SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

TS MEDIA, INC., *et al*	:	
	:	
v.	:	Case No. 2018 CA 001247 B
	:	
PUBLIC BROADCASTING SERVICE	:	

ORDER

The Court (1) grants in part the motion for attorney fees of defendant Public Broadcasting Service ("PBS"), (2) denies PBS's motion to seal exhibit F to the declaration of Grace E. Speights, and (3) denies as moot the conditional consent motion filed by plaintiffs Tavis Smiley Presents, Inc., The Smiley Group Inc., and TS Media, Inc. (collectively "TSM") to seal portions of the opposition to the attorney fees motion.

I. BACKGROUND

In its four-count complaint, TSM alleged that (1) PBS breached its November 2016 agreement with TSM, (2) PBS breached its November 2017 agreement with TSM, (3) PBS intentionally interfered with contract, and (4) PBS tortiously interference with business expectancy. Both sets of claims arise out of PBS's decision to suspend distribution of the *Tavis Smiley* show to PBS member stations after former co-workers accused Mr. Smiley of sexual harassment. Invoking the D.C. Anti-SLAPP Act, D.C. Code §§ 16-5501 – 5505, PBS filed a special motion to dismiss counts III and IV. On May 15, 2018, the Court granted the special motion to dismiss ("5/15/18 Order").

On June 29, 2018, PBS filed a motion for attorney fees pursuant to the Anti-SLAPP Act ("Motion). On July 13, 2018, TSM filed an opposition ("Opp."). PBS represents, and TSM does not dispute, that PBS attempted to meet and confer about a reasonable award and that TSM did not respond. *See* Motion at 1-2.

On June 29, 2018, PBS filed a motion to seal exhibit F to the declaration of Grace Speights, which was submitted in support of PBS's motion for attorney fees ("Motion to Seal"). On July 13, TSM filed an opposition. On July 20, PBS filed a reply ("Reply").

On July 13, TSM filed a consent motion to seal parts of its opposition if the Court grants PBS's Motion to Seal.

II. SEALING

The Court denies PBS's Motion to Seal. The entirety of PBS's conclusory argument is that "[g]ood cause exists to seal the billing invoices because information contained in the time entries are confidential and private information of PBS and PBS's counsel and is not publicly available information." Motion to Seal at 1.

There is a "strong presumption in favor of public access to judicial proceedings." *EEOC v. National Children's Center, Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996) (quotation and citation omitted); *see Mokhiber v. Davis*, 537 A.2d 1100, 1106-09 (D.C. 1988). Judicial records include all documents filed with the Court, and "the meaning and legal import of a judicial decision is a function of the record upon which it was rendered." *In re McCormick & Co., Pepper Products Marketing & Sales Practices Litigation*, 2018 U.S. Dist. LEXIS 97473, at *17-18 (D.D.C. June 13, 2018) (Huvelle, J.) (quotation and citation omitted). Under *National Children's Center, Inc.*, 98 F.3d at 1409, and *United States v. Hubbard*, 650 F.2d 293, 317-22 (D.C. Cir. 1980), courts consider six factors that may act to overcome the presumption in favor of public access to judicial proceedings:

> (1) the need for public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings.

"The burden to rebut the presumption of disclosure rests with the objecting party." *McCormick & Co.*, 2018 U.S. Dist. LEXIS 97473, at *19 (citation omitted). "And, a party seeking to seal court documents must come forward with specific reasons why the record, or any part thereof, should remain under seal." *Id.* (quotations and citations omitted).

PBS does not address these factors or cite any authority for the proposition that attorney time records filed to support a claim for attorney fees should be sealed. The public has an interest in understanding the basis for any judicial ruling on any request for attorney fees, including this ruling on PBS's request, and PBS does not provide specific reasons why its lawyers' time records should be sealed. Motions for attorney fees, and judicial rulings on these motions, are ordinarily public, and the undersigned judge does not recall even a request to seal such a motion or billing records submitted by the requesting party.

Because it denies PBS's Motion to Seal, it denies as moot TSM's consent motion to seal parts of its opposition. TSM states, "If the Court denies PBS's sealing motion, this motion becomes moot." *See* Consent Motion to Seal at 1.

III. THE LEGAL STANDARD FOR ATTORNEY FEES

A. The Anti-SLAPP Act

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[s] 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 that prevails on a special motion to dismiss under § 16-5502. 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 … the costs of litigation, including reasonable attorney fees." "[A] successful movant under [the Anti-SLAPP Act] 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." *Doe v. Burke*, 133 A.3d 569, 571 (D.C. 2016).

"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). Rather, when a plaintiff asserts claims that are dismissed under the Anti-SLAPP Act and also claims that will be 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 e.g. Fox v. Vice*, 563 U.S. 826, 836 (2011) (explaining that 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). "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. 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 general litigation costs incurred by the party who prevails on the special motion to dismiss because the plaintiff included the SLAPP claim in its complaint.

B. Reasonableness

"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." *Lively v. Flexible Packaging Ass'n,* 930 A.2d 984, 993 (D.C. 2007) (quotation and citation omitted).

The Supreme Court has "emphasize[d] that the determination of fees should not result in a second major litigation," and "[t]he essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection." *Fox*, 563 U.S. at 829 (quotation and citation omitted). "The trial court [is] … not required to perform an in-depth analysis of the billing records…." *Lively*, 930 A.2d at 993. "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 Commission*, 123 A.3d 170, 191 (D.C. 2015).

In deciding what total fee award is reasonable, "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 v. Eckerhart*, 461 U.S. 424, 436-37 (1983); *Raton Gas Transmission Co. v. FERC*, 891 F.2d 323, 331 (D.C. Cir. 1989).

The *Laffey* Matrix is a chart consisting of estimates of the hourly rates charged by attorneys in the Washington area based on experience. *See Lively*, 930 A.2d at 988; *Salazar v. District of Columbia*, 809 F.3d 58, 62 (D.C. Cir. 2015). The Court of Appeals "has held that the rates set in the *Laffey* matrix are 'presumptively reasonable'" and "that '[d]eviations from the *Laffey* Matrix's presumptively reasonable measure should not be lightly undertaken and need to be substantially supported.'" *Illinois Farmers Ins. Co. v. Hagenberg*, 167 A.3d 1218, 1236 (D.C. 2017) (quoting and citing *Tenants of 710 Jefferson St.*, 123 A.3d at 184). Not only is "the *Laffey* Matrix is a very good place to start" but "in most cases will be the best place to end lest litigation over attorney's fees overshadow the underlying case." *See Tenants of 710 Jefferson St.*, 123 A.3d at 184. These statements by the Court of Appeals "should not be understood as saying that the *Laffey* Matrix must be applied in every case," but the presumption that the *Laffey* Matrix rates are reasonable generally may be overcome only if a party "presents very specific and reliable evidence establishing" the reasonableness of a different rate. *See id.* at 184-85; *see also Lively*, 930 A.2d at 990 ("an automatic application of this formula will not be appropriate in many cases and could result in an injustice to attorneys who had willingly taken on important

public issues"); *Miller v. Holzmann*, 575 F. Supp. 2d 2, 16 (D.D.C. 2008) (the *Laffey* Matrix does not "impose a ceiling on the rates courts can award pursuant to fee-shifting statutes").

The *Laffey* Matrix was developed as the benchmark for lawyers engaged in "complex federal litigation," *Eley v. District of Columbia*, 793 F.3d 97, 100 (D.C. Cir. 2015), and courts may consider whether the litigation is sufficiently complex to justify use of this matrix. *See Salazar*, 809 F.3d at 64; *Prunty v. Vivendi*, 195 F. Supp. 3d 107, 115 (D.D.C. 2016). The *Laffey* Matrix is used as a benchmark for lawyers with regular hourly billing rates, *see, e.g.*, *Prunty v. Vivendi*, 195 F. Supp. 3d 107, 114-16 (D.D.C. 2016), although it was originally developed for "public interest attorneys without a customary billing rate." *See Electronic Privacy Information Center v. U.S. Drug Enforcement Administration*, 266 F. Supp. 3d 162, 170 (D.D.C. 2017) ("*EPIC*").

Courts have considered two versions of the *Laffey* matrix – one updated by the Legal Services Index ("LSI *Laffey* Matrix"), and one compiled by the U.S. Attorney's Office based on a survey of average hourly rates in the D.C. area and updated annually ("USAO *Laffey* Matrix"). *See generally JAP Home Solutions, Inc. v. Lofft Construction, Inc.*, Case No. 2017 CA 003390, Order at 16-17 (D.C. Super. Ct. March 22, 2018) (describing the different versions). The "LSI-adjusted matrix is probably a conservative estimate of the actual cost of legal services, in this area," *Salazar*, 809 F.3d at 62 (quotation and citation omitted), and the USAO *Laffey* Matrix may be less generous than the LSI *Laffey* Matrix. *See Prunty*, 195 F. Supp. 3d at 115.

The Court of Appeals has approved use of the LSI *Laffey* Matrix as a measure of prevailing average hourly rates in the D.C. legal market. *See, e.g., Tenants of 710 Jefferson St.*, 123 A.3d at 182-83. However, the Court of Appeals has not considered whether the current USAO *Laffey* Matrix provides a more reliable measure of prevailing rates of Washington-area

lawyers than the LSI *Laffey* Matrix. *EPIC*, 266 F. Supp. 3d at 171, concluded, based on expert testimony, that the current USAO *Laffey* Matrix is a better benchmark because it "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 adopts the conclusion in *EPIC*. *See JAP Home Solutions*, Order at 17.

IV. DISCUSSION

PBS seeks attorney fees in the amount of $114,517.20, or $96,223.83 if the Court uses the USAO *Laffey* Matrix. *See* Reply Ex. A. TSM argues that the Court should deny PBS's motion for attorney fees on five grounds: (a) special circumstances make any fee award unjust; (b) PBS does not establish "but for" causation; (c) PBS's request is based on the incorrect matrix; (d) the billing entries are vague; and (e) the attorneys spent an unreasonable amount of time on the matter. The Court addresses each argument in turn.

A. Special circumstances

A plaintiff can overcome the presumption in favor of an award of reasonable attorney fees to a successful movant under the Anti-SLAPP Act if "special circumstances in the case make a fee award unjust." *See Doe*, 133 A.3d at 571. TSM contends special circumstances overcome the presumption in this case because it "is a purely commercial dispute between parties to a television production agreement" and "there are no political or governmental issues at stake." *See* Opp. at 3. However, as the Court ruled in granting PBS's special motion to dismiss, "there is no genuine dispute that Plaintiffs' tort claims are based on PBS's expressive conduct about an issue of public interest involving a public figure," and "PBS made the statement at a time of extraordinary public interest in alleged sexual misconduct by men in positions of power, particularly in news and entertainment." 5/15/18 Order at 4-5. Moreover,

"[t]he statements by PBS that form the basis of Plaintiffs' tort claims do not on their face discuss or further any commercial interest of PBS, which is a non-profit entity." *Id.* at 5-6.

B. "But for" causation

TSM claims that "[i]n addition to seeking fees that arguably related to its anti-SLAPP motion, PBS seeks fees that are related to its defense of the underlying case and its affirmative counterclaim against TSM" and that "PBS cannot reasonably contend that any of its counsel's work related to its Answer and Counter-complaint … were necessary 'but for' TSM's third and fourth claims." *See* Opp. at 4, 6.

Notably, TSM wholly ignores the fact that PBS is seeking only half of the hours its lawyers spent in their initial investigation relating to all of TSM's claims and in preparing the answer and counterclaim. *See* Motion at 5 & n.2. This adjustment is reasonable to "to account for the fact that only two of the Plaintiff's four claims were subject to PBS's Special Motion to Dismiss." *See id.* PBS would not have had to conduct the portion of its investigation relating to its statements to the media but for TSM's inclusion of the SLAPP claims, and it is reasonable for PBS to estimate that this work accounted for about half of the investigation. It is also reasonable for PBS to estimate that half of the work on the answer and counterclaim would not have been done but for the SLAPP claims. *See* Speights Declaration ¶ 24.

A court may make a rough percentage adjustment in determining what portion of attorney fees are recoverable, *see Fox*, 563 U.S. at 838, *Hensley*, 461 U.S. at 436-37, and so may the prevailing party. The Court recognizes that in adjusting for a prevailing party's limited success, "a mathematical approach comparing the total number of issues in the case with those actually prevailed upon … provides little aid in determining what is a reasonable fee in light of all the relevant factors." *See Lively*, 930 A.2d at 992. However, in allocating hours between the

SLAPP claims and the contract claims in the particular circumstances of this case, this approach appears reasonable, and TSM does not object to it.

C. Reasonableness of rates

TSM argues that PBS's lawyers' rates are unreasonable because they exceed the USAO *Laffey* Matrix and because PBS used the LSI *Laffey* Matrix as a benchmark. Opp. at 6-7.[1] In the circumstances of this case, the *Laffey* Matrix is the "best place to end" as well as to start the analysis, *see Tenants of 710 Jefferson St.*, 123 A.3d at 184, and PBS has not demonstrated that an upward departure from these rates is warranted in the circumstances of this case. For the reasons discussed in Section III.A above, it is appropriate to use the current USAO *Laffey* Matrix rather than the LSI *Laffey* Matrix.

One reason why an upward adjustment is not justified involves the complexity of this case. "Courts may look to the complexity of the case and use discretion to determine what rates are warranted." *Gardill v. District of Columbia*, 930 F. Supp. 2d 35, 43 (D.D.C. 2013). TSM does not dispute that the issues raised by PSB's special motion to dismiss under the Anti-SLAPP Act are complex enough to warrant use of the *Laffey* Matrix. However, the issues are not complex enough to justify rates higher than the rates in the *Laffey* Matrix.

Use of the rates in the USAO *Laffey* Matrix does not mean that the rates charged by PBS's lawyers are unreasonable. The *Laffey* Matrix in general, and the USAO *Laffey* Matrix in particular, are conservative. *See* Section III.A above. Moreover, the rates billed to PBS include a 20% discount from the rates actually charged to other clients for the time of these attorneys, and, for purposes of this motion, PBS lowered one lawyer's hourly rate an additional $40/hour.

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[1] TSM attributes to the District of Columbia Court of Appeals decisions by the U.S. Court of Appeals for the District of Columbia Circuit. *See* Opp. at 7 (referring to *Covington v. District of Columbia*, 57 F.3d 1101 (D.C. Cir. 1995), as a decision by the D.C. Court of Appeals).

See Motion at 7-8. In addition, the largest discrepancy between the LSI *Laffey* Matrix and the USAO *Laffey* Matrix involves Ms. Speights, whose $780/hour discounted billing rate is $178 more than the USAO *Laffey* Matrix, and Ms. Speights brings particular experience and qualifications to this case. Nevertheless, PBS has not carried its burden to justify an upward departure from the presumptively reasonable hourly rates in the USAO *Laffey* Matrix.

D. Vague and generic billing entries

TSM argues that the many of the time entries are vague, generic, and inadequate. *See* Opp. at 8-12. The Court concludes that the billing records are specific enough to permit it to assess the reasonableness of the time spent by lawyers on particular tasks because they include "some fairly definite information as to the hours devoted to various general activities." *See Tenants of 710 Jefferson St.,* 123 A.3d at 187 (quotations and citations omitted). "It is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney." *See id.* (quotations and citation omitted). For example, a lawyer who is part of a small team editing a motion is not required to specify exactly what edits he or she made when the lawyer records his or her time. To the extent that *Role Model America, Inc. v. Brownlee*, 353 F. 3d 962, 971 (D.D.C. 2004) (finding that multiple entries of "research and writing for appellate brief" were inadequate), suggests otherwise, the Court follows the holding in *Tenants of 710 Jefferson St.,* 123 A.3d at 187, that it is not necessary to know "the precise activity to which each hour was devoted."

E. Reasonableness of hours

TSM argues that PBS's lawyers billed an unreasonable number of hours. *See* Opp. at 10. Based on a thorough review of the billing records of PBS's attorneys and TSM's objections, 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. TSM admits that it "has no evidence to support the notion that each attorney did not actually work the claimed hours," Opp. at 10, and "[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.,* 123 A.3d at 191.

In evaluating the reasonableness of the total hours of the PBS lawyers, the Court takes into account TSM's strategy and tactics. PBS reasonably, and correctly, anticipated that TSM would fight tooth and nail in this case. Two recent examples of TSM's hard-line intransigence illustrate the point: (1) TSM would not respond when PBS attempted to resolve or at least narrow the dispute about attorney fees (*see* page 1 above), even though (a) Rule 12-I(a) requires the parties to try to resolve a dispute before the filing of a motion, and (b) the Court encouraged the parties at the hearing on May 25 to work out these issues; and (2) TSM is unwilling to accept the Court of Appeals' decision in *Doe* that the prevailing defendant in an anti-SLAPP motion is presumptively entitled to attorney fees (*see* Opp. at 3).[2] 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), TSM's aggressive litigation strategy forced PBS to respond in kind, and TSM cannot litigate tenaciously and then be heard to complain about the time necessarily spent by PBS in response. To paraphrase *EEOC v. Harris Farms, Inc.*, 2006 U.S. Dist. LEXIS 36903, at *50 (E.D. Cal. 2006), TSM may have been entitled to litigate the case that it initiated in the way that it did, but when it lost, it cannot complain about the overall cost to PBS of defeating the SLAPP claims. Plaintiffs that sow the wind may later reap the whirlwind.

[2] Even without this presumption, the Court would exercise its discretion to award attorney fees to PBS in the circumstances of this case.

Furthermore, the higher the stakes, the more thorough the defense that is justified, and TSM seeks "multiple millions of dollars" in compensatory damages, plus unspecified punitive damages. *See* Complaint ¶ 45, *see id.* at ¶¶ 64 & 71 (the damages allegations for the dismissed tort claims). In addition, TSM's tort claims alone put PBS's own reputation at risk.

As a general matter, PBS's attorney fees are proportionate to the amount of time TSM forced it to spend and to the monetary and reputational stakes for PBS. That includes the time conducting a factual investigation, preparing the answer and counterclaim, preparing PBS's special motion to dismiss, and drafting its reply. *See* Motion at 4. For example, PBS filed a 33-page answer, and because TSM filed a narrative complaint, it was reasonable for PBS to provide a narrative answer based on a thorough factual investigation. The answer included 22 affirmative defenses and three counterclaims, including one involving the conduct that was the subject of PBS's statements to the media. In addition, PBS is not seeking fees associated with paralegal time and the billing records do not establish that lawyers billed for tasks that should have been performed by non-attorneys. *See* Motion at 4.

According to TSM, its lawyers spent about half as many hours on its opposition to PBS's special motion to dismiss (65 hours) as PBS's lawyer spent on its motion and reply (115 hours). *Compare* Opp. at 14-15 *with* Motion at 6. However, the fact that PBS's lawyers spent more time to win the dismissal of these claims than TSM's lawyers spent in their losing efforts to defend them does not mean that PBS's lawyers' hours were unreasonable.

The Court also finds that the work of the different lawyers was not duplicative. "An award for time spent by two or more attorneys is proper as long as it reflects the distinct contribution of each lawyer to the case and the customary practice of multiple-lawyer litigation." *Fred A. Smith*, 957 A.2d at 920 (citation omitted). Here, four lawyers performed this work, and

only two of them performed the lion's share. *See* Motion at 8 (summarizing the hours of each lawyer). The Court accepts Ms. Speights' statement under penalty of perjury that these lawyers played complementary roles and that the final work product benefitted from the participation of each of them. *See* Declaration of Grace E. Speights ¶¶ 24-28.

V. CONCLUSION

For these reasons, the Court orders that:

1. PBS's motion for attorney fees is granted in part.

2. PBS is awarded its reasonable fees in the amount of $96,223.83.

3. PBS's motion to seal exhibit F to the declaration of Grace Speights is denied.

4. The consent motion to seal portions of TSM's opposition is denied as moot.

5. To the extent that they are currently sealed, the clerk shall unseal PBS's motion for attorney fees and TSM's opposition.

Anthony C. Epstein
Judge

Date: July 24, 2018

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