

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division**

MARK Z. JACOBSON, Ph.D., Plaintiff, v. CHRISTOPHER T.M. CLACK, Ph.D., et al., Defendants.	Case No. 2017 CA 006685 B Judge Elizabeth C. Wingo
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ORDER

Before the Court again is the request of Defendant National Academy of Sciences (hereinafter “NAS”) for attorney fees, pursuant to both the D.C. Anti-SLAPP Act, § 16-5504(a) and this Court’s April 20, 2020 Order, which granted NAS’s March 7, 2018 Motion for an Award of Attorney’s Fees and Costs Pursuant to D.C. Code § 16-5504(a). On September 13, 2021, this Court issued an *Order* granting Defendant Clack’s Motion for Costs and Attorney’s Fees Under D.C. Anti-SLAPP Act, § 16-5504(a), directing Plaintiff to pay Defendant Clack \$75,000 in attorneys’ fees, and ordering Defendant NAS to provide to the Court “an unredacted copy of Exhibit B, the invoices, on or before September 20, 2021” for the Court’s *in camera* review. *See* September 13, 2021 *Order*, at 10. As the Court noted in the September 13, 2021 Order, as the Court has already determined that Defendant NAS is entitled to an award of attorney’s fees and costs, the only matter left for resolution is the amount of attorney fees and costs to award. Defendant NAS having timely submitted the required materials, the Court now issues its ruling.

I. The Pleadings re: Attorney's Fees

Defendant NAS filed its Praecipe Regarding its Attorney's Fees Request on June 2, 2020 (hereinafter "NAS Praecipe"). The NAS Praecipe asserts that between 2017 and 2018, its attorneys and paralegals billed approximately 785.6 hours, amounting to \$535,903.65 in fees¹ and \$8,257.20 in costs. *See* NAS Praecipe, at 2-4. In response to Plaintiff's objections to the hourly rates charged by NAS's counsel, Counsel also analyzed the hours of its attorneys and paralegals using the Laffey Matrix, which they correctly assert is "widely accepted by the D.C. Superior Court as furnishing hourly rates for attorneys and paralegals;" that recalculation yielded a higher total amount of fees due, specifically \$605,038.10. *See id.* at 4-5.² Additionally, although "NAS maintains that the costs incurred are recoverable, it agrees to waive its request for reimbursement of costs" in response to Plaintiff's objections to such costs. *See id.* at 5. Thus, NAS only seeks the \$535,903.65 in attorney's fees.³ Finally, NAS, in its Praecipe, also responds to several of Plaintiff's original objections, from the number of hours and money billed in this matter, to the manner the hours were billed. *See id.* at 5-7.

On June 15, 2020, Plaintiff filed a Praecipe in Response to Affidavit in Support of Fees of Defendant NAS (hereinafter "Plaintiff's Response to NAS Praecipe") in which he argued the Court should deny NAS's request for attorney's fees and costs as a sanction for its "unreasonable, poorly documented, and overreaching fee request." *See* Plaintiff's Response to NAS Praecipe, at 22. Plaintiff requests that if the Court decides to award any amount, the award

¹ Paragraph 6 of the NAS Praecipe notes that this amount reflects a ten percent discount on total fees billed each month. *See* NAS Praecipe at 3, para. 6.

² As the Court previously noted, therefore, even without the 10% discount, the fees charged are slightly lower than under the Laffey Matrix; if the \$605,038.10 amount is discounted by 10%, the amount of fees would be \$544,534.30.

³ NAS, in its Praecipe, also reserves the right to supplement its request for additional fees incurred in responding to a subsequently filed motion, that is, Plaintiff's Motion for Reconsideration. *See id.* at 2 n.1.

be limited to no more than \$30,000. *Id.* at 5, 22. Plaintiff asserted multiple arguments in opposing NAS's Praeceptum, specifically

- (1) NAS failed to timely submit its "proposed attorney's fees and costs to Plaintiff in writing on or before May 4, 2020" per the Court's Order;
- (2) NAS failed to meet its burden of proof to show that the requested \$535,903.65 in attorneys' fees was reasonable and necessary – indeed the 785.6 total hours billed to draft 3 motions worth of briefing was unreasonable and excessive;
- (3) the block billing is improper and evades a fair assessment of the reasonableness of NAS's fees;
- (4) the redactions are excessive, improper, and prevent a fair assessment of the reasonableness of NAS's fees;
- (5) there is an excessive amount of attorney duplication;
- (6) there is an excessive number of attorneys (six) and paralegals (two), thus creating further attorney duplication and inefficiency;
- (7) NAS has failed to provide critical information regarding the experience levels of its attorneys to assess the reasonableness of the hourly rates charged;
- (8) NAS improperly seeks reimbursement of excessive charges for the clerical work of paralegals;
- (9) NAS should not be awarded fees for making an excessive and overreaching fee request for providing false or misleading information in its briefs to the Court; and
- (10) the Court should not permit NAS to submit a reply brief.

See id. at 4.

On June 22, 2020, Defendant NAS filed a Reply in Further Support of its Praeceptum Regarding its Attorney's Fee Request (hereinafter "NAS Reply"). In NAS's Reply, Defendant NAS disputes Plaintiff's assertion that the fees sought are excessive, arguing this was not a "straightforward defamation case" as Plaintiff claims, but rather, a lawsuit that included three separate causes of action, detailed in a 41-page Complaint, resulting in a 36-page Court opinion finding the Defendant's entitled to attorney's fees. *See* NAS Reply, at 1. NAS also argues the question of whether the number of hours was reasonable should be obviated by the fact that NAS's fees are already 12 percent lower than the fees reflected in the Laffey matrix, the fee scale Plaintiff requested be used. *Id.* at 2.

II. Analysis

As the Court stated in its September 13, 2021 *Order*, the Anti-SLAPP Act “authorizes the trial court to award costs and fees – including attorney’s fees – to a moving party who prevails ‘in whole or in part’ on a special motion to dismiss.” *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1238 (D.C. 2016); D.C. Code § 15-5504(a). Specifically, pursuant to Code § 16-5504(a), “[t]he court may award a moving party who prevails, in whole or in part, on a motion brought under Code § 16-5502 . . . the costs of litigation, including reasonable attorney’s 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 Court then noted that:

[t]his Court has already determined that for the purposes of resolving the request for attorney’s fees, Defendants have prevailed in whole or part under the statute and there are no special circumstances that would render an award of reasonable fees unjust in this case. The D.C. Anti-SLAPP Act was enacted to protect the right of advocacy on issues of public interest against lawsuits intended to punish or censor speech. The safeguards provided by the Act, including reasonable attorney’s fees and costs, are critical parts of the statute that must serve its purpose and be upheld. Defendants are entitled to recoup such fees pursuant to D.C. Code § 16-5504(a).

See September 13, 2021 *Order*, at 6. The Court then proceeded to reject most of the arguments asserted by Plaintiff, including the assertion that Defendant NAS had failed to comply with the Court’s May 4, 2020 order by failing to provide him with an actual fee petition, that the Court had limited the award of fees to that of one attorney per Defendant and that the fees requested were unreasonable because “[t]his is not a patent infringement or antitrust case with complex theories of law,” but instead “is a relatively straightforward defamation case primarily involving two written publications” (quoting Plaintiff’s Response to NAS Praecipe, at 8); the Court found, in rejecting these arguments, that because “[t]he briefing involved complex issues under the

relatively recently-enacted statute, including issues of first impression with respect to the fees,” “that the fees are high is not in any way surprising.” September 13, 2021 *Order*, at 6-8. The Court also found that some of the arguments related to block billing and the invoices were not persuasive, and indeed, that some of the more than 70 asserted “discrepancies” identified by Plaintiff were, upon closer review, so clearly misleading that “Plaintiff’s arguments in general are undermined.” September 13, 2021 *Order*, at 9. The Court did find, however, that Plaintiff’s complaints with respect to the redactions in the NAS invoices had some merit, as the redactions did hamper the Court’s ability to evaluate what tasks were involved to determine whether the amount of time spent was reasonable. Thus, as the invoices were redacted on the basis of asserted privilege, the Court ordered Defendant NAS to submit an unredacted version of the invoices for its *in camera* review to chambers in order to determine whether to award Defendant NAS its requested fees in whole or in part. *See, e.g., SEIU Nat’l Indus. Pension Fund v. Liberty House Nursing Home of Jersey City*, 232 F. Supp. 3d 69, 81 (D.D.C. 2017) (directing the party seeking fees to submit “counsel’s monthly invoices” noting that “[a]ny privileged portion of the monthly invoices may be redacted, with the unredacted invoice provided to the court in camera.”).

Defendant NAS timely submitted the required unredacted exhibit. The Court has reviewed each page of the unredacted exhibit, as well as the arguments of both parties in the related pleadings. Based upon its review, the Court concludes that while, on the whole, the entries are generally thorough and reflect the significant work necessary to address the complex issues in this SLAPP case, which asserted three different causes of action and raised issues of first impression with respect to attorney’s fees, a reduction of the fees requested is appropriate for two reasons.

In general, a review of the unredacted exhibit leads the Court to conclude that Plaintiff's complaints regarding block billing are without merit, as the tasks are generally sufficiently specifically described that it is possible to determine the reasonableness of time spent. Moreover, the total number of hours billed does not strike this Court as disproportionate given the number of areas that NAS had to address to respond appropriately to the Complaint; the bills reflect legal research on a wide range of issues, all of which the Court concludes were in fact implicated by the Complaint filed in this matter, including choice of law issues, defamation, breach of contract, promissory estoppel, jurisdiction, anti-SLAPP laws and motions generally and with respect to academic publications, and implied contracts generally and with respect to company's policies. Moreover, the nature of the case increased its complexity, and therefore, the time necessitated to respond appropriately, as the defamation and other claims Plaintiff asserted arose out of the publication of an academic paper addressing complex scientific modeling regarding environmental issues.

Nonetheless, as the trial court noted in *Parsi v. Daiouleslam*, 937 F. Supp. 2d 44, 48 (D.D.C. 2013), "it remains defendant's burden to show the reasonableness of each element of his fee request." And here, the Court concludes that there are a number of instances of billing entries by two of the six attorneys where the entries are not sufficiently specific as to the work done for the Court to conclude the hours are reasonable. For example, in October 2017, Attorney Potts lists 5.3 hours to "[r]eview case law; prepare motion to dismiss" on October 26; 8.5 hours on October 27 to "[p]repare motion to dismiss; review case law and documents for same"; on October 30, 8.5 hours "[p]repare motion to dismiss; conferences with J. Esposito, V. Farrah and A. Squires regarding same; telephone conference with A. Mosely and M. Gold regarding motion to dismiss and related issues;" and on October 31, 6.4 hours to "[p]repare

motion to dismiss; conferences with J. Esposito, V. Farrah and A. Squires regarding same.” *See* Exhibit B, October 2017 invoice, at 4-5. Similarly, in the November 2017 invoice, Attorney Feiler billed 4.6 hours on November 7 for “[w]ork on brief in support of motion to dismiss; analyze complaint, exhibits thereto;” on November 8, 4.3 hours for “[w]ork on brief in support of motion to dismiss, strategy regarding same;” on November 9, 4.1 hours for “[w]ork on brief in support of motion to dismiss; analyze materials regarding same;” on November 10, 4.4 hours for “[t]elephone conference with J. Esposito, B. Potts regarding strategy; work on briefs in support of motion to dismiss; legal research regarding same;” on November 11, 2.4 hours for “[w]ork on briefs in support of motion to dismiss, attachment to same; November 13, 3.9 hours for “[w]ork on briefs in support of motion to dismiss;” and on November 14 and 15, 1.7 and 2.7 hours respectively to “[w]ork on briefs in support of motion to dismiss.” *See* Exhibit B, November 2017 invoice, at 3-6.⁴ Moreover, the non-specific entries provided by these two attorneys on some days explains many of the “discrepancies” asserted by Plaintiff; either Potts or Feiler failed to include meetings or communications with attorneys that the other attorneys did include.⁵ Moreover, although the Court concludes that staffing this matter with multiple attorneys is entirely reasonable given both its complexity and what was at stake for NAS, it is clear that to some extent, the large number of attorneys created some redundancies, for which NAS has not met its burden of demonstrating the reasonableness. For example, on January 26, 2018, both Attorney Esposito and Attorney Potts included time for “final proofing of reply” and “finalize reply in support of motion to dismiss.” *See* Exhibit B, January 2018 invoice, at 8. For both of

⁴ Although the Court would not characterize these issues as widespread, as they generally involved only the entries by these two attorneys, and only involved a small fraction of the entries by those two attorneys, the instances cited are not a complete listing, as the issue did arise in other invoices as well, such as Feiler’s January 2018 entries.

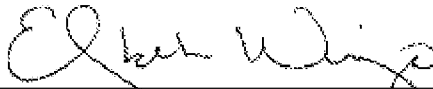
⁵ Thus, vague entries by Potts and Feiler explain, for example, the asserted discrepancies that “[o]n October 26, 2017, Esposito claims to review multiple emails with Potts, but Potts lists no such email or conference;” “[o]n October 27, 2017, Esposito claims to review an email from and have a conference with Potts, but Potts lists no such email or conference;” “[o]n November 7, 2017, Esposito claims both multiple conferences and multiple emails with Feiler, but Feiler lists no such conferences.” *See* Plaintiff’s Response to NAS Praecipe, at 10-11.

these reasons, the Court concludes that some reduction in the requested attorney's fees is warranted. *See, e.g., Parsi*, 937 F. Supp. 2d at 48 (imposing a "modest, 10% reduction" where the Court found that the overall hours did not seem disproportionate to the task at hand, but where the attorney's entries "make it hard to tell whether the nearly 40 hours claimed for drafting, reviewing, and revising were reasonably expended"). Where, as here, Plaintiff already benefits from the 10% reduction in fees afforded NAS, and where the Court finds both the level of staffing and the work expended generally reasonable given the issues before the Court, the Court concludes that reducing the requested fees by an additional 20% reduction appropriately addresses the issues found, while satisfying the purpose of the Anti-SLAPP Act's provisions. As a result, the Court will award Defendant NAS \$428,722.92 in attorneys' fees.

Accordingly, it is this 5th day of July, 2022, hereby

ORDERED, that Plaintiff Mark Z. Jacobson shall pay Defendant National Academy of Sciences \$428,722.92 in reasonable attorney fees within 60 days of the date of this Order.

SO ORDERED.



JUDGE ELIZABETH CARROLL WINGO
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
(Signed in Chambers)

Copies to:

Mark Z. Jacobson, Ph.D.
jacobson@stanford.edu
Via Email
Plaintiff, pro se

Paul S. Thaler
Jackson S. Nichols
Via CaseFileXpress
Former Counsel for Plaintiff Mark Z. Jacobson, Ph.D.

Drew W. Marrocco
Via CaseFileXpress
Counsel for Defendant Christopher T. M. Clack, Ph.D.

Evangeline C. Paschal
Counsel for Defendant National Academy of Sciences