

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

PETER GORDON, *et al.*,)
) Case No. 2016 CA 006397 B
Plaintiffs,) Judge Steven Wellner
)
v.)
)
FOREST HILLS NEIGHBORHOOD)
ALLIANCE, *et al.*)
)
Defendants.)
_____)

**DEFENDANTS' MOTION FOR AN EXPEDITED AWARD OF ATTORNEYS' FEES
AND COSTS**

I. Introduction

On October 10, 2017, this Court granted the special motion to dismiss filed by Defendants Forest Hills Neighborhood Alliance, a local non-profit historic preservation organization and Jane Solomon, its volunteer officer, pursuant to the D.C. Anti-SLAPP Act of 2010, D.C. Code § 16-5504 (“the Alliance” or “Defendants”). This Court also ruled that “Because Defendants have been successful in their Special Motion to Dismiss and because no special circumstances exist in this case, Defendants are entitled to reasonable attorneys’ fees.” Order of Oct. 11, 201, at 11. This Court therefore directed Defendants to file their application for attorneys' fees and costs by October 30, 2017. *Id.* at 12. Because this Court has already adjudicated the Alliance’s entitlement to reasonable attorneys’ fees, this motion provides the justification for the amount of fees sought by Defendants.

II. Request for Expedited Consideration

On October 25, 2017, Plaintiffs filed a notice of appeal of this Court’s order dismissing

their complaint under the D.C. Anti-SLAPP Act. However, the filing of an appeal does not deprive this Court of jurisdiction over this motion, which seeks to enforce this Court's order of October 11, 2017, not modify it. *See Masalosalo by Masalosalo v. Stonewall Insurance Co.*, 718 F.2d 955, 956 (9th Cir. 1983)

The Alliance hereby requests that this Court issue an expedited decision on this motion for attorneys' fees in light of the pending appeal. Expediting consideration of this motion will prevent delay and duplication at the appellate level, and will permit any attorney's fees issues to be resolved along with the merits, thereby avoiding piecemeal judicial review and promoting judicial efficiency *Id.* at 957 (noting that "[i]f a district court decides a fee issue early in the course of a pending appeal on the merits, and the fee order is appealed, the appeals may be consolidated."). Any delay in the award of attorney's fees would heighten the financial harm that the Alliance has already experienced by forcing the Alliance to incur the additional costs of defending this Court's decision for an indefinite period of time while the appeal is pending. Accordingly, prompt resolution of this motion is "[c]onsistent with the Anti-SLAPP Act's purpose to deter meritless claims filed to harass the defendant for exercising First Amendment rights." *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1239 (2016)

III. Calculation of Attorney's Fees and Costs.

The Anti-SLAPP attorneys' fee provision is similar to the attorneys' fee provision enacted as part of the Civil Rights Act, 42 U.S.C. § 1988. The D.C. Court of Appeals has relied on such statutes in interpreting the Anti-SLAPP Act's attorneys' fee provision. *Doe v. Burke*, 133 A.3rd 569l 577 (D.C. 2016). The purpose of such fee-shifting statutes is, among other things, "to encourage attorneys to accept" these cases, and to ensure 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”. *Ungar v. District of Columbia Rental Housing Commission*, 535 A.2d 887, 889 (DC, 1987); *Tenants of 710 Jefferson St. v. D.C. Rental Hous. Comm'n*, 123 A.3d 170, 181 (DC, 2015)

In determining the reasonableness of attorneys’ fees in a broad range of contexts, the D.C. Court of Appeals has applied the formula spelled out by the U.S. Supreme Court for calculating attorneys’ fee awards under § 1988 of the Civil Rights Act. *See, e.g. Bagley v. Foundation for Preservation of Historic Georgetown*, 647 A.2d 1110, 1115 (DC, 1994) (historic easement enforcement case). As set forth by the U.S. Supreme Court, the calculation of fees requires a three-step process: first, the court must determine the amount of time reasonably expended on the case; second, it must determine a reasonable hourly rate, which is then multiplied by the amount of time to come up with the lodestar, and third, in appropriate cases, the Court may make upward adjustments to the lodestar. *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air (Delaware Valley I)*, 470 U.S. 546, 563-65 (1986); *Blum v. Stenson*, 465 U.S. 886, 888, 901 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983).

A. Number of Hours Reasonably Expended in this Case

Notwithstanding the complexity of the issues in this case, this case was staffed in an efficient and low-budget manner, utilizing a single experienced attorney, Andrea Ferster, who brought experience in defending against SLAPP suits, as well as over 30 years of experience in litigation in the District of Columbia, including expertise in historic preservation and nonprofit law, which was highly relevant to responding to Plaintiffs’ arguments. This expertise allowed counsel to address the issues in this case in a cost-efficient and expeditious manner, allowing

Defendants to reduce the total number of hours that would otherwise have been expended in the case. *See* Declarations of Andrea Ferster and Elizabeth Merritt, attached as Exhibit 1 and 2.

Defendants' counsel maintained complete, detailed billing records, which were contemporaneously recorded and accurately reflect the work done. *See* Ferster Declaration (Exhibit 1). The work performed by counsel in this matter is set forth in detail on the printout attached as Exhibit A to the Ferster Declaration (Exhibit 1). The print-out reflects the date, time, and nature of each activity, and includes details about the specific task performed. *Id.* Defendants have therefore provided satisfactory billing records in this matter.

The work performed by Defendants falls roughly into the following categories, in approximately chronological order: 1) briefing and arguing the motion to dismiss; 2) responding to other motions filed by Plaintiffs (motion to amend complaint, renewed motion for discovery), and 3) preparation of this attorneys' fee petition.

Each of these categories of work is compensable. Of course, the primary substantive work on the special motion to dismiss is clearly compensable. Compensating Defendants for all reasonable work performed to defend against this lawsuit and protect Defendants from further burdensome litigation including renewed requests for burdensome discovery and untimely efforts to expand the scope of this SLAPP suit are also compensable furthers the purpose of the Anti-SLAPP Act to protect targets from the costs and burdens of litigation. Finally, time reasonably devoted to obtaining attorneys' fees, where the court must be petitioned for such an award, is itself subject to an award of fees. *See Prandini v. National Tea Co.*, 585 F.2d 47, 53 (3d Cir. 1978); *Environmental Defense v. EPA*, 672 F.2d 42, 62 (D.C. Cir. 1982); *Johnson v. State of Mississippi*, 606 F.2d 635, 637-38 (5th Cir. 1979). Finally, the Alliance will be entitled to

attorney's fees for work on the appeal. *Dougherty v. Barry*, 820 F. Supp. 20, 25 (D.D.C. 1993). The Alliance will submit a supplemental schedule of fees associated with the filing of this attorneys' fee petition and before the D.C. Court of Appeals upon the resolution of the pending appeal by the D.C. Court of Appeals.

B. Determination of Reasonable Hourly Rates and Calculation of the "Lodestar."

Once it is established that a party is entitled to attorneys' fees, "[i]t remains for the district court to determine what fee is 'reasonable.'" *Hensley v. Eckerhardt*, 461 U.S. at 433. "[A] fee applicant's burden in establishing a reasonable hourly rate entails a showing of at least three elements: [1] the attorneys' billing practices; [2] the attorneys' skill, experience, and reputation; and [3] the prevailing market rates in the relevant community." *Tenants of 710 Jefferson St. v. D.C. Rental Hous. Comm'n*, 123 A.3d 170, 181 (DC, 2015) (citing *Covington v. District of Columbia*, 557 F.3d 1101, 1107 (D.C. 1995), *cert. denied*, 516 U.S. 1115 (1996)).

"A lawyer's hourly rate is measured by its fair market value, "regardless of whether plaintiff is represented by private or non-profit counsel." *Id.* (citing *Blum v. Stenson*, 465 U.S. 886, 895 (1984)). *See also Doe v. Burke*, 133 A.3d at 578 (holding that a movant is entitled to fees without regard to whether its counsel was *pro bono*, or "whether plaintiff was represented by private counsel or by a nonprofit legal services organization"). The U.S. Court of Appeals for the D.C. Circuit has also held that market rates are permitted in the case of attorneys engaged in private, for-profit practice, who "adjusted fee schedules downward from *pro bono* or quasi public interest motives to reflect the reduced ability of the client to pay or what the attorney saw as the importance and justice of the client's cause." *Save Our Cumberland Mountains, Inc. v. Hodel (SOCM)*, 857 F.2d 1516, 1519 (D.C.Cir.1988). As the Court explained:

Congress did not intend the private but public-spirited rate-cutting attorney to be penalized for his public spiritedness by being paid on a lower scale than either his higher priced fellow barrister from a more established firm or his salaried neighbor at a legal services clinic.

857 F.2d at 1524.

In determining the prevailing market rate in the District of Columbia, the District of Columbia courts have routinely relied on the on the “well-established *Laffey* matrix.” *Thanos v. Dist. of Columbia*, 109 A.3d 1084, 1091 (DC, 2014).¹ Specifically, the D.C. Court of Appeals has held that the “‘reasonable hourly rate’ should be measured by the same standard used for calculating fee awards to counsel in private practice: the ‘prevailing market rates in the relevant community for attorneys of similar experience and skill.’” *Tenants of 710 Jefferson St. v. D.C. Rental Hous. Comm'n*, 123 A.3d at 181 (citations omitted). Moreover, the Court cautioned “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.” *Id.* at 184-5. Instead, the Court held that “the Laffey Matrix is a very good place to start, and, we would add, in most cases will be the best place to end lest litigation over attorneys’ fees overshadow the underlying case.” Here, use of the rates in the *Laffey* Matrix is appropriate, since the legal issues involved in this case do not fit neatly within a particular submarket, but instead included constitutional law, nonprofit corporations, historic preservation law, and general civil litigation.

¹ The “*Laffey* Matrix” is the schedule of prevailing rates compiled in *Laffey v. Nw. Airlines, Inc. (Laffey I)*, 572 F. Supp. 354, 371 (D.D.C.1983), *aff'd in part, rev'd in part on other grounds, Laffey v. Nw. Airlines, Inc. (Laffey II)*, 746 F.2d 4 (D.C.Cir.1984), *overruled in part on other grounds en banc by Save Our Cumberland Mountains, Inc. v. Hodel (SOCM)*, 857 F.2d 1516 (D.C.Cir.1988)

Because the Laffey Matrix is now over thirty years old, it has been updated to reflect inflationary changes in the cost of legal services. The courts in the District of Columbia have relied on the Legal Services Index of the National Consumer Price Index, resulting in an adjusted Laffey Matrix, referred to as the "LSI-Adjusted Laffey Matrix." *Salazar v. District of Columbia*, 809 F.3d 58, 62 (D.C. Cir. 2015). In *Salazar*, the Court found that "the LSI-adjusted matrix is probably a *conservative* estimate of the actual cost of legal services in this area." See *Salazar III*, 991 F.Supp.2d at 48 (citation and internal quotation marks omitted) (emphasis added).² A copy of the LSI-Adjusted Laffey Matrix for the Baltimore/Washington, D.C. area applied by the *Salazar* Court is attached to the declaration of Andrea Ferster as Attachment C.

<http://www.laffeymatrix.com/sec.html>. The LSI-Adjusted *Laffey* Matrix establishes the relevant market rates in the District of Columbia, where the lawsuit was brought, where Defendants' counsel practices law, and where the work on the case was performed. *Tenants of 710 Jefferson St. v. D.C. Rental Hous. Comm'n*, 123 A.3d at 183-4.

As the declarations attached hereto demonstrate, Defendants' counsel has substantial (more than thirty years) of litigation experience in this jurisdiction, and is highly regarded in her area of expertise, which includes litigating historic preservation cases under the D.C. Historic Landmarks and Historic District Protection Act ("Preservation Act"), D.C. Code § 6-1101 *et seq.*, as well as in defending historic preservation organizations against SLAPP suits. See

² The U.S. Attorney's Office for the District of Columbia has adopted its own Laffey Matrix, called the USAO Laffey Matrix, reflecting lower hourly rates than the LSI-Adjusted Laffey Matrix. The USAO Laffey Matrix is attached hereto as Exhibit 3. Defendants are requesting the hourly rates at the LSI-Adjusted Laffey Matrix rates as these rates reflect the relevant hourly rates in the Washington, D.C. legal market. As noted in the attached Declaration of Elizabeth Merritt (Exhibit 2), these hourly rates are particularly appropriate in this case in light of the efficiency with which this case was handled, utilizing a single, highly experienced attorney, avoiding duplication and ultimately reducing the total number of hours expended.

Declarations of Andrea Ferster and Elizabeth Merritt, attached as Exhibit 1 and 2. She has provided her services to Defendants in this case at a discount based on the importance and justice of this cause and on the contingent expectation that she would recover market rate attorneys' fees under the Anti-SLAPP Act in Defendants' prevailed in their special motion to dismiss. These factors warrant awarding fees at the prevailing market rate for the Baltimore/Washington, D.C. community set forth in the LSI-Adjusted *Laffey* Matrix.

Further, it is appropriate to award attorneys' fees based on the 2017 updated *Laffey* rates that are currently in effect rather than the rates in effect at the time the services were rendered, given that the Plaintiffs "have maintained exclusive control of the fees at issue." *Stamenkovic v. Campbell-Crane & Assocs., Inc.*, Case No. 05 CA 3597 at 4 (D.C. Super., Nov. 7, 2013) ("this Court has discretion to make an 'appropriate adjustment for delay in payment - whether by the application of current rather than historic hourly rates or otherwise.'") (citing *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989)).

In this case, awarding all fees at the 2017 LSI-Adjusted *Laffey* rates is particularly appropriate, given that Plaintiffs had every opportunity to voluntarily dismiss this lawsuit without permission from the Court when being advised in advance of Defendants' plans to file a special motion to dismiss under the Anti-SLAPP Act. Instead, Plaintiffs elected to aggressively prosecute this case, notwithstanding Plaintiffs' counsel's explicit recognition that "an Anti-SLAPP motion would be difficult to fend off." Def. Opp. To Plaintiffs' Renewed Motion for Discovery, Exhibit 4 (filed Spt. 19, 2017). Since Plaintiffs by their own actions significantly delayed the resolution of this case, it is appropriate to award attorneys' fees at the 2017 LSI-

Adjusted *Laffey* rate for all legal services rendered in this case. The 2017 hourly rate for an attorney with more than 30 years of experience is \$864/hour.

Based on the foregoing, the lodestar for work performed during the pendency of this case is as follows:

<u>2017 Services</u>	<u>Hours</u>	<u>Rate (\$/hr)</u>	<u>Total</u>
Andrea Ferster	93.95	\$864	\$80,654.40
<u>2016 Services</u>	<u>Hours</u>	<u>Rate (\$/hr)</u>	<u>Total</u>
Andrea Ferster	55.10	\$864	\$47,606.40
TOTAL:			<u>\$128,260.50</u>

C. Determination of Reasonable Expenses or Costs of Participation in the Action.

During the course of this litigation, Defendants have incurred expenses for filing fees, photocopying, postage and delivery, travel, and WESTLAW charges in the amount of \$ 1,054.90. These costs are itemized in Attachment D to the Declaration of Andrea C. Ferster (Exhibit 1). These expenses were reasonably and necessarily incurred in connection with Plaintiffs' participation in this case, and thus reimbursement is appropriate under the D.C. Anti-SLAPP Act.

IV. Conclusion

For the reasons stated above, Defendants request an award of attorneys' fees and costs, pursuant to the D.C. Anti-SLAPP Act, D.C. Code § 16-5504(a).

Respectfully submitted,

/s/

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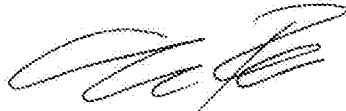
Counsel for Defendants

Certificate of Service

I hereby certify that, on October 26, 2017, I served the foregoing Defendants' motion for attorneys' fees and costs by Casefilexpress, on the following responsible persons:

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Andrea Ferster