reasonable attorney fees and other costs of litigation." D.C. Code § 2-537 (c).

discretionary language in the civil rights statutes' fee-shifting provisions is similar to ERISA's attorneys' fees provision, there are crucial differences, notably the interests furthered by ERISA differ from those furthered by the civil rights statutes. "Civil rights are constitutionally based; ERISA rights are statutory. . . [and] ERISA protects economic interests, while the civil rights statutes advance dignitary as well as economic interests").

The fee-shifting provision in the civil rights statutes reflects the unique importance of enforcement of the statutes. *Id.* at 205. Consequently, the presumption in favor of awarding fees derives not solely from the language of the civil rights statutes, but from the legislative history, which indicates congressional intent to constrain the district court's discretion to award fees in civil rights cases. *See id.* On the contrary, where the legislative history of a statute lacks any indication of an intent to create a presumption in favor of awarding fees, it militates against adopting the standard from civil rights statutes. *See id.* (citing *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 523 (1994)). The legislative history of the D.C. Anti-SLAPP Act creates no such presumption.[2] The permissive language of § 16-5504(a), coupled with the absence of legislative history that indicates otherwise, leads the Court to conclude that an award of fees is in the Court's discretion. *Cf. FOP v. District of Columbia*, 52 A.3d 822, 828 (D.C. 2012) (quoting *Langon*, 633 A.2d at 1250) ("Although in the final analysis, the meaning of the word 'may' in a particular statute depends on the context of the statute, and on whether it is fairly to be presumed that it was the intention of the legislature to confer a discretionary power or to impose an imperative duty," the legislative history of the fee award provision leaves us

[2] Defendant contends that Mr. Spitzer's Statement is indicative of the Council's intent to create a presumption in favor of awarding fees under § 16-5504(a). However, the Court is not inclined to accept the statement as part of the formal record of the statute's legislative history which is documented in the Council's Committee Report.

with no doubt that 'may' has its ordinary permissive meaning); *see also Summers v. Dept. of Justice*, 477 F. Supp. 2d 56, 69 (D.C. Cir. 2007) ("The question of whether a prevailing party is entitled to an award of attorneys fees and costs permits the Court to exercise its sound discretion based on the facts of a particular case").

When exercising its discretion to award attorneys' fees here, the Court must therefore look to the purpose for which the statutory fee provision was put in place and determine whether an award of fees would further that purpose. *See Village of Kaktovik v. Watt*, 689 F.2d 222, 225 (D.C. Cir. 1982) ("Courts are allowed to award attorneys' fees to parties who have substantially contributed to the goals of the underlying statute"). Statutory provisions that authorize the Court to award attorneys' fees often have wide-ranging purposes. A statutory provision for attorneys' fees may aim to deter arbitrary and frivolous suits, encourage lawyers to act in the public interest, attract competent counsel for these cases, or ensure attorneys who are willing to take on public interest work presenting issues of first impression are adequately compensated. *See Lively v. Flexible Packaging Ass'n*, 930 A.2d 984, 988 (D.C. 2007) ("The goal [of awarding attorneys' fees under the District of Columbia Human Rights Act] is to attract competent counsel for [civil rights and public interest] cases, but not to provide them with windfalls"); *District of Columbia v. Hunt*, 520 A.2d 300, 304 (D.C. 1987) (explaining that attorneys' fees under the federal Backpay Act, 5 U.S.C. § 5596(b)(1)(A)(ii) (1982), "are a restitutionary form of compensation for employees who are forced to litigate District personnel actions later determined to be improper"); *Ungar*, 535 A.2d at 892 (noting that the purposes of the discretionary attorneys' fee provision under the Rental Housing Act of 1980, were to "encourage tenants to enforce their own rights . . . and to

encourage attorneys to accept cases brought under the [Act]."); *see also Newman*, 390 U.S. at 402 (explaining that Title II of the Civil Rights Act of 1964 was intended "not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II"); *Ketchum v. Moses*, 17 P.3d 735, 741 (Cal. 2001) (noting that the purpose of the mandatory fee award [under California's anti-SLAPP statute, Cal. Code Civ. Proc. § 425.16], is to discourage SLAPP suits seeking to "chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances" by imposing the litigation costs on the party that files a SLAPP suit).

The D.C. Anti-SLAPP Act intentionally follows "the lead of other jurisdictions, which have similarly extended absolute or qualified immunity to individuals engaged in protected actions." *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29, 36 (D.C. Cir. 2012) (citing Comm. Rep. at 4). As Mr. Spizter stated in his testimony to the City Council, "litigation is the appellee's weapon of choice in a SLAPP suit." (Spitzer Testimony at 3.) Thus the Court finds that the purpose for awarding fees to a prevailing party in a D.C. SLAPP action is to discourage those seeking to chill protected speech by imposing the litigation costs on the party that files a SLAPP suit. *See* Def.'s Mem. at 3 (citing Comm. Rep. at 4) (noting the SLAPP statute was structured to "provide defendants protection not from liability, but from the burden of litigation itself"). Indeed, Defendant cities case law that supports the proposition that the purpose for awarding fees against a plaintiff that files a frivolous claim is "to deter the undesirable behavior." Def.'s Mem. at 8 (citing *Peddlers Square, Inc. v. Scheuermnn*, 766 A.2d 551, 558) (D.C. 2001). Moreover, courts interpreting statutes similar to the D.C. Anti-SLAPP

Act have found that even if an action is construed as a SLAPP suit, attorneys' fees and costs are not automatic and may be recovered only upon a showing that a frivolous claim has been made against defendants. *See Rubel v. Daily News, LP,* No. 100023-2010, 2010 N.Y. Misc. LEXIS 4273, at *19-20 (N.Y. Sup. Ct. Aug. 26, 2010). Accordingly, where as here, the evidence contradicts any conclusion that Plaintiff acted with intent to inflict costly litigation fees, bring a frivolous suit, or to stifle speech, the award of attorneys' fees is not automatic. This Court must instead weigh the equities, balancing the aims of the D.C. Anti-SLAPP Act and the purpose for awarding fees, in making a determination of whether to award fees.

**c. The Award of Attorneys' Fees**

We turn now to the issue of whether it is proper to award attorneys' fees in this case. Defendant argues counsel is entitled to attorneys' fees because this case was hard fought, fittingly stressing that Defendant had to prevail on several close issues to reach the final result, notwithstanding that Plaintiff opposed him vigorously on every issue. Defendant also maintains this was a complex, precedent-setting case, in which several issues of first impression in the interpretation of an important civil rights statute were settled. Indeed, the national press attention and in-depth articles are indicative of this being an issue of considerable public interest. The Court is mindful that the issues litigated presented close questions on which reasonable legal minds could differ, requiring diligent efforts at every phase of litigation. However, Plaintiff proffers a plausible equitable argument that the Court finds defeats what Defendant deems is a presumptive right to attorneys' fees because he successfully defended his position on appeal. Specifically, Plaintiff maintains that the case is not reflective of a classic SLAPP

suit and Defendant's counsel advanced his own interest here. The Court agrees, recognizing that Plaintiff's action was apparently intended to vindicate her legally cognizable rights rather than to chill Defendant's free speech rights to express an opposing point of view. In weighing the arguments Defendant advances in favor of an award against the aims of the statute in making a discretionary provision of fees available, the Court finds an award of attorneys' fees to Defendant is not warranted here.

Defendant, citing the Court of Appeals, argues it is important that attorneys who are willing to take on civil rights and other public interest work are adequately compensated or it will be difficult to find competent counsel to handle this important job. *See Lively*, 930 A.2d at 988. The goal, Defendant contends, is to attract competent counsel for these cases. *See id.* Defendant's recitation of the objective of fee awards in public interest cases is accurate. However, this Court is not persuaded that Defendant has established that the instant case is the type of case the Court of Appeals contemplated when it spoke in *Lively*.

When rationalizing the need to award attorneys' fees in civil rights and public interest cases in *Lively*, the Court of Appeals cited the U.S. Supreme Court case *Newman*, 390 U.S. 400. In *Newman*, the Supreme Court explained that when the Civil Rights Act of 1964 was passed, Congress recognized enforcement would prove difficult and that ensuring broad compliance with the law would require reliance in part upon private litigation. 390 U.S. at 401. The Supreme Court reasoned that "[if a plaintiff] obtains an injunction [under the Civil Rights Act], he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Id.* at 402. Congress enacted the provision for attorneys' fees because

successful plaintiffs were routinely forced to bear their own attorneys' fees, and few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. *Id.* The purpose of such fees is thus "to encourage individuals injured by racial discrimination to seek judicial relief under Title II." *Id.* The unique reasons for adopting a fee-shifting presumption in civil rights actions do not warrant adopting the presumption in this case. *Cf. Eddy,* 59 F.3d at 206 (discussing ERISA suits). As this Court has determined, neither the language of the Anti-SLAPP Act, nor its legislative history imply the presumption, and fee-shifting is less necessary as an incentive in this case, not because the Anti-SLAPP Act protects unimportant interests, but because the interests it protects here are somewhat different.

Here, Defendant's counsel needed no incentive to take on Defendant's case. Notably, Plaintiff highlights that counsel's own website states "We are not a legal service firm nor a public policy institute. Rather, we aggressively litigate and publicize a handful of carefully selected cases that advance the right of individuals to govern themselves . . . We make no apologies for bringing only those cases that overtly advance this agenda." Pl.'s Opp'n at 7. Furthermore, Plaintiff argues, the website declares that counsel take "an opportunistic approach to public interest law." *Id.* In short, Defendant's counsel actively pursue this type of litigation to further their own self-interest and need no encouragement to do so. The Court makes no judgment regarding the nature of counsel's work, and does not seek to penalize Defendant because of counsel's motivations. However, the Court does find that in protecting Defendant's right to anonymous free speech, counsel has already achieved an award by succeeding in its own interest. Given one of the purposes for awarding attorneys' fees is to attract competent counsel to such cases, not to vindicate

the attorney's public policy positions, Defendant should not be entitled to an additional award of attorneys' fees.

Defendant also maintains this case was precedent setting. The Court agrees that several issues of first impression in the interpretation of the D.C. Anti-SLAPP Act were settled. Yet, the Court finds that here, attorneys for all sides contributed to the jurisprudence on this statute. As Defendant acknowledges, a number of prominent organizations submitted *amicus* briefs, including the American Civil Liberties Union of the Nation's Capital, the Reporters Committee for Freedom of the Press, Gannet Co., Inc., and the Washington Post. Def.'s Mem. at 9. The Court of Appeals even granted one group of *amici* time at oral argument. *See id.* Although the result of the case is without question vital, several others, in addition to Defendant's counsel, substantially contributed to the goals of the statute by the nature of their involvement. Indeed, *amici* and Plaintiff's counsel rendered important aid to the interpretation and implementation of the D.C. Anti-SLAPP Act. To grant attorneys' fees in this case based on the significance of the contributions made by Defendant's counsel alone would necessarily diminish the equally noteworthy contributions of Plaintiff and *amici* who submitted compelling arguments to the Court of Appeals during this complex litigation.

Finally, the Court's exercise of discretion also considers the relative merits of Plaintiff's suit. Defendant acknowledges that it was necessary to prevail on several close issues to achieve the Court of Appeals decision that found Defendant was entitled to have the subpoena seeking his identity quashed. That every issue was close is something this Court cannot ignore. Therefore, although Defendant's anonymity was protected, the Court finds Plaintiff commenced a credible suit that required vigorous opposition on the

part of Defendant in order for Defendant to succeed on all issues. Plaintiff had reason to believe Blackwater had set out to defame her because of threats made to her by a Blackwater agent, Mr. Prince. When Defendant posted erroneous information to her Wikipedia page, but declined to accept a good faith settlement offer, Plaintiff's suspicions were heightened, leading Plaintiff to seek to discover Defendant's true identity.

In vindicating its authority, the court must scrupulously avoid penalizing litigants for aggressively litigating their claims or discouraging good faith assertions of colorable claims and defenses. *Jung v. Jung*, 844 A.2d 1099, 1108 (D.C. 2004); *see also Newman v. Piggie Park Enterprises, Inc.*, 377 F.2d 433, 437 (4th Cir. 1967) (A litigant should not be punished under the guise of an award of counsel fees for taking a position in Court in which he honestly believes -- however lacking that position may be). Although Plaintiff may not be able to prove who was behind Defendant's edits, or that Defendant acted with malice, this Court cannot leap to the conclusion that Plaintiff set out to stifle Defendant's right to free speech by filing a frivolous claim. Accordingly, the Court finds Plaintiff's suit was not a classic SLAPP, and a balancing of the equities weighs in favor of not awarding attorneys' fees to Defendant in this case. Defendant remains anonymous, while Plaintiff is yet to determine if there is a deliberate, malicious attempt to defame her.

## III. CONCLUSION

This Court has the discretion to make a reasoned judgment as to whether the purposes of the D.C. Anti-SLAPP statute would be furthered by sanctioning a Plaintiff who commenced her suit under a cognizable legal theory, with no intent to stifle Defendant's First Amendment rights. A review of the record supports a finding that

Plaintiff did not file a classic SLAPP suit. While acknowledging that the result of Defendant's case on appeal is important, the Court finds an award of attorney's fees to Defendant here is unwarranted. Accordingly, it is this 15th day of May 2015,

**ORDERED**, that Defendant's Motion for Attorney's Fees is **DENIED**.

**IT IS SO ORDERED**.

Maurice A. Ross

Judge Maurice A. Ross

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