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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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LOREN SCOTT,

Plaintiff,

v.

KELKRIS ASSOCIATES, INC.
dba CREDIT BUREAU ASSOCIATES,

Defendant.

NO. CIV. 2:10-1654 WBS DAD

MEMORANDUM AND ORDER RE:
MOTION FOR ATTORNEY'S FEES

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Plaintiff Loren Scott brought this action against defendant Kelkris Associates, Inc., dba Credit Bureau Associates arising out of defendant's allegedly improper service of plaintiff in a debt collection action. Presently before the court is defendant's motion for attorney's fees.

I. Factual and Procedural Background

Defendant was assigned a debt that plaintiff allegedly owed to Travis Credit Union. After failing to collect the debt from plaintiff voluntarily, defendant initiated a debt collection

1 suit against plaintiff in the Superior Court of California for
2 Sacramento County on January 23, 2009. (Compl. ¶ 6, Ex. B.)

3 Through a licensed process server, defendant
4 unsuccessfully attempted to effectuate substitute service on the
5 plaintiff by leaving a copy of the summons and lawsuit with
6 plaintiff's father at a house that defendant incorrectly believed
7 to be plaintiff's residence and by mailing copies of the same to
8 the residence. (Steinheimer Decl. ¶¶ 7-9 (Docket No. 28).) A
9 default judgment was entered against plaintiff in the debt
10 collection action. (Compl. ¶ 8.)

11 The first that plaintiff learned of the suit filed
12 against him was when he received a letter notifying him of an
13 Earning Withholding Order. After learning of the lawsuit and the
14 default judgment against him, plaintiff contested the default
15 judgment, which the Superior Court vacated "on the ground of
16 inadvertence and excusable neglect." (Friedman Decl. Ex. A
17 (Docket No. 18).)

18 Plaintiff brought suit against defendant alleging
19 violations of §§ 1692b(1)-(2), 1692c(b), 1692d, 1692e, 1692e(10),
20 and 1692f of the federal Fair Debt Collection Practices Act
21 ("FDCPA"), 15 U.S.C. § 1692 et seq., and §§ 1788.12(b) and
22 1788.14(a) of the California Rosenthal Fair Debt Collection
23 Practices Act ("Rosenthal Act"), Cal. Civ. Code § 1788 et seq.
24 (Docket No. 1.)

25 Defendant then brought a special motion to strike
26 plaintiff's state law claims under California's anti-Strategic
27 Lawsuits Against Public Participation ("anti-SLAPP") statute,
28 Cal. Civ. Proc. Code § 425.16. (Docket No. 8.) The motion was

1 granted only as to plaintiff's claim for invasion of privacy,
2 eliminating the possibility that plaintiff could recover punitive
3 damages. (Oct. 29, 2010, Order (Docket No. 13).) After the
4 court issued its order on defendant's anti-SLAPP motion,
5 defendant's counsel sent plaintiff's counsel an email requesting
6 attorney's fees, but did not file a motion. (Shaw Decl. ¶¶ 5-8,
7 Ex. A (Docket No. 29).) Plaintiff's counsel objected to the
8 request, contending that because the invasion of privacy claim
9 was not "the crux" of plaintiff's lawsuit and plaintiff would not
10 have ultimately sought to recover the punitive damages requested
11 in the complaint, defendant was not a "prevailing defendant" on
12 its anti-SLAPP motion. (Id. ¶¶ 3-7, Ex. A.)

13 During discovery, plaintiff served one set of what
14 defendant characterizes as "boilerplate discovery" and did not
15 take any depositions. (Steinheimer Decl. ¶ 3.) Plaintiff
16 identified only one witness who supported his claims, his father
17 Lewis Scott. (Id. ¶ 4.) Shortly before defendant had requested
18 that he be deposed, Lewis Scott suffered a stroke that rendered
19 him unable to attend the deposition. (Friedman Decl. ¶ 11
20 (Docket No. 29); Scott Decl. ¶ 12.) The deposition was
21 rescheduled after he had recovered, but he failed to appear at
22 the deposition. (Friedman Decl. ¶ 11; Scott Decl. ¶¶ 9-12.)
23 Lewis Scott did not respond to calls from plaintiff or
24 plaintiff's counsel when they attempted to find out why he had
25 not appeared at the deposition as he had indicated he would.
26 (Friedman Decl. ¶ 11; Scott Decl. ¶¶ 9-12.)

27 At the close of discovery, defendant moved for summary
28 judgment on all of plaintiff's remaining claims. (Docket No.

1 17.) The only evidence plaintiff produced were declarations
2 filed by himself and his father, which were similar to
3 declarations filed in the state court debt collection action.
4 (Steinheimer Decl. ¶ 5.) The court found that there were no
5 disputed material facts and that plaintiff had failed to produce
6 evidence sufficient to support his allegations that defendant had
7 violated the FDCPA and the Rosenthal Act. (Mar. 23, 2012, Am.
8 Order at 8-17 (Docket No. 32).) Accordingly, the court granted
9 defendant's motion for summary judgment as to all remaining
10 claims.

11 Defendant now moves for reasonable attorney's fees in
12 the amount of \$24,929.29 pursuant to 15 U.S.C. § 1692k(a)(3) and
13 California Civil Code section 1788.30(c), or for reasonable
14 attorney's fees in the amount of \$8,459.00 pursuant to California
15 Code of Civil Procedure section 425.16(c) as the prevailing
16 defendant on its special motion to strike.

17 II. Discussion

18 A. Attorney's Fees Pursuant to the FDCPA and the Rosenthal
19 Act

20 Both the FDCPA and the Rosenthal Act contain fee-
21 shifting provisions. Under § 1692k(a)(3) of the FDCPA, "[o]n a
22 finding by the court that an action under this section was
23 brought in bad faith and for the purpose of harassment, the court
24 may award to the defendant attorney's fees reasonable in relation
25 to the work expended and costs." 15 U.S.C. § 1692k(a)(3). To
26 recover under this statute, there must be "evidence that the
27 plaintiff knew that his claim was meritless and that plaintiff
28 pursued his claims with the purpose of harassing the defendant."

1 Gorman v. Wolpoff & Abramson, LLP, 435 F. Supp. 2d 1004, 1013
2 (N.D. Cal. 2006), rev'd on other grounds, 584 F.3d 1147 (9th
3 Cir. 2009). At a minimum, "minimally colorable" claims are not
4 considered bad faith, Guerrero v. RJM Acquisitions LLC, 499 F.3d
5 926, 940 (9th Cir. 2007), and to show bad faith, a defendant must
6 show more than mere frivolousness, Krapf v. Nationwide Credit
7 Inc., No. SACV 09-00711, 2010 WL 2025323, at *5 (C.D. Cal. May
8 21, 2010).

9 The Rosenthal Act, in turn, provides that "reasonable
10 attorney's fees may be awarded to a prevailing creditor upon a
11 finding by the court that the debtor's prosecution or defense of
12 the action was not in good faith." Cal. Civ. Code § 1788.30(c).
13 Both statutes, therefore, limit a defendant's ability to recover
14 attorney's fees to instances where the plaintiff has acted in bad
15 faith in bringing his or her action. Roybal v. Trans Union, No.
16 Civ. 2:05-01207, 2009 WL 394290, at *1 (E.D. Cal. Feb. 17, 2009).

17 Defendant argues that plaintiff's bad faith in bringing
18 this action is demonstrated by the fact that plaintiff's claims
19 lacked merit and a factual or legal basis. It notes that
20 plaintiff produced only limited evidence in opposition to
21 defendant's motion for summary judgment and that defendant was
22 successful in obtaining summary judgment on all of plaintiff's
23 claims under the FDCPA and the Rosenthal Act. It is true that
24 the court ultimately determined that plaintiff had not
25 demonstrated a triable issue of material fact as to his FDCPA and
26 Rosenthal Act claims. While it might be fair to characterize
27 plaintiff's claims as frivolous or barely colorable, there is no
28 proof that plaintiff knew his claim was meritless, Gorman, 435 F.

1 Supp. 2d at 1013, or other evidence to support a finding of bad
2 faith.

3 It cannot be the law that any time a plaintiff loses on
4 summary judgment, he has acted in bad faith. See id. at 1012-13
5 (granting defendant's motion for summary judgment on FDCPA
6 claims, but declining to find bad faith); Walsh v. Frederick J.
7 Hanna & Assocs., No. Civ. 2:10-2720, 2011 WL 537854, at *1 (E.D.
8 Cal. Feb. 15, 2011) (finding no bad faith where plaintiff's FDCPA
9 and Rosenthal Act claims were dismissed with prejudice).

10 Defendant has not made the extra showing of bad faith.

11 Accordingly, defendant is not entitled to attorney's fees under
12 California Civil Code section 1788.30(c) or § 1692k(a)(3) of the
13 FDCPA.

14 B. Fees Pursuant to California Code of Civil Procedure
15 Section 425.16

16 Pursuant to California's anti-SLAPP statute, "a
17 prevailing defendant on a special motion to strike shall be
18 entitled to recover his or her attorney's fees and costs." Cal.
19 Civ. Proc. Code § 425.16(c)(1). It is well-settled that such an
20 award of fees and costs is mandatory under the statute, Ketchum
21 v. Moses, 24 Cal. 4th 1122, 1131 (2001), and applies to
22 successful anti-SLAPP motions brought in federal court, Verizon
23 Del., Inc. v. Covad Commc'ns Co., 377 F.3d 1081, 1091 (9th Cir.
24 2004). An award of fees under subsection 425.16(c)(1) may also
25 include the "fees incurred in litigating the award of attorney
26 fees." Ketchum, 24 Cal. 4th at 1141.

27 "The fee-shifting provision was apparently intended to
28 discourage [] strategic lawsuits against public participation by

1 imposing the litigation costs on the party seeking to 'chill the
2 valid exercise of the constitutional rights of freedom of speech
3 and petition for the redress of grievances' and encourage
4 'private representation in SLAPP cases.'" Id. at 1131 (quoting
5 Cal. Civ. Proc. Code § 425.16(a)); see also Northon v. Rule, 637
6 F.3d 937, 938 (9th Cir. 2011) ("The entitlement to fees and costs
7 enhances the anti-SLAPP law's protection of the state's
8 'important, substantive' interests."). California courts have
9 thus held that the anti-SLAPP statute reflects a "strong
10 preference for awarding attorney fees to successful defendants"
11 and the "term 'prevailing party' must be interpreted broadly to
12 favor an award of attorney fees to a partially successful
13 defendant." Lin v. City of Pleasanton, 176 Cal. App. 4th 408,
14 425-26 (1st Dist. 2009) (internal citations and quotation marks
15 omitted). Plaintiff contends that despite defendant's success in
16 bringing an anti-SLAPP motion as to the claim for invasion of
17 privacy, defendant should not be considered a prevailing party.

18 Under certain circumstances, a defendant may not be
19 considered a prevailing party even though the court granted its
20 anti-SLAPP motion because "the results of the motion were so
21 insignificant that the party did not achieve any practical
22 benefit from bringing the motion." Mann v. Quality Old Time
23 Serv., Inc., 139 Cal. App. 4th 328, 340 (4th Dist. 2006). "The
24 crucial question is one of practicality; did anything of
25 substance (technical victories notwithstanding) change in the
26 posture of the case and the claims being lodged against the
27 defendant after it brought the special motion to strike than were
28 in existence beforehand." Brown v. Elec. Arts, Inc., 722 F.

1 Supp. 2d 1148, 1155 (S.D. Cal. 2010).

2 In Moran v. Endres, 135 Cal. App. 4th 952 (2d Dist.
3 2006), the trial court denied fees under subsection 425.16(c)
4 when the defendant had moved to strike all eleven causes of
5 action in the complaint, but was successful only in striking a
6 purported cause of action for "conspiracy." Id. at 954-56. The
7 appellate court upheld this decision on the grounds that such a
8 trivial victory on a cause of action that was not truly a cause
9 of action to begin with did not entitle the defendant to
10 attorney's fees where the ruling "in every practical sense meant
11 nothing." Id.

12 In contrast, in Mann, the court held that the
13 defendants were entitled to fees even though they had
14 successfully eliminated only a trade libel cause of action.
15 Mann, 139 Cal. App. 4th at 340. In holding that the defendants
16 were the prevailing party despite the partial success of their
17 motion, the court noted that the eliminated cause of action,
18 although similar to a remaining claim for defamation, was not
19 identical to that claim and that its elimination had the
20 "potential to narrow the litigation" and "reduc[e] recoverable
21 damages." Id.

22 Here, it cannot be said that the court's ruling on
23 defendant's anti-SLAPP motion "in every practical sense meant
24 nothing." To the contrary, the motion was successful in
25 eliminating plaintiff's invasion of privacy claim, and with it
26 the threat of punitive damages as that was the only claim in the
27 complaint on which punitive damages were available. The motion
28 also narrowed the scope of discovery. Plaintiff's protestations

1 that the invasion of privacy claim was not central to his action
2 and that punitive damages would likely not have been available in
3 this case are of no moment. If this claim was truly one that
4 plaintiff did not intend to seriously pursue, then it was
5 precisely the type of claim that the anti-SLAPP statute is
6 intended to protect against. See Cal. Civ. Proc. Code § 425.16.
7 Accordingly, defendant is a prevailing party entitled to an award
8 of the attorney's fees incurred in bringing the special motion to
9 strike.

10 III. Calculating the Award

11 " [T]he fee setting inquiry in California ordinarily
12 begins with the 'lodestar,' i.e., the number of hours reasonably
13 expended multiplied by the reasonable hourly rate." PLCM Grp. v.
14 Drexler, 22 Cal. 4th 1084, 1095 (2000); see Ketchum, 24 Cal. 4th
15 at 1131 (indicating that the lodestar is used to calculate fees
16 under the anti-SLAPP statute). "The reasonable hourly rate is
17 that prevailing in the community for similar work." PLCM Grp.,
18 22 Cal. 4th at 1095 (citing Margolin v. Reg'l Planning Comm'n,
19 134 Cal. App. 3d 999, 1004 (2d Dist. 1982)). The lodestar may
20 then be adjusted upward or downward by the court based on
21 relevant factors. Ketchum, 24 Cal. 4th at 1132. Specifically,
22 Local Rule 293(c) provides the following list of non-exhaustive
23 factors that guide a court's award of attorney's fees:

- 24 (1) the time and labor required of the attorney(s);
- 25 (2) the novelty and difficulty of the questions
26 presented;
- 27 (3) the skill required to perform the legal service
28 properly;
- 27 (4) the preclusion of other employment by the
28 attorney(s) because of the acceptance of the
action;
- 28 (5) the customary fee charged in matters of the type

- 1 involved;
- 2 (6) whether the fee contracted between the attorney and
the client is fixed or contingent;
- 3 (7) any time limitations imposed by the client or the
circumstances;
- 4 (8) the amount of money, or the value of the rights
involved, and the results obtained;
- 5 (9) the experience, reputation, and ability of the
attorney(s);
- 6 (10) the "undesirability" of the action;
- 7 (11) the nature and length of the professional
relationship between the attorney and the client;
- 8 (12) awards in similar actions; and
- (13) such other matters as the Court may deem
appropriate under the circumstances.

9 Local R. 293(c); see also Kerr v. Screen Extras Guild, Inc., 526
10 F.2d 67, 70 (9th Cir. 1975) (identifying the same factors as
11 relevant). The purpose of adjusting the lodestar is to "fix a
12 fee at the fair market value for the particular action."
13 Ketchum, 24 Cal. 4th at 1132.

14 Defendants propose a lodestar figure of \$8,459.00 for
15 work done on the anti-SLAPP motion. This figure accounts for
16 hours expended by Andrew M. Steinheimer, a partner at Ellis Law
17 Group, LLP, and Brandon Reeves, an associate at Ellis Law Group,
18 LLP.

19 A. Reasonable Hourly Rate

20 The first step in calculating the lodestar is
21 determining the reasonable hourly rate, which is the rate
22 "prevailing in the community for similar work." PLCM Group, 22
23 Cal. 4th at 1095. "Generally, the relevant community is the
24 forum in which the district court sits." Barjon v. Dalton, 132
25 F.3d 496, 500 (9th Cir. 1997).

26 Defendant requests rates of \$200 per hour for Mr.
27 Steinheimer and \$195 per hour for Mr. Reeves, which are the
28 hourly rates agreed upon by defendant and defendant's counsel.

1 (Steinheimer Decl. ¶ 21.) The court finds that these rates are
2 reasonable, and if anything, below the prevailing rate in the
3 Eastern District of California for similar work. See, e.g.,
4 Branco v. Credit Collection Servs., Inc., No. Civ. 2:10-01242,
5 2011 WL 6003877, at *4 (E.D. Cal. Dec. 1, 2011) (\$275); Valero v.
6 Bryant, LaFayette & Assocs., LLC, No. Civ. 1:10-01174, 2011 WL
7 1438436, at *6 (E.D. Cal. Apr. 14, 2011) (\$250); Hartung v. J.D.
8 Bryider, Inc., No. Civ. 1:08-00960, 2009 WL 1876690, at *12 (E.D.
9 Cal. June 26, 2009) (\$250); Lowe v. Elite Recovery Solutions, No.
10 Civ. S-07-0627, 2008 WL 324777, at *5 (E.D. Cal. Feb. 5, 2008)
11 (\$250). Accordingly, the court finds these rates reasonable.

12 B. Reasonable Number of Hours

13 Defendant has submitted itemized billing for work on
14 the anti-SLAPP motion that details the number of hours spent by
15 each attorney. In total, defendant represents that counsel spent
16 26.7 hours on the special motion to strike. At oral arguments,
17 plaintiff objected generally to the number of hours spent on the
18 special motion to strike as unreasonable. However, neither in
19 its briefing nor at oral arguments was plaintiff able to point to
20 any specific entry as unreasonably excessive or to submit any
21 relevant evidence in support of this contention, as he should
22 have been prepared to do in opposition to defendant's motion.¹

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24 ¹ In suggesting that the time spent by defendant's
25 attorneys in seeking summary judgment on plaintiff's claim for
26 invasion of privacy and request for punitive damages was
27 excessive, plaintiff's attorney indicates that he would have been
28 willing to drop that claim and request had defendant's attorney
approached him before filing the anti-SLAPP motion. However,
plaintiff included that claim and prayer for relief in his
Complaint and opposed defendant's anti-SLAPP motion. It was only
after the court granted defendant's anti-SLAPP motion that
plaintiff's attorney indicated he would have been willing to

1 See Premier Med. Mgmt. Sys., Inc. v. Cal. Ins. Guar. Ass'n, 163
2 Cal. App. 4th 550, 560-63, (2d Dist. 2008) (recognizing that,
3 "[s]ince appellants submitted no evidence that the hours claimed
4 by counsel were excessive, they appear to be asking that we
5 declare as a matter of law that the hours were unreasonable," and
6 declining to do so); Maughan v. Google Tech., Inc., 143 Cal. App.
7 4th 1242, 1251 (2d Dist. 2008) (discussing declaration submitted
8 by plaintiff comparing hours requested by defendant's counsel
9 with the significantly fewer hours spent by plaintiff's counsel
10 in upholding trial court's reduction of hours as excessive). In
11 light of the absence of specific objections by plaintiff and the
12 complexity of the issues and quality of the work involved in
13 defendant's anti-SLAPP motion, the court finds that the less than
14 30 hours spent on the motion as a whole is reasonable.

15 Defendant also seeks compensation for eight hours spent
16 drafting the instant motion for attorney's fees as "fees incurred
17 in litigating the award of attorney fees," which are recoverable
18 under subsection 425.16(c)(1). Ketchum, 24 Cal. 4th at 1141.
19 The records before the court, however, do not indicate what
20 portion of these hours was spent seeking fees related to the
21 anti-SLAPP motions and what portion was spent seeking fees under
22 the Rosenthal Act and the FDCPA. Recovery on these eight hours
23 is sought in addition to the 7.9 hours that defendant seeks to
24 recover for work done on an earlier motion for attorney's fees
25 under subsection 425.16(c)(1) that was never filed, but was used
26 in preparing the instant motion. (Steinheimer Decl. ¶ 17.)

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eliminate the claim that had already been stricken by the court.

1 For two reasons, the court does not find it reasonable
2 to include the eight hours spent drafting the instant motion in
3 defendant's tally. First, the court cannot tell what portion of
4 those hours was actually spent on matters related to defendant's
5 special motion to strike and it does not appear that the requests
6 for attorney's fees under various statutes were so intertwined
7 that allocation would be impossible. See Akins v. Enterprise
8 Rent-A-Car Co., 79 Cal. App. 4th 1127, 1133 (1st Dist. 2000)
9 (noting that a court is not required to allocate attorney's fees
10 between successful and unsuccessful efforts for work on issues or
11 claims that are so intertwined that it is impossible to separate
12 them). It would be improper to allow defendant to recover fees
13 under the anti-SLAPP statute that were not incurred on matters
14 related to its special motion to dismiss. Lafayette Morehouse,
15 Inc. v. Chronicle Publ'g Co., 39 Cal. App. 4th 1379, 1383 (1st
16 Dist. 1995).

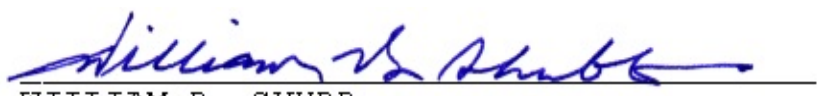
17 Second, it apparently took 7.9 hours for defendant's
18 counsel to draft a motion for attorney's fees related to its
19 anti-SLAPP motion. It does not seem reasonable, then, that in
20 the eight hours spent drafting the instant motion, which included
21 new requests under two different statutes and dealt with
22 additional facts, counsel would have had time to do much work
23 related to the anti-SLAPP recovery beyond simply attaching the
24 earlier drafted material. Accordingly, the court finds that
25 while it is reasonable to include the 7.9 hours expended by
26 defendant on its special motion to strike as time spent to
27 recover fees, it would be unreasonable to also include the
28 additional eight hours.

1 Accordingly, the court will award defendant the
2 following fees:

3	Motion	Attorney	Hours	Rate	Fee
4	Special motion to	Steinheimer	15.2	\$200	\$3,040.00
5	strike	Reeves	11.5	\$195	\$2,242.50
6	Motion for attorney's	Steinheimer	7.2	\$200	\$1,440.00
7	fees	Reeves	0.7	\$195	\$136.50
8	TOTAL				\$6,859.00

10 IT IS THEREFORE ORDERED that defendant's motion for
11 attorney's fees be, and the same hereby is, GRANTED in the amount
12 of \$6,859.00.

13 DATED: March 28, 2012

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16 WILLIAM B. SHUBB
17 UNITED STATES DISTRICT JUDGE
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