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IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

JAP HOME SOLUTIONS, INC., ET AL. :
:
Plaintiffs, :
:
v. : Case No.: 2017 CA 003390 B
:
:
:
LOFFT CONSTRUCTION, INC., ET. AL., :
:
Defendants. :

PLAINTIFFS' OPPOSITION TO DEFENDANT JOSÉ GALLEGO ESPINA'S MOTION FOR AN AWARD OF COSTS OF LITIGATION, INCLUDING AN AWARD OF REASONABLE ATTORNEY'S FEES

Plaintiffs, JAP Home Solutions, Inc. ("JAP"), Gustavo Frech Barriero ("Gustavo"), and Jesús Antón Perez ("Jesús"), by and through counsel, hereby oppose Defendant's Motion for an Award of Costs of Litigation including an Award of Reasonable Attorney's Fees ("Motion for Attorney's Fees") for the reasons stated below.

INTRODUCTION

Pursuant to Rule 54 and D.C. Code § 16-5504(a) of the D.C. Anti-SLAPP Act, Defendant requests that the Court grant him an award of reasonable attorney's fees and costs in the amount of $143,845.60 and costs in the amount of $405.00.[1] The Court should deny Defendant's request in full because the amount of fees incurred by Defendant in this case are unreasonable. The inflated fees at issue are the result of Defendant's efforts to overwork a

[1] On December 18, 2017, Defendant filed a Motion for Attorney's Fees requesting $103,622 for fees incurred by three attorneys for the Reporter's Committee for Freedom of the Press and $21,250 for fees incurred by co-counsel, Mark Bailen, from the law firm Baker Hostetler, LLP. On January 31, 2018, pursuant to this Court's January 26, 2018 Order, the Reporter's Committee filed a Supplemental Declaration of Katie Townsend requesting additional fees in the amount of $16,943.60. Mr. Bailen filed a Supplemental Declaration requesting additional fees in the amount of $1,625. The Reporter's Committee is also request costs totaling $389.20 and Mr. Bailen requests total costs in the amount of $16.38.

simple case and run up attorneys' fees to punish Plaintiffs by putting them out of business. Specifically, Plaintiffs contest: (1) the reasonableness of the Reporter's Committee's hourly rates, which are based on the Legal Services Index of the Bureau of Labor Statistics *Laffey* matrix ("LSI Matrix")—a fee matrix explicitly reserved for "complex federal litigation," Def. Mot. Att'ys Fees at 12, —and (2) the unreasonable and unnecessary number of hours dedicated to this case, which are the result of Defendant's war of attrition style of litigation.

This case exemplifies "special circumstances" that override the presumption of fee awards in D.C. Anti-SLAPP litigation. For these reasons, Plaintiffs respectfully ask that the Court deny Defendant's fee request in it its entirety, or in the alternative, that the Court significantly reduce the fee award.

RELEVANT BACKGROUND

Defendant attempts to paint a picture of two individuals who are unhappy about his reporting and have thus filed a lawsuit for purpose of intimidating him into silence. This is far from the case. He also attempts to justify his harmful reporting by invoking the privileges afforded by the D.C. Anti-SLAPP Act to those who diligently report on in issues of public interest. However, despite the Court's grant of Defendant's Special Motion to Dismiss, Plaintiffs are the real victims of Defendant's selective and false reporting. This is a case where the law has failed to work as it should, allowing an unscrupulous reporter to get away with irreversibly harmful defamatory statements at the expense of private individuals' recognized right to protect their livelihood and their personal and professional reputations.

ARGUMENT

A. Defendant's fees are unreasonable precluding an award of fees.

A "reasonable fee" is determined by using the "lodestar" method of multiplying the reasonable number of hours spent on a matter multiplied by a reasonable attorney fee rate.

Campbell Crane & Assoc., Inc. v. Stamenknovic, 44 A.3d 924, 947 (D.C. 2012). Determining the amount of a "reasonable" attorney's fee is a matter within the trial judge's discretion. *F.W. Bolgiano & Co., Inc. v. Brown*, 333 A.2d 674, 675 (D.C. 1975). The initial burden of showing that fees claimed are reasonable falls upon the fee claimant. *D.C. v. Jerry M.*, 580 A.2d 1270, 1281 (D.C. 1990) (citing *Blum v. Stenson*, 465 U.S. 886, 897 (1984). Notably, The D.C. Court of Appeals requires counsel "'to prove and establish the reasonableness of each dollar, each hour, above zero.'" *Williams v. Johnson*, 174 F. Supp. 3d 336, 345 (D.D.C. 2016) (quoting *Lively v. Flexible Packaging Ass'n*, 930 A.2d 984, 993 (D.C. 2007), *as amended* (Aug. 30, 2007) (string citations omitted)). Defendant has failed to meet his burden precluding an award of fees in this case.

1. The number of hours Defendant's four attorneys spent on this matter is unreasonable.

When assessing the reasonableness of fees, "[i]t does not follow that the amount of time actually expended is the amount of time *reasonably* expended." *Copeland v. Marshall*, 205 U.S.App.D.C. 390, 401, 641 F.2d 880, 891–92 (1980) (en banc) (emphasis in original)). The Court "should compute the number of hours reasonably expended on the litigation, excluding any claimed hours that are excessive, redundant, or unnecessary." *Id.* (citing *Henderson v. District of Columbia*, 493 A.2d 982, 999 (D.C.1985) (string citations omitted)). Moreover, "in the private sector, 'billing judgment' is an important component in fee setting," *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980). Judge MacKinnon has stressed that "[a]ttorneys … should be forced to be mindful of the monetary and equitable benefits that are being sought and should not be permitted to run up bills that are greatly disproportionate to the ultimate benefits that may be reasonably attainable." *Copeland*, 641 F.2d at 908 (J. MacKinnon, joining).

Additionally, D.C. trial and federal courts have found that hours are not reasonable and fees should be denied when cases are overstaffed and when an attorney "takes extra time due to inexperience, or if an attorney performs tasks that are normally performed by paralegals, clerical personnel or other nonattorneys." *Tenants of 710 Jefferson St., NW v. D.C. Rental Hous. Comm'n*, 123 A.3d 170, 186–87 (D.C. 2015) (quoting *Action on Smoking and Health v. CAB,* 233 U.S.App.D.C. 79, 88–89 (1984); see also *Copeland*, 641 F.2d at 891 ("where three attorneys are present at a hearing when one would suffice, compensation should be denied for the excess time."). California courts, which have more experience with Anti-SLAPP Act litigation, and to which this jurisdiction often looks for guidance on the same, stress that "a case that presents a close question based on the facts is not necessarily a complex or time-consuming one." *Christian Research Inst. v. Alnor*, 165 Cal. App. 4th 1315, 1328 (2008) (finding that the trial court properly reduced the number of compensable hours in Anti-SLAPP act litigation from over 600 hours to 71 hours).

As specifically identified specifically in Exhibits 1 and 2 attached, many of the Reporter's Committee's Mr. Bailen's fees are unreasonable. First, as a general matter, the total claim for over 280 hours billed by four attorneys resulting in total attorney's fees of over $143,000 in less than four months is excessive.[2] This matter only contained one cause of action for defamation against Defendant and the only real issue was whether Plaintiffs met their burden of showing a probability of success. There was no discovery.

Second the Reporter's Committee spend an unreasonable amount of time researching and drafting their special motion to dismiss and Reply. This amount of time spent on the motions is excessive given counsel's admission that they specialize in Anti-SLAPP Act

[2] Counsel entered their appearance on behalf of Defendant on September 18, 2017 and the Court granted Defendant's Special Motion to Dismiss on November 29, 2017—two months and 11 days later.

litigation. *See* Townsend Decl. ¶¶3-11.; Bailen Decl. 1-2. *See Maughan v. Google Tech., Inc.*, 143 Cal. App. 4th 1242, 1249 (2006) (finding that reduction of attorney fees and costs sought by defendant, from $112,288 to $23,000 did not constitute an abuse of discretion after finding defendant's claim for over 200 hours was excessive when defendant's counsel acknowledged that they were experienced experts regarding the type of litigation involved.).

Third, Plaintiffs proffer that a significant portion of Defendant's fees are not recoverable because the fee provision applies only to fees and costs incurred in defending the Anti-SLAPP motion to dismiss. *See Christian Research Inst. v. Alnor*, 165 Cal. App. 4th 1315, 1324 (2008) (string citations omitted) ("It is well-established, however, that the anti-SLAPP statute's fee provision "'applies only to the motion to [dismiss], and not to the entire action.'"). Defendant has not presented any support for its assumption that the Anti-SLAPP Act's fee shifting provision applies to all efforts extended by his attorneys in his for the entire litigation. Therefore, the Court should not consider any fees that are not related to the special motion to dismiss. This includes any request for fees related to attacking service of process and/or evading service, and attending the Court's mandatory initial scheduling conference because they would have been incurred whether or not Defendant filed a special motion to dismiss. *See Christian Research*, 165 Cal. App. 4th at 1324-25 (finding that seeking reimbursement for all efforts, "whether or not anti-SLAPP work was involved" was not reasonable, including "reimbursement for non-anti-SLAPP efforts such as attacking service of process, preparing and revising an answer to the complaint" and "attending the trial court's mandatory case management conference—all of which would have been incurred whether or not [defendant] filed the [special motion to dismiss]."). *See* Ex. 1 and Ex. 2 Plaintiff's specific objections to instances where attorney's fees are not available to Defendant under the Anti-SLAPP Act's fee shifting provision.

Finally, the Reporter's Committee and Mr. Bailen elected to file unnecessary and unreasonable motions to strike that included *hundreds* of objections to Plaintiffs' Affidavits. These filings and the time incurred in drafting them were not proportional to their expected benefit. Defendant, aware of Plaintiffs' limited resources, chose a litigation strategy to overwhelm counsel with an avalanche of unnecessary motions. This caused Defendant to incur an inordinate amount of attorney's fees. Therefore, the Court should not allow Defendant to argue that this case was "complex" based on the number of motions filed or that he is therefore entitled to the exorbitant fees incurred.

2. The documentation submitted to support attorneys' hours billed is inadequate.

It is well established in this jurisdiction that the Court "may exercise its discretion to decrease the number of compensable hours in the lodestar calculation '[w]here the documentation of hours is inadequate' and… [can] exclude from [the] initial fee calculation hours that were not 'reasonably expended' or that are excessive, redundant, or otherwise unnecessary....'" *Tenants*, 123 A.3d 170, 186–87 (D.C. 2015) (string citations omitted). Moreover, "'it is insufficient to provide [the fact-finder] with very broad summaries of work done and hours logged.'" *Id.* (string citations omitted). Therefore, any application for fees "'must be sufficiently detailed to permit the [court or agency] to make an independent determination whether or not the hours claimed are justified.'" *Id.*

For these reasons, the Court should eliminate in its entirety all billing time that is block billed and/or that is impermissibly vague. *See Williams v. Johnson*, 174 F. Supp. 3d 336, 349 (D.D.C. 2016) (eliminating days of fees "in their entirety" because movant "committed the sin of block billing" and the court could "[]not distinguish between the amount of time spent on … discrete tasks because [movant] only list[ed] a single total hour figure for each day, which [was] associated with a laundry list of activities.") (relying on the D.C. Court of

Appeals to address situations where a party invokes relief sought under D.C. fee shifting statues); *Id.* at 356 (applying a percentage reduction across the board for fee request because it "failed to provide the requisite specificity" "when "numerous entries in [counsel's] billing submission [were] identical, including approximately 35 entries stating '[p]reparation of Brief; legal research; analysis of D.C.'s Brief,'" when [counsel's] "billing also include[d] approximately 28 entries that state 'Review and analysis of Briefs; legal research; preparation For oral argument," and when "[counsel's] billing also include[d] a significant number of entries with identical phrasing pertaining to drafting Plaintiff's reply brief in support of her cross-appeal and a significant number of entries with identical phrasing regarding the motion for summary affirmance.").

The clear majority of Mr. Bailen's time entries consist of impermissible block billing that contain only basic descriptions of multiple tasks performed on the matter, and should be eliminated in their entirety. *See* Ex. B for objections to specific entries. Similarly, the Reporter Committee's time entries contain many impermissibly vague time entries that fail to provide the required specificity. *See* Ex. A for objections to specific entries.

In summary, as noted specifically in specifically in Ex. A and Ex. B, a review of the Defendant's time entries reveals many instances of the following unreasonable practices for which Defendant is not entitled to compensation falling in to the following general categories:

- Excessive time billed for experienced attorneys regarding the type of litigation involved
- Unreasonably inflated time spent on tasks/billing excessive time in relation to the task performed
- Billing for tasks that should be performed by paralegals, clerical personnel, or other non-attorneys
- Lack of billing judgment/hours billed disproportionate to ultimate benefits reasonably attainable
- Duplicative efforts
- Unnecessary tasks
- Impermissibly broad and/or vague time entries
- Extra time billed due to inexperience--education at the expense of the other party

- Request for reimbursement of fees that are not appropriate pursuant to the Anti-SLAPP Act's Fee shifting provisions
- Block billing of multiple time entries

The number and range of these defects alone is enough to warrant a full denial of fees in this matter. Therefore, the Court should deny Defendant's fee request in it its entirety.

3. Defendant has submitted an unreasonable and inflated fee request that justifies denying attorney's fees all together.

District of Columbia courts frequently rely upon the USAO *Laffey* matrix, a methodology for calculating the prevailing market rate for attorneys' fees in the Washington, D.C. community and the Court of Appeals has affirmed that parties may rely on the updated USAO *Laffey* matrix as evidence of prevailing market rates for litigation counsel in the Washington, D.C. area. *See Covington v. District of Columbia*, 57 F.3d 1101, 1105, n.14, 1109 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1115 (1996).

In *Tenants*, 123 A.3d at 184–85 the Court of Appeals looked to the D.C. federal court's practice of relying on USAO *Laffey* matrix and explicitly "adopt[ed] the D.C. Circuit's caution against engaging in a submarket analysis when setting fee awards, unless the party opposing the fee request presents very specific and reliable evidence establishing the existence of a submarket and the prevailing rates for attorneys practicing within the submarket." *See also Covington*, 57 F.3d at 1111–12. The court noted that "[t]he [USAO] *Laffey* Matrix is "regularly used in the federal courts of this jurisdiction to determine attorneys' fees where…there is a statutory entitlement." *Tenants*, 123 A.3d at 170 (citing *Lively v. Flexible Packaging Ass'n*, 930 A.2d 984, 988-99 (D.C.2007)). It also noted that "the federal government's announced policy … that it will not contest the award of fees based on the [USAO] *Laffey* Matrix in cases where certain fee-shifting statutes provide for attorney's fees to the prevailing party" was "a significant indicator that the fees are not excessive or out of tune with the market." *Id.*; *see also Novak v. Capital Mgmt. & Dev. Corp.*, 496 F.Supp.2d 156, 159 (D.D.C. 2007). The court advised that

when assessing the reasonableness of fees "the [USAO] *Laffey* Matrix is a very good place to start, and…in most cases will be the best place to end lest litigation over attorney's fees overshadow the underlying case. *Id.* at 184–85. Notably, the Court stated that "[d]eviations from the [USAO] *Laffey* Matrix's presumptively reasonable measure should not be lightly undertaken and need to be *substantially supported*. *Id.* (emphasis added).

Defendant has unreasonably inflated its attorney's fees by setting his rates on the LSI matrix despite the Court of Appeal's clear adoption of the USAO *Laffey* matrix for reasonable rates in the D.C. legal community. Defendant relies on the inflated LSI rates despite knowing that application of the LSI *Laffey* matrix is limited to matters involving complex federal litigation, and that this matter is before the D.C. Superior Court pursuant to a fee shifting provision that arises out the D.C. Code.

The **"**[c]ourts typically deem cases 'unusually complex' where they contain factors such as prolonged preparation time, lengthy proceedings, extensive administrative records, high numbers of witnesses and exhibits, and written closing statements," none of which apply in this case. *Cox v. D.C.,* 264 F. Supp. 3d 131, 143 (D.D.C. 2017). Defendant's only justification for inflating its rates is that "attorneys at the Reporters Committee provide legal services to their clients on a pro bona basis" and "seek[s] to recover the value of those services, as well as any litigation costs, when statutorily available… utilizing the rates established by the Legal Services Index-updated Laffey Matrix (the "LSI Laffey Matrix")." Townsend Decl. ¶5.

In Williams v. Johnson, 174 F. Supp. 3d 336, 345 (D.D.C. 2016), the D.C. District Court denied movant's request for attorney's fees under the LSI Laffey matrix pursuant to thte District of Columbia Whistleblower Protection Act's fee-shifting statute. In doing so, the court found it relevant that "there is no case in which the D.C. Court of Appeals has approved of the use of the LSI *Laffey* matrix" and that that movant "ha[d] not identified any

case in which the LSI *Laffey* matrix was applied to a District of Columbia fee-shifting statute. Similar to the facts in this case, the court also found it notable that movant "does not indicate anything regarding litigation under the Whistleblower Protection Act that establishes it as a *particularly* complex category of litigation. This is not a case with national significance. Nor is it a case under Federal law or involving significant numbers of plaintiffs." *Id.* Also relevant to this case, the court emphasized "that neither the length of a case itself nor the number of opinions issued by the Court is itself a measure of the complexity of the case" finding that those facts merely "reveal how vigorously the parties contested various issues presented." *Id.* at 346. The D.C. federal court also emphasizes that it has approved fee awards based on the LSI Matrix only "where fee applications in matters involving 'complex federal litigation' are supported by competent evidence of prevailing market rates." *Young v. Sarles*, 197 F. Supp. 3d 38, 49 (D.D.C. 2016). Defendant has failed to meet this burden.

Finally, Defendant has *also* failed to prove that the alternative USAO *Laffey* matrix rates proffered in the alternative are the prevailing market rates for Anti-SLAPP Act litigation in the D.C. community. To support his fee, Defendant "must demonstrate the rates that practitioners actually collected from clients or that courts awarded those practitioners." *Id.* at 140-41; *see, e.g.*, 141 *Wilhite v. District of Columbia*, 196 F.Supp.3d 1, 8 (D.D.C. 2016) (stating that affidavits focusing on fees charged by the practitioners rather than those actually received were not helpful to the Court in determining the prevailing market rates). The affidavits provided to support Defendant's fee rates merely allege the fees charged by Defendant's attorneys and fail to offer any proof of fees received by counsel or any other Anti-SLAPP attorneys. *Id.* Therefore, the Court should deny Defendant's fee request all together, or, as in Cox, the Court should apply significant percentage reduction to all rates.

B. Defendant's inflated fee request that constitutes a special circumstance that justify denial of attorney's fees all together.

The D.C. Court of Appeals notes that its preference for allowing "attorneys who are willing to take on civil rights and other public interest work" to request USAO Laffey matrix fees is the result of a conscious effort to "attract competent counsel for these cases" and "not to provide them with windfalls." *Tenants*, 123 A.3d at 181. Recognizing the many ways attorneys fee shifting provisions encourage inflation of fee requests, California Courts of Appeal have specifically held in an Anti-SLAPP case that "[a] fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether." *Christian Research Inst. v. Alnor*, 165 Cal. App. 4th 1315, 1321–22 (2008) (string citations omitted). The courts state that denial of fees is necessary to discourage this unethical behavior:

> If ... the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked in the first place. To discourage such greed, a severer reaction is needful....

Serrano v. Unruh, 32 Cal.3d 621, 635 (1982) (quoting *Brown v. Stackler,* 612 F.2d 1057, 1059 (7th Cir. 1980)). The Court should adopt the same stance for deterrence in this case and deny Defendants fee award in its entirety.

C. There is no presumption of for fees for special motions to dismiss brought under D.C. Code Ann. § 16-5502.

Defendant claims that "[t]he D.C. Court of Appeals has held that fees should be "presumptively" awarded to a party that has prevailed on a motion brought under D.C. Code § 16-5502 or § 16-5503." Def. Mot. Att'ys Fees at 7-8 (citing *Doe v. Burke*, 133 A.3d 569, 575 (D.C. 2016). However, this is not the law. In *Burke*, the subject of an entry in a collaboratively edited internet encyclopedia filed a defamation claim against several

anonymous editors of the entry. *Burke*, 133 A.3d at 572. Pursuant to D.C. Anti-SLAPP Act, D.C. Code § 16–5503, the editor of the encyclopedia filed a motion to quash a subpoena seeking the seeking editor's identity and the Superior Court denied the motion. *Id.* The Court of Appeals reversed the Superior Court's ruling and remanded the case. On remand, the editor moved for an award of attorney's fees under D.C. Anti-SLAPP Act § 16–5504(a), which provides that "[t]he court may award a moving party who prevails, in whole or in part, on a motion brought under ... § 16–5503 the costs of litigation, including reasonable attorney fees." *Id.* The Superior Court denied the motion for fees and the editor appealed.

In its March 2016 Opinion, the Court of Appeals noted that one of the ways the Anti-SLAPP Act protects the target of suits intended as a weapon to chill or silence speech is by "recognizing the importance of anonymous speech on matters of public interest" thus "enable[ing] an individual 'whose personal identifying information is sought' to safeguard his identity by filing a 'special motion to quash' a subpoena…and if successful, 'avoid being named in a suit and served with a complaint.'" *Id.* (quoting *Doe No. 1 v. Burke*, 91 A.3d 1031, 1033, 1036 (D.C. 2014) ("*Burke I*") (quoting D.C. Code § 16–5503(a)). Recognizing the need to protect the identities of those who chose to maintain their anonymity when participating in discourse on matters of public interest, the court held that "an anonymous civil defendant who files and prevails on a special motion to quash a subpoena for identifying information under D.C. Code § 16–5503…[may] be awarded attorney's fees under D.C. Code § 16–5504(a) without showing that the suit prompting the subpoena was frivolous or improperly motivated." *Id.* at 571.

Additionally, the court held "that a successful movant under § 16–5503 is entitled to reasonable attorney's fees in the ordinary course—i.e., presumptively—unless special circumstances in the case make a fee award unjust." *Id.* In a footnote, the court specified

that its analysis was "focuse[d] on" the standards for success on a "special motion to quash," which are the same for a special motion to dismiss and advised that not all of what it said "applies to the [special motion to dismiss]." *Id.* at n. 2. Finally, the court reiterated that "'[t]he right the Council sought to protect with the special motion to quash… is the right to engage in anonymous speech.'" *Id.* at 577 (quoting *Burke I*, 91 A.3d at 1039) (internal quotation marks omitted).

Nine months later, in *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1238 (D.C. 2016), the court again discussed the financial levies in place to deter a SLAPP plaintiff. It specified that the Act authorizes the trial court to award attorney's fees and costs "to a moving party who prevails 'in whole or in part' on a special motion to dismiss. *Id.* It noted *separately* its holding in *Burke*—under the "provision for special motions to quash under D.C. Code § 16–5503, the successful movant is presumptively entitled to an award of fees unless special circumstances make a fee award unjust." *Id.*

There is nothing in *Burke* that indicates that the court intended that its holding to apply to the fee shifting provision in §16–5504 as applied to the provisions for special motions to dismiss under §16–5502. In fact, the opposite is true—the court specifies repeatedly that its analysis is focused on actions falling under § 16–5503. The Opinion mentions the words "presumptively" or "presumptive" six times—making sure each time to refer specifically to § 16–5503 and/or special motions to quash. The court avoids any ambiguity with respect to whether a successful movant under §16–5502 is inclusively presumed to be entitled to an award of fees. *See Burke*, 133 A.3d at 571 ("We further hold, after considering the language and legislative history of the Act, that a successful movant under § 16–5503 is entitled to reasonable attorney's fees in the ordinary course—*i.e.,* presumptively—unless special circumstances in the case make a fee award unjust."); *id.* at 573 ("For the trial judge, it is

apparent, "a moving party who prevails" on a motion to quash under § 16–5504 may not be awarded attorney's fees, presumptively or otherwise, without consideration by the court of the merits of, and motive behind, the underlying lawsuit."); *id.* at 575 ("From the text of the statute alone, therefore, we think it a fair inference that the D.C. Council intended the successful movant under § 16–5503 to be awarded attorney's fees in the ordinary course, *i.e.*, presumptively, on request."); *id.* at 576 ("In light of all we have seen, it is plain to us that D.C. Code § 16–5504(a) contemplates a presumptive award of attorney's fees to the moving party who prevails on a special motion to quash under § 16–5503."); *id.* at 578 ("We now read D.C. Code § 16–5504(a) in similar fashion: it entitles the moving party who prevails on a special motion to quash to a presumptive award of reasonable attorney's fees on request, 'unless special circumstances would render such an award unjust.'").

The *Mann* court similarly refrained from explicitly extending the presumption of attorney's fees to all special motions allowed pursuant to the Act: it noted that the Act authorizes (1) the court to award fees and costs to a prevailing movant on a special motion to dismiss, and (2) a presumptive award of fees to a successful movant under a § 16–5503 motion to quash unless special circumstances make a fee award unjust. *Mann*, 150 A.3d at 1238. The court could have easily clarified its intent to extend a presumptive fee award to § 16–5502 special motions to dismiss. It did not, even when provided an opportunity to do. Notably, Defendant cites to no case law to support its claim that the holding in *Burke* applies when a moving party prevails on a § 16–5502 special motion to dismiss. This is because upon information and belief, there is no such case law.

As noted in detail in Plaintiffs' Motion to Strike Defendant Gallego's Motion for Attorney's Fees, incorporated here in its entirety, and for the reasons stated below, this is not a case that warrants a presumptive award of attorney's fees and costs. For these reasons, Plaintiffs

respectfully ask that the Court deny Defendant's fee request in it its entirety.

CONCLUSION

Defendant chose to litigate this matter instead of publishing the *reasonable clarifications* requested of him and his editors prior to Plaintiffs' suit, and instead of providing Plaintiffs with a signed *private clarification* that addressed their justified concerns prior to Defendant's time to file Answer/special motion to strike in this case.

Further, Defendant chose to pursue a litigation strategy that has resulted in an exorbitant amount of fees and costs. The pleadings Defendant filed in addition to those required for his special motion were objectively unnecessary. One can only conclude that Defendant chose to file them **to punish Plaintiffs by driving the cost of litigation to a level that will ensure that Plaintiffs go out of business if the requested fees are awarded**. If not evident from the very nature of Defendant's superfluous pleadings, then Defendant's unjustifiably inflated fee request should leave the Court with no doubt of Defendants reprehensible purpose.

For the foregoing reasons, Plaintiffs request that the Court deny Defendant's Motion for Attorney's Fees in its entirety, or in the alternative, that insignificantly reduce the fee award as appropriate and just under the facts of this case.

Respectfully submitted,

By: /s/ *Diana M. Lockshin*

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