SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

JAP HOME SOLUTIONS, INC., *et al.*	:	
	:	
v.	:	Case No. 2017 CA 003390 B
	:	
LOFFT CONSTRUCTION, INC., *et al.*	:	

ORDER

The Court denies the motion of plaintiffs JAP Home Solutions, Inc., Gustavo Frech Barriero, and Jesus Anton Perez to alter the Court's January 26, 2018 Order. The Court concludes that defendants José Gallego Espina, Lofft Construction, Inc. ("Lofft"), and Alejandro R. Sanguinetti are entitled to attorney fees and costs that they would not have incurred but for the claim dismissed under the Anti-SLAPP Act, including but not limited to attorney fees relating to their successful special motion to dismiss. The Court orders further briefing relating to the amount of these fees and costs, and it resolves plaintiffs' other objections to defendants' motion for attorney fees and costs.

I. BACKGROUND

Plaintiffs filed this action on May 16, 2017 against Mr. Gallego, Mr. Sanguinetti, Lofft, and John Drury. Plaintiffs alleged defamation by Mr. Gallego, conspiracy to defame by all four defendants, and two other conspiracy claims against Lofft and Messrs. Drury and Sanguinetti. On October 3, 2017, plaintiffs voluntarily dismissed Mr. Drury as a defendant.

On September 18, 2017, Mr. Gallego filed a special motion to dismiss seeking dismissal of all defamation-based claims under the D.C. Anti-Strategic Lawsuits Against Public Participation Act of 2010, D.C. Code § 16-5501 *et seq.* ("Anti-SLAPP Act"), or alternatively under Rule 12(b)(6). On September 19, 2017, Lofft and Mr. Sanguinetti filed a special motion to

dismiss under the Anti-SLAPP Act that simply incorporated Mr. Gallego's arguments. On October 11, 2017, Lofft and Mr. Sanguinetti filed a motion to dismiss under Rule 12(b)(6).

On November 29, 2017, the Court issued an order dismissing part of the defamation claim against Mr. Gallego under the Anti-SLAPP Act, and it dismissed under Rule 12(b)(6) the rest of the defamation claim against him and the conspiracy claim against all defendants. *See* 11/29/17 Order at 8, 10-11.

Plaintiffs and the two remaining defendants, Lofft and Mr. Sanguinetti, filed a stipulation of dismissal of the remaining counts on December 5 and an amended stipulation on December 6, 2017.

Mr. Gallego filed a motion for costs and attorney fees on December 18 ("Gallego Motion"), and Lofft and Mr. Sanguinetti filed a similar motion on December 22 ("Lofft Motion"). Instead of filing oppositions to these motions, plaintiffs filed motions to strike the attorney fee motions on January 2 and 5, 2018 based on their alleged untimeliness.

On January 26, 2018, the Court denied plaintiffs' motions to strike and allowed plaintiffs to file oppositions to both attorney fee motions by February 9, 2018 ("1/26/18 Order").

Between January 30 and February 5, 2018, defendants filed supplemental memoranda in support of their motions with updated fees and costs. Plaintiffs filed their opposition to both motions on February 9 ("Pl. Opp. to Gallego Motion" and "Pl. Opp. to Lofft Motion"), and Mr. Gallego filed motion for leave to file a reply, along with his reply on February 16 ("Gallego Reply"). Plaintiffs have not filed a response to Mr. Gallego's motion, and the Court exercises it discretion under Rule 12-I(e) to treat this motion as conceded.

On February 23, 2018, plaintiffs filed a motion to alter or amend the 1/26/18 Order ("Pl. Motion"). On March 7 and March 9, 2018 respectively, Mr. Gallego and Lofft filed oppositions.

II. MOTION TO ALTER OR AMEND

A. Legal standard for reconsideration

Plaintiffs seek reconsideration under Rules 59(e) and 60(b). However, these Rules apply to reconsideration of final orders, and the 1/26/18 Order, which addressed plaintiffs' procedural objection to defendants' attorney fee motions and established a schedule for resolving plaintiffs' substantive objections, is plainly not a final order. Rule 54(b) addresses modification of interlocutory orders like the 1/26/18 Order. Rule 54(b) provides that "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."

The standard for reconsideration of interlocutory orders under Rule 54(b) is whether reconsideration is consonant with justice See *Marshall v. United States*, 145 A.3d 1014, 1019 (D.C. 2016) (discussing the standard for reconsideration of interlocutory orders). Reconsideration is warranted if, for example, moving parties "present newly discovered evidence, show that there has been an intervening change in the law, or demonstrate that the original decision was based on a manifest error of law or was clearly unjust." *See Bernal v. United States*, 162 A.3d 128, 133 (D.C. 2017) (quotation, ellipsis, and brackets omitted). However, "it is well-established that motions for reconsideration, whatever their procedural basis, cannot be used as an opportunity to reargue facts and theories upon which a court has already ruled, nor as a vehicle for presenting theories or arguments that could have been advanced earlier." *Ali v. Carnegie Inst. Of Wash.*, 309 F.R.D. 77, 81 (D.D.C. 2015); *SmartGene, Inc. v. Advanced Biological Labs., SA*, 915 F. Supp. 2d 69, 72 (D.D.C. 2013). Raising

"arguments that should have been, but were not, raised in" the original filing "is, frankly, a waste of the limited time and resources of the litigants and the judicial system." *Estate of Gaither v. District of Columbia*, 771 F. Supp. 2d 5, 9-10 (D.D.C. 2011); *see FDIC v. United Pacific Ins. Co.*, 152 F.3d 1266, 1272 (10th Cir. 1998); *Caisse Nationale de Credit Agricole v. CBI Industries, Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996) ("Reconsideration is not an appropriate forum for … arguing matters that could have been heard during the pendency of the previous motion.").

The "consonant with justice" standard is comparable to the "as justice requires" standard that federal courts apply for reconsideration of interlocutory orders. *See, e.g., Capitol Sprinkler Inspection, Inc. v. Guest Services, Inc.*, 630 F.3d 217, 227 (D.C. Cir. 2011). In deciding whether justice requires reversal of an interlocutory order, courts assess circumstances such as "whether the court 'patently' misunderstood the parties, made a decision beyond the adversarial issues presented, made an error in failing to consider controlling decisions or data, or whether a controlling or significant change in the law has occurred." *In Defense of Animals v. NIH*, 543 F. Supp. 2d 70, 75 (D.D.C. 2008) (quoting *Singh v. George Washington University*, 383 F. Supp. 2d 99, 101 (D.D.C. 2005)); *Loumiet v. United States*, 65 F. Supp. 3d 19, 24 (D.D.C. 2014) (same).

The purpose of this standard for reconsideration "is to ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters." *In re Okean B.V.*, 2013 U.S. Dist. LEXIS 126361, at *2 (S.D.N.Y. Sep. 4, 2013) (quotations and citations omitted). Courts have greater discretion to reconsider interlocutory orders than final judgments because the interest in finality is less, *Williams v. Vel Rey Properties*, 699 A.2d 416, 419 (D.C. 1997), but there is still a substantial

interest against endless relitigation. The standard for reconsideration "attempts to balance the interests in obtaining a final decision on matters presented to the Court and the recognition that the Court, like all others, is capable of mistake and oversight." *Brambles USA, Inc. v. Blocker*, 735 F. Supp. 1239, 1240 (D. Del. 1990). A trial court's orders "are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure." *Quaker Alloy Casting v. Gulfco Industries, Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1988). Because "courts do not tolerate such efforts to obtain a second bite at the apple," they "have repeatedly warned parties that motions for reconsideration should not be made reflexively in order to reargue those issues already considered when a party does not like the way the original motion was resolved." *In re Okean B.V.*, 2013 U.S. Dist. LEXIS 126361, at *3 (quotations and citations omitted); *see NYSA-PPGU Pension Fund v. Am. Stevedoring, Inc.*, 2013 U.S. Dist. LEXIS 124417 at *9 (D.N.J. Aug. 30, 2103) ("A motion for reconsideration is improper when it is used to ask the Court to rethink what [it] had already thought through – rightly or wrongly.") (quotation and citation omitted).

"The burden is on the moving party to show that reconsideration is appropriate and that harm or injustice would result if reconsideration were denied." *United States ex rel. Westrick v. Second Chance Body Armor, Inc.*, 893 F. Supp. 2d 258, 268 (D.D.C. 2012) (citing *Husayn v. Gates*, 588 F. Supp. 2d 7, 10 (D.D.C. 2008)).

B. Discussion

Plaintiffs have not carried their burden to show that reconsideration of the 1/26/18 Order is consonant with justice.

Plaintiffs first argue that it was "an error of law and a mistake of fact for the Court to allow Defendants Lofft and Sanguinetti to file Motions for Attorneys' fees because they are not prevailing parties on a special motion to dismiss" under the Anti-SLAPP Act. Pl. Motion at 9.

The Court made clear in the 1/26/18 Order that it was addressing only plaintiffs' procedural objection about the timeliness of the defendants' attorney fee motions and that it was not ruling on the merits of any these motions, and the Court gave plaintiffs an opportunity to make substantive arguments against each of these motions. The Court addresses in Section III.B below plaintiffs' argument that Lofft and Mr. Sanguinetti did not prevail on their special motion to dismiss.

Plaintiffs also argue that the Court committed "an error of law" in finding "that an order granting a special motion to dismiss pursuant to the Anti-SLAPP Act requires a final order pursuant to Rule 54 or Rule 58 to trigger the time for appeal." Pl. Motion at 10. The discussion in the 1/26/18 Order about final orders speaks for itself and relates only to the timeliness of defendants' motions for attorney fees. Plaintiffs reassert several arguments that the Court already considered and rejected, but that is not a proper use of a reconsideration motion – as plaintiffs themselves acknowledge. *See* Pl. Motion at 9 (quoting *District No. 1 – Pacific Coast District v. Travelers Casualty & Surety Co.*, 782 A.2d 269, 279 (D.C. 2001)); *see also* Section II.A above. Nothing in the 1/26/18 Order affected plaintiffs' right or ability to file a notice of appeal before the Court issued the Order on January 26, 2018, and the Court is frankly baffled by plaintiffs' suggestion that this Order somehow prevented them from filing an appeal of the 11/29/17 Order within 30 days after November 29, 2017. *See* Pl. Motion at 13-14. Similarly, nothing in the 1/26/18 Order affects their right to appeal after that date because the Court of Appeals is the court that decides whether any appeal is timely or whether the order appealed from is final. Plaintiffs' right to appeal includes the right to appeal a final order awarding attorney fees.

III. MOTIONS FOR ATTORNEY FEES

The Anti-SLAPP Act was designed to protect defendants in lawsuits filed "to punish or prevent the expression of opposing points of view" because strategic lawsuits against public participation (or "SLAPPs") chill speech even when they are meritless. *See* Committee Report on Bill 18-893 (Nov. 18, 2010) at 1 ("Committee Report"). Because a defendant generally must dedicate a substantial "amount of money, time, and legal resources" to fight a SLAPP, the Anti-SLAPP Act "incorporate[es] substantive rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP." *See id.*

One protection for victims of SLAPPs is the Court's authority under § 16-5504(a) to award litigation costs to a party who prevails on a special motion to dismiss under § 16-5502, as well as under special motions to quash under § 16-5503. Section 16-5504(a) 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." As the Court discusses in Section III.B below, Mr. Gallego, Lofft, and Mr. Sanguinetti prevailed at least in part on their special motions to dismiss under § 16-5502. For the reasons explained in Section III.A below, the Court concludes that defendants are entitled under § 16-5504(a) to attorney fees and costs that they would not have incurred but for the claim dismissed under the Anti-SLAPP Act, including but not limited to attorney fees relating to their special motions to dismiss. The Court orders further briefing about how the "but for" standard applies to this case. The Court also addresses in Section III.B-D below other issues raised by the parties.

A. The "but for" standard

To determine what litigation costs Mr. Gallego, Lofft, and Mr. Sanguinetti may recover under § 16-5504(a), it is useful to divide plaintiffs' claims into two categories. The first category

includes what the Court calls the "SLAPP" claim: the portion of the defamation claim in Count I that was based on the third article and that the Court dismissed under the Anti-SLAPP Act. The second category includes the other or "non-SLAPP" claims: the portion of the defamation claim based on the first article that the Court dismissed under Rule 12(b)(6); the conspiracy-to-defame claim in Count II that the Court also dismissed under Rule 12(b)(6); and the two other conspiracy claims in Counts III and IV that the parties dismissed by stipulation.

Defendants prevailed on their special motion to dismiss with respect to the SLAPP claim, and they prevailed for other reasons on the non-SLAPP claims. "The [Anti-SLAPP] Act does not purport to make attorney's fees available to parties who obtain dismissal by other means, such as under Federal Rule 12(b)(6)." *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1136 n.5 (D.C. Cir. 2015). That raises the question of whether, and to what extent, defendants are entitled to attorney fees relating to the non-SLAPP claims.

The Court draws the applicable standard from a related context. Federal law authorizes award of attorney fee to defendants in certain civil rights cases if the claim is frivolous, and when a plaintiff asserts both frivolous and non-frivolous claims, the defendant may recover attorney fees that it would not have incurred "but for" the frivolous claims. *Fox v. Vice*, 563 U.S. 826, 829 (2011). Under the same "but for" standard, when a plaintiff asserts claims that are dismissed under the Anti-SLAPP Act and also claims that are resolved on other grounds, the defendant may recover attorney fees that it would not have incurred but for the claim dismissed under the Anti-SLAPP Act. In other words, § 16-5504(a) allows a defendant to recover reasonable attorney fees incurred because of, but only because of, a SLAPP claim, and if the defendant would have incurred those fees anyway to defend against non-SLAPP claims, then a court has no basis for transferring the expense to the plaintiff. *See id.* at 836. "At the same time, the 'but-for' standard

... may in some cases allow compensation to a defendant for attorney work relating to both" SLAPP and non-SLAPP claims. *See Fox*, 563 U.S. at 837. The "dispositive question is not whether attorney costs at all relate to a [non-SLAPP] claim, but whether the costs would have been incurred in the absence of the [SLAPP claim]." *See id.* at 838.

Fox "emphasize[d]" that the determination of reasonable attorney fees under the "but for" standard (or otherwise) "'should not result in a second major litigation.'" *Fox*, 563 U.S. at 838 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). As a result "trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time." *Fox*, 563 U.S. at 838. When exercising its "discretion in making this equitable judgment," the "court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for" any fees that defendants did not incur only because plaintiffs included the SLAPP claim in their complaint. *See Hensley*, 461 U.S. at 436-37; *Raton Gas Transmission Co. v. FERC*, 891 F.2d 323, 331 (D.C. Cir. 1989).

This "but for" standard is consistent with the language of § 16-5504(a), which states (emphasis added), "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." If the Council intended to restrict the recovery of costs only to the costs of successful special motions to dismiss or quash, it could have so provided. The broader language indicates that the Court has authority to award litigation costs incurred by the party who prevails on the special motion to dismiss only because the plaintiff included the SLAPP claim in its complaint.

Under the "but for" standard, defendants are entitled to reasonable attorney fees and costs directly relating to their successful special motions to dismiss. In their briefs, the parties did not

address the standard that the Court concludes applies to work on non-SLAPP claims, and the parties should have an opportunity to address the extent to which the defendants incurred litigation costs only because plaintiffs included the SLAPP claim. Among the issues that it would be helpful to the Court for the parties to address are the following three.

First, the parties should address the relationship between the issues concerning the first and third articles. *See Metabolife International, Inc. v. Wornick*, 213 F. Supp. 2d 1220, 1223 (S.D. Cal. 2002) ("the entire lawsuit is subject to the anti-SLAPP motion because all causes of action … relate to free speech and all of the activity by [the defendant's] attorneys occurred in the context of, and were inextricably intertwined with, the anti-SLAPP motion."); *see also Hensley*, 461 U.S. at 435 (when successful and unsuccessful claims "involve a common core of facts" or are "based on related legal theories[,] [m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis").

Second, the parties should address any significance of the fact that dismissal of the SLAPP claim was a necessary predicate for dismissal of the conspiracy-to-defame claim dismissed under Rule 12(b)(6). *See* 11/29/17 Order at 10 ("conspiracy to defame necessarily requires an underlying defamatory act").

Third, the parties should address the extent to which the claims against Lofft and Mr. Sanguinetti for conspiracy to injure (Count III) and tortious interference (Count IV) were based on the alleged defamatory statements. *See* Complaint ¶ 136. Plaintiffs themselves state in their opposition to Lofft's and Mr. Sanguinetti's attorney fee motion that "[t]his matter only contained one cause of action for conspiracy to defame against Defendants." Pl. Opp. to Gallego Motion at 3. In evaluating whether defendants' investment in their special motions to dismiss was

reasonable, the Court can consider whether the special motion to dismiss the SLAPP claim was the domino that caused all of the other dominos to fall and enabled defendants as a practical matter to prevail on the non-SLAPP claims as well. *See Hensley*, 461 U.S. at 435 ("Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.").

The parties are free to address other issues related to application of the "but for" standard to the facts of this case.

B. Lofft and Mr. Sanguinetti as prevailing parties

In the motion for reconsideration that they filed two weeks after they filed their opposition to Lofft and Mr. Sanguinetti's attorney fee motion, plaintiffs argue for the first time that Lofft and Mr. Sanguinetti did not prevail on their special motion to dismiss because the 11/29/17 Order dismissed only the defamation count under the Anti-SLAPP Act and this count named only Mr. Gallego as a defendant. However, the 11/29/17 Order explicitly stated (at 11) "that the Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act of defendants Sanguinetti and Lofft is **GRANTED**," and the 11/29/17 Order referred (at 7) to "defendants" in the plural when it stated that "the defendants are entitled to dismissal of the defamation claim (Count I) under the Anti-SLAPP Act, to the extent it is based on the statements in the third article, unless the plaintiffs can demonstrate that the claim is likely to succeed on the merits." Even though plaintiffs did not name Lofft and Mr. Sanguinetti in Count I, plaintiffs accused Lofft and Mr. Sanguinetti of conspiring to defame them through the third article. For that reason, Lofft and Mr. Sanguinetti filed their own special motion to dismiss, and it is hard to see how the Court could have granted any part of Mr. Gallego's motion without also granting Lofft and Mr. Sanguinetti's motion to the same extent.

Therefore, Lofft and Mr. Sanguinetti are each "a moving party who prevails, in whole or in part, on" a special motion to dismiss within the meaning of § 16-5504(a).

C. Presumptive entitlement to attorney fees

The parties disagree whether the Anti-SLAPP Act creates a presumption that a party who prevails in whole or in part on a special motion to dismiss is entitled to attorney fees. Defendants cite *Doe v. Burke*, 133 A.3d 569 (D.C. 2016), for the proposition that a prevailing party is "presumptively entitled" to recoup costs and fees. *See* Gallego Motion at 1, Lofft Motion at 2. Plaintiffs argue that the holding in *Burke* applies only to special motions to quash under § 16-5503 and not to special motions to dismiss under § 16-5502. *See* Pl. Opp. to Gallego Motion at 7-10, Pl. Opp. to Lofft Motion at 11-15.

The reasoning of *Burke* applies equally to special motions to dismiss and to quash. *Burke* cites the Committee Report in its discussion of Anti-SLAPP Act, and the Committee Report indicates that concerns about the cost that SLAPPs impose on defendants and the danger that SLAPPs are used to "intimidate large numbers of people" are related to the provision that "allows for certain costs and fees to be awarded to the successful party of a special motion to dismiss or a special motion to quash." *See* Committee Report at 4. Both types of special motions provide a remedy for the same problem, and the costs of each motion when successful are equally compensable. This context makes persuasive the dictum in *Burke*, 133 A.3d at 571 n.2, that "[t]he same standards apply to a 'special motion to dismiss,' D.C. Code § 16-5502 (2012 Repl.), not at issue in this case" and "[o]ur analysis thus focuses on the 'special motion to quash,' though most of what we say applies to the former motion as well."

In any event, even if the Anti-SLAPP Act does not create a presumption in favor of an award to a party who prevails on a special motion to dismiss, the Court would exercise its

discretion to make an award in the circumstances of this case. By prevailing on their special motions to dismiss, defendants satisfied the basic statutory requirement for an award of attorney fees, and an award would serve the purposes of this statutory provision. Countervailing considerations do not make such an award unjust or inappropriate.

D. Reasonableness of hours

Plaintiffs argue that defendants' lawyers billed excessive hours and provided inadequate documentation of those hours. Some of plaintiffs' objections are addressed by application of the "but for" standard discussed in Section III.A above. The Court addresses in this Section some issues independent of application of the "but for" standard.

"To establish a reasonable fee, the judge must calculate a 'lodestar' amount by multiplying the number of hours reasonably expended on the litigation by the reasonable hourly rate for the services rendered." *Fred A. Smith Management Co. v. Cerpe*, 957 A.2d 907, 918 (D.C. 2008) (quotation and citation omitted). It is "counsel's burden to prove and establish the reasonableness of each dollar, each hour, above zero," but "[t]he trial court [is] … not required to perform an in-depth analysis of the billing records. *Lively v. Flexible Packaging Ass'n,* 930 A.2d 984, 993 (D.C. 2007) (quotation and citation omitted). In reviewing the prevailing party's billing records, "trial courts need not, and indeed should not, become green-eyeshade accountants." *Fox*, 563 U.S. at 838. "A review for 'reasonableness' is not *carte blanche* for micromanaging the practice of lawyers the court … has no reason to believe are padding their hours." *Tenants of 710 Jefferson St. v. D.C. Rental Housing Comm'n*, 123 A.3d 170, 191 (D.C. 2015). "The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection." *Fox*, 563 U.S. at 838.

The total hours spent by defendants' lawyers on all claims – both the SLAPP claim and the non-SLAPP claims – are substantial. However, that is in large part the result of plaintiffs' strategy and tactics concerning both substantive and procedural matters (strategy and tactics that plaintiffs have continued to employ in the current attorney fee phase of this litigation). To paraphrase *Riverside v. Rivera*, 477 U.S. 561, 580 n. 11 (1983), and *Copeland v. Marshall*, 641 F.2d 880, 904 (D.C. Cir. 1980) (en banc), plaintiffs' aggressive and contentious litigation strategy forced defendants to respond in kind, and plaintiffs cannot litigate tenaciously and then be heard to complain about the time necessarily spent by defendants in response. Plaintiffs may have been entitled to assert the SLAPP and non-SLAPP claims that the Court dismissed and to litigate the case that they initiated the way that they did, but when they lost, they cannot complain about the overall cost to defendants of defeating their claims. *See. EEOC v. Harris Farms, Inc.*, 2006 U.S. Dist. LEXIS 36903, at *50 (E.D. Cal. 2006). As a general matter, defendants' attorney fees are proportionate to the amount of time plaintiffs forced them to spend.

In addition, plaintiffs do not claim that the hours (or rates) of defendants' lawyers are grossly disproportionate to those of their own lawyers, and "Plaintiffs' objection is especially unpersuasive when they do not disclose their own attorneys' fees in prosecuting the numerous claims that [defendants] defeated." *See FaulknerUSA, Inc. v. Durrant Group, Inc.*, 2014 U.S. Dist. LEXIS 198495, at *5-6 (D. Ariz. 2014).[1] Plaintiffs also do not dispute that all defendants agreed to waive any claim to attorney fees under the Anti-SLAPP Act if plaintiffs dropped this case before any defendant filed a special motion to dismiss in September. Gallego Motion Ex. D (Declaration of Mark Bailen) at ¶ 4; Lofft Motion at 4-5. To that extent, plaintiffs' responsibility

[1] The Court does not suggest that it would be unreasonable if the defendants' lawyers spent more time to win the case and to respond to plaintiffs' scattershot and shifting tactics than plaintiffs' lawyers spent in their losing efforts.

for the prevailing defendants' reasonable attorneys' fees is a "self-inflicted wound." *Ragland v. Ortiz*, 2012 U.S. Dist. LEXIS 86610, at *43-44 (N.D. Ill. 2012) (quotation and citation omitted).[2] In sum, plaintiffs have sown the wind, and now they must reap the whirlwind.

Based on a thorough review of the billing records of defendants' attorneys and plaintiffs' objections, and subject to adjustment using the "but for" standard, the Court concludes that the total number of hours spent by the lawyers is within the range of reasonableness, although they are at the high end of this range. Plaintiffs effectively invite the Court to micromanage the practice of the defense lawyers, but that is not the Court's role. *See Tenants of 710 Jefferson St.*, 123 A.3d at 191. The Court has no reason to believe that any lawyer was padding hours. *See id.* Before they prevailed, neither defendants nor their lawyers could know for sure whether their special motions to dismiss would be successful, or whether they would ever recoup their litigation costs. The staff lawyers at the Reporters Committee for Freedom of the Press ("Reporters Committee") who worked on a *pro bono* basis had even less incentive than lawyers who billed on an hourly basis to spend more time on the case than they thought necessary in the exercise of their professional judgment. In addition, nothing suggests that they did not take full advantage of their expertise in this area of the law and use their specialized knowledge to make arguments more effectively and efficiently. Furthermore, the billing records are specific enough to permit the Court to assess the reasonableness of the time spent by lawyers on particular tasks.

[2] As a general matter, "a trial court should not, any more than a jury should, use the information provided in settlement letters for the purpose of determining what is an appropriate resolution of a matter." *Lively*, 930 A.2d at 994 (holding that the trial court could not use a statement in a settlement offer about the amount of the plaintiff's attorney fees to reduce a later award of attorney fees). Here, however, the Court is using plaintiffs' position in settlement for a limited, and valid, purpose – to assess the extent to which each party's positions during the course of the case affected the overall cost of litigating the defamation claims, and whether defendants' unreasonableness in any respect caused their litigation costs to be higher than they could and should have been.

The billing records do not establish that lawyers billed for tasks that should have been performed by paralegals, clerical personnel, or other non-attorneys.

The Court notes two concerns that may warrant a downward adjustment of the attorney fees sought by Lofft and Mr. Sanguinetti even after application of the "but for" standard. First, Lofft and Mr. Sanguinetti's special motion to dismiss was a "me too" motion that simply incorporated by reference the arguments in Mr. Gallego's special motion to dismiss, although Lofft's and Mr. Sanguinetti's lawyers reasonably spent some time conducting their own independent research and assessment concerning the Anti-SLAPP Act and consulting with Mr. Gallego's lawyers about the special motions to dismiss. Second, one of their entries does not appear to be related to Lofft and Mr. Sanguinetti. *See* 7/28/17 entry by Mr. Drury for "Research and review summons for Gallego Espina."

E. Reasonableness of rates for *pro bono* lawyers

The parties disagree about which matrix should be used to calculate the hourly rates of Mr. Gallego's *pro bono* counsel with the Reporters Committee. Attorney fees for lawyers who do not charge their clients should be "calculated according to the prevailing rates the relevant community." *District of Columbia v. Patterson*, 667 A.2d 1338, 1343 (D.C. 1995). Mr. Gallego argues that the Reporters Committee lawyers should be compensated under the *Laffey* Matrix as updated by the Legal Services Index ("LSI *Laffey* Matrix"). The *Laffey* Matrix is a schedule of fees, based on an attorney's experience level, which has long been accepted as reflective of prevailing average rates in the D.C. legal market. *See, e.g., Tenants of 710 Jefferson St.*, 123 A.3d at 182-83. The LSI update is based on the 1989 rates in the *Laffey* Matrix, adjusted annually according to the legal services component of the Consumer Price Index. *See* Gallego Motion Ex. A.

Plaintiffs argue that the correct measure for rates is the Matrix compiled by the U.S. Attorney's Office for the District of Columbia ("USAO Matrix"). *See* Pl. Opp. to Gallego Motion at 8-10. The methodology for the USAO Matrix was revised in 2015, and it is now based on a survey of average hourly rates in the D.C. area that was conducted in 2011 and has been since updated annually according to the Producer Price Index – Office of Lawyers. *See* U.S. DEPT. OF JUSTICE, USAO-DC, USAO ATTORNEY'S FEES MATRIX – 2015-2018, *available at* https://www.justice.gov/usao-dc/file/796471/download.

Electronic Privacy Information Center v. United States DEA, 266 F. Supp. 3d 162, 171 (D.D.C. 2017) ("*EPIC*"), concludes based on expert testimony that the current USAO Matrix provides a more reliable measure of prevailing rates of Washington-area lawyers than does the LSI *Laffey* Matrix because the USAO Matrix "is based on 2011 rather than 1989 billing rates, breaks attorney experience levels into nine categories rather than five, and uses an inflation index that better captures the pricing changes of the relevant market." The Court agrees that the current USAO Matrix should be used to calculate the reasonable rate of the Reporters Committee lawyers. This conclusion is consistent with the Court of Appeals' endorsement of the *Laffey* Matrix, because the Court of Appeals did not consider the relative merits of the *Laffey* Matrix and the current version of the USAO Matrix. *See Tenants of 710 Jefferson St.*, 123 A.3d at 182, 185 (referring to the *Laffey* Matrix as "presumptively reasonable" and "a very good place to start"); *Lively*, 930 A.2d at 989 (accepting *Laffey* Matrix). Mr. Gallego acknowledges that the USAO Matrix, which provides for slightly lower rates, may be used as an alternative to the *Laffey* Matrix. *See* Gallego Motion at 13-14, Gallego Reply at 5 n.7.

Thus, the Court will award attorney fees for Ms. Townsend at the rate of $410/hour, Ms. Nelson at $352/hour, and Ms. Glickman at $302/hour.

IV. CONCLUSION

For these reasons, the key remaining issue is how to apply the "but for" standard in calculating the number of attorney hours for which defendants are entitled to compensation under § 16-5504(a). The Court sets a briefing schedule for the parties to address this issue.

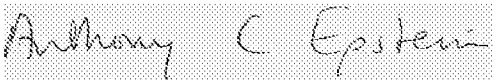
The Court encourages the parties to reach agreement on a reasonable award of attorney fees. Through additional briefing, the Court seeks a basis for a more reliable estimate of litigation costs incurred by defendants because of the SLAPP claim, but the Court's review of defendants' billing records indicates that these costs are very substantial. In addition, defendants are entitled to reasonable attorney fees that they incur in continuing to litigate the reasonableness of their fees. If the parties cannot agree on the reasonable amount of these additional attorney fees, the Court will allow defendants to file a motion for additional litigation costs – consistent with the procedure the Court established in the January 18, 2018 Order in a related case, *Lofft Construction, Inc. v. JAP Homes Solutions, Inc.*, Case No. 2015 CA 005203.

For these reasons, it is hereby ordered that:

1. Plaintiffs' motion to alter or amend the order issued on January 26, 2018 is denied.

2. Mr. Gallego's motion for leave to file a reply is granted, and the reply is accepted for filing.

3. Defendants shall file a supplemental brief concerning application of the "but for" standard by April 5, 2018. Plaintiffs shall file any response by April 19, 2018. Defendants may file a reply by April 26, 2018.



Anthony C. Epstein
Judge

Date: March 22, 2018

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