

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

RON PISTORESI

CASE NO. CV-F-08-843-LJO-DLB

Plaintiff,

ORDER ON DEFENDANTS' MOTIONS FOR ATTORNEYS FEES (Docs. 56, 60)

V.

MADERA IRRIGATION DISTRICT,
LESLIE ALAN TURNER, CARL
JANZEN, JAMES ANTHONY
CAVALLERO, TIMOTHY DESILVA,
RASCOE CINDI, GARY BURSEY,
MADERA DISTRICT EMPLOYEE
ASSOCIATION, DENNIS FLIPPO,
MICHAEL CAMPOS, BARBARA
BRENNER, and STOEL RIVES, LLP,

Defendants.

INTRODUCTION

Defendants Stoel Rives LLP, Michael A Campos, and Barbara A. Brenner's (collectively "Stoel Rives defendants") and defendants Madera Irrigation District, Carl Janzen, James Anthony Cavallero, Gary Bursey, Timothy DaSilva, Cyndi Rascoe, and Dennis Flippo's (collectively "MID defendants") separately move for attorneys fees, pursuant to Cal. Code Civ. Proc. §425.16, against plaintiff Ron Pistoresi ("Mr. Pistoresi"). Defendants¹ argue that they are entitled to attorneys' fees based on this Court's order to grant the special motions to strike Mr. Pistoresi's complaint pursuant to Cal. Code Civ.

¹All defendants are collectively referred to as “Defendants.”

1 Proc. §425.16, California’s “anti-SLAPP statute.” Having considered the parties’ requests, this Court
2 GRANTS in part and DENIES in part the parties’ motions.

3 **BACKGROUND**

4 On November 25, 2008, this Court issued its Order on Defendants’ Motions to Dismiss and
5 Strike and Motion for Sanctions (Doc. 44) (“Order to Dismiss and Strike”), in which this Court
6 dismissed claims abandoned by Mr. Pistoresi; granted defendants’ motions to dismiss Mr. Pistoresi’s
7 federal claim; granted defendants’ motions to strike Mr. Pistoresi’s state claim; denied without prejudice
8 the Stoel Rives defendants’ motion for sanctions; and granted Mr. Pistoresi leave to amend. By notice
9 on December 31, 2008, the Stoel Rives defendants moved for attorneys fees. The MID defendants
10 moved for attorneys fees on January 9, 2009. Mr. Pistoresi opposed the motions on January 20, 2009
11 and January 23, 2009. The Stoel Rives defendants replied on January 26, 2009. The MID defendants
12 replied on February 4, 2009. Having considered the parties memoranda in support, opposition, and reply
13 to the motions, including all attachments, this Court vacates the February 9, 2009 hearing, pursuant to
14 Local Rule 78-230(h), and issues the following order.

15 **STANDARD OF REVIEW**

16 “A prevailing defendant on a special motion to strike [pursuant to Cal. Code Civ. Proc.
17 425.16(b)] shall be entitled to recover his or her attorneys’ fees.” Cal. Code Civ. Proc. §425.16(c). To
18 calculate a reasonable attorneys fees award, the Court uses the “lodestar adjustment method.” *Ketchum*
19 *v. Moses*, 24 Cal. 4th 1122, 1131 (2001). “[T]he fee setting inquiry in California ordinarily begins with
20 the ‘lodestar,’ i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate.”
21 *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095 (2000). “The lodestar figure may then be
22 adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market
23 value for the legal services provided.” *Id.* “In referring to ‘reasonable’ compensation...courts must
24 carefully review attorney documentation of hours expended; ‘padding’ in the form of inefficient or
25 duplicative efforts is not subject to compensation.” *Ketchum*, 24 Cal. 4th at 1132 (emphasis in original).

26 An award of attorneys’ fees to a prevailing defendant “is usually mandatory.” *Christian Research*
27 *Institute v. Alnor*, 165 Ca. App. 4th 1315, 1321 (2008). In enacting the attorneys’ fees statute, the
28 California “Legislature, however, did not intend recovery of fees and costs as a windfall.” *Christian*

1 *Research Institute v. Alnor*, 165 Cal. App. 4th 1315, 1321 (2008); *see also Olsen v. Harbison*, 134 Cal.
2 App. 4th 278, 283 (2005) (noting “ironic unintended consequence that anti-SLAPP procedures, enacted
3 to curb abusive litigation, are also prone to abuse.”). “This section authorizes the court to make an
4 award of reasonable attorneys fees to a prevailing defendant which will adequately compensate the
5 defendant for the expense of responding to a baseless lawsuit.” *Dove Audio v. Rosenfeld*, 47 Cal. App.
6 4th 777, 785 (1996). Thus, the “court [is] not bound by the amount sought be defendants and ha[s]
7 discretion to award them a lesser sum.” *Robertson v. Rodriguez*, 36 Cal. App. 4th 347, 362 (1995).

8 **DISCUSSION**

9 **Stoel Rives’ Defendants’ Motion**

10 The Stoel Rives defendants’ updated fee request totals \$124,941.00. This amount consists of
11 \$75,768 incurred by the attorneys of Allen Matkins Leck Gamble Mallary & Natsis LLP (“Allen
12 Matkins”) with respect to the successful anti-SLAPP motion and motion to dismiss; \$21,053 for the
13 preparation of the instant motion for attorneys fees; and \$28,120 for the time spent by Stoel Rives’
14 partner Edward C. Duckers (“Mr. Duckers”) in assisting counsel to prepare for the motions to dismiss
15 and strike. For the Stoel Rives defendants’ request, this Court considers: (1) the reasonableness of the
16 fee request; (2) whether the motion to dismiss and motion to strike were “inextricably intertwined;” and
17 (3) whether the recovery for Mr. Duckers’ fees is appropriate.

18 **Reasonableness of Request**

19 The Court begins by determining the reasonableness of the attorneys’ fee request. To calculate
20 attorneys fees, this Court begins with a lodestar figure based on the reasonable hours spent, multiplied
21 by the hourly prevailing rate for private attorneys in the community conducting litigation of the same
22 type.” *Serrano v. Unruh*, 32 Cal. 3d 621, 625 (1982). The reasonable value of attorney services is
23 defined as the “hourly amount to which attorneys of like skill in the area would typically be entitled.”
24 *Id.* at 640. “The experienced trial judge is the best judge of the value of professional services rendered
25 in his court, and while his judgment is of course subject to review, it will not be disturbed unless the
26 appellate court is convinced that it is clearly wrong.” *Ketchum v. Moses*, 24 Cal.4th 1122, 1132 (2001)
27 (quotations and citation omitted).

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1 The hourly rates charged by the Allen Matkins attorneys and paralegals are excessive, as they
2 are significantly above the prevailing rate for private attorneys in this Court’s community. Stephen
3 Walters (“Mr. Walters”), an experienced and skilled attorney, has a billing rate of \$605 per hour. Yadira
4 Taylor (“Ms. Taylor”), as associate admitted to practice in 2007, charges at a billing rate of \$270 per
5 hour. The two paralegals involved in this action charged \$210 and \$180 per hour. The excessive nature
6 of the rates charged by Allen Matkins becomes clear when compared with the hourly rates of the
7 attorneys and paralegals of LaMore, Brazier, Riddle & Giampaoli (“Lamore, Brazier”), who also seek
8 to recover attorneys fees against Mr. Pistoresi (as discussed separately below). According to the
9 declaration of Thomas S. Brazier (“Mr. Brazier”), Lamore, Brazier charges \$150 an hour for the name
10 partner’s work, \$135 for the associate attorney, and \$75 for paralegal work.

11 “To the extent a trial court is concerned that a particular award is excessive, it has broad
12 discretion to adjust the fee downward or deny an unreasonable fee altogether.” *Ketchum*, 24 Cal.4th at
13 1138. Because this Court finds that the hourly fees charged by the Allen Matkins attorneys and
14 paralegals are excessive, the Court uses its broad discretion to adjust downward the fee request. The
15 Court finds that a reasonable rate in this community for someone of Mr. Walters experience and skill
16 is \$350 per hour, the reasonable rate for Ms. Taylor is \$135 per hour, and the reasonable rate for the
17 paralegal’s work is \$100 per hour. At this rate, the fees charged by Allen Matkins to work on the motion
18 to dismiss and motion to strike is reduced from \$75,768 to \$41,984.50. The Court arrived at this award
19 by adding together the adjusted fees for Mr. Walters (\$350 per hour for 86.1 hours); Mr. Taylor (\$135
20 per hour for 85.7 hours) and the paralegals (\$100 an hour for 2.8 hours).

21 The parties do not dispute that Stoel Rives defendants are entitled to recover for fees related to
22 the instant motion. The Stoel Rives defendants request a total of \$21,053 for a total of 55 hours worked
23 by Mr. Walters, Ms. Taylor, and Ms. Manfreda, Allen Watkins’ paralegal. Mr. Walters billed a total of
24 19.1 hours for this motion, Ms. Taylor billed 33.6 hours, and Ms. Manfreda, Allen Watkins’ paralegal,
25 billed 2.3 hours. As discussed more fully above, this Court will adjust downward this request and award
26 reasonable fees according to the prevailing rate for this community. After adjustment, the Stoel Rives
27 defendants may recover a total of \$11,451, as the sum of the number of hours worked by the reasonable
28 rate for that professional.

Inextricably Intertwined

2 The Stoel Rives defendants adjusted fee of \$41,984.50 includes the preparation and defense of
3 a motion to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), as well as the anti-SLAPP motion. The Stoel
4 Rives' defendants argue that they should recover for work on the motion to dismiss, because that motion
5 was "inextricably intertwined" with the anti-SLAPP motion.

6 Generally, “[t]he prevailing party attorney fee provision under the special motion to strike the
7 complaint under the anti-SLAPP statute applies only to the motion to strike, and not the entire action.”
8 *S.B. Beach Properties v. Berti*, 39 Cal. 4th 374, 381(2006); *Platypus Wear, Inc. v. Goldberg*, 166 Cal.
9 App. 4th 772 (2008). However, some courts have ruled that a prevailing anti-SLAPP defendant may
10 recover all attorneys’ fees and costs “incurred in connection with” a successful special motion to strike.
11 *Metabolife Int’l, Inc. v. Wornick*, 213 F. Supp. 2d 1220, 1221-24 (S.D. Cal. 2002). Under this approach,

[a]ll expenses incurred on common issues of fact and law qualify for an award of attorneys' fees under California's anti-SLAPP statute, where there are both anti-SLAPP and non-anti-SLAPP causes of action, and those fees need not be apportioned; but mere common issues of fact are insufficient to award all fees when legal theories do not overlap are not inextricably intertwined.

15 || *Kearney v. Foley and Lardner*, 553 F. Supp. 2d 1178, 1184 (S. D. Cal. 2008).

16 The motions to dismiss and special motion to strike were not inextricably intertwined by
17 common issues of fact and law. In resolving the motion to dismiss, this Court did not consider the
18 additional allegations and documents filed by the parties in support of the motion to strike. The Court
19 struck Mr. Pistoresi’s declaration filed in opposition to the motions, and ruled that “the Court does not
20 consider matters outside of the pleadings to rule on the Rule 12(b)(6) motions.” Order to Dismiss and
21 Strike, 10. The allegations of the complaint differed markedly from the facts alleged by both parties in
22 the special motions to strike. *See* Order to Dismiss and Strike, 2-6. Additionally, the Court dismissed
23 Mr. Pistoresi’s complaint on a legal theory unrelated to the motion to strike. The Court dismissed Mr.
24 Pistoresi’s complaint for failure to allege sufficiently that the parties acted jointly, and for failure to
25 identify which Constitutional rights he claimed were violated. The Court relied on Fed. R. Civ. P. 8(a)
26 in determining that Mr. Pistoresi’s formulaic recitation of his federal claim was insufficient to survive
27 the motion to dismiss. Order to Dismiss and Strike, 13. By contrast, the Court dismissed Mr. Pistoresi’s
28 state claim pursuant to the anti-SLAPP statute after considering additional allegations and evidence and

1 determining that Mr. Pistoresi's action arose from protected activity. *Id.* at 14-16; *c.f. Kearney*, 553 F.
2 Supp. 2d at 1184 (defendants were entitled to recover reasonable attorneys' fees for their motion to
3 dismiss federal claims insofar as that motion was premised on the *Noerr-Pennington* doctrine and/or
4 litigation privilege, but not otherwise). Because the issues of fact and law diverged between the motions,
5 and the dismissal was not based on a burden to the exercise of the defendants' constitutional free speech
6 and petition rights, the Stoel Rives defendants are not entitled to recover attorneys fees for the motion
7 to dismiss. *See Mann v. Quality Old Time Service, Inc.*, 139 Cal. App. 4th 328 (2006) (the fee shifting
8 provisions of the anti-SLAPP statute were enacted to impose litigation costs on those who assert
9 meritless claims burdening the exercise of the defendant's constitutional free speech and petition rights).

10 The Stoel Rives defendants did not separate the fees request between the motions to dismiss and
11 strike. Therefore, this Court must apportion the fees request. Having reviewed the Stoel Rives
12 defendants' Exhibit A to their reply brief, which includes a detailed accounting of the fees request, this
13 Court finds that 60% of the preparation and defense relates to the anti-SLAPP motion and 40% relates
14 to the motion to dismiss. Accordingly, the Stoel Rives defendants may recover 60% of fees requested,
15 as they relate to the special motion to strike only, or \$25,190.70.

16 **Mr. Duckers' Fees**

17 The Stoel Rives defendants seek to recover \$28,120 in fees for the time of Edward C. Duckers
18 ("Mr. Duckers"), a partner at defendant Stoel Rives. According to his declaration, Mr. Duckers served
19 as in-house litigation counsel for Stoel Rives, Mr. Campos, and Ms. Brenner. In that capacity, he
20 performed the following tasks: (1) interviewing and retaining outside counsel; (2) consulting with
21 outside counsel on the facts and history of the state action; (3) consulting with outside counsel on
22 litigation strategy; (4) reviewing and revising motion papers and declarations; and (5) generally
23 coordinating the defense of all defendants in this action. In connection with this action, Mr. Duckers
24 declares that he worked a total of 59.20 hours at a rate of \$475.00 per hour, for a total of \$28,120.

25 The Stoel Rives defendants may recover Mr. Duckers' fees charged for hours he worked in
26 assisting the Stoel Rives defendants as in-house counsel. *Ramona Unified School Dist. v. Tskiknas*, 135
27 Cal. App. 5th 510 (2005); *PLCM Group v. Drexler*, 22 Cal. 4th 1084 (2000). *See also*, Opp., 9
28 ("Although ample case-law cited in *Ramona* does provide for the recovery of attorney's fees by Stoel

1 Rives for services provided to them by Mr. Duckers....Plaintiff request that none be granted.”).

2 As this Court discussed above, however, the Stoel Rives defendants are entitled to recover
3 attorneys’ fees for work incurred in connection with the special motion to strike only. Mr. Duckers’
4 declaration does not separate his hours between the motions. As a result, this Court must apportion his
5 hours as 60% for the motion to strike and 40% for the motion to dismiss. Accordingly, this Court finds
6 that Mr. Duckers billed 35.52 hours in connection with the anti-SLAPP motion to strike.

7 The Court further adjusts Mr. Duckers hourly rate, as discussed more fully above. The Court
8 finds that the reasonable rate in this Court’s community for the services provided by Mr. Duckers is
9 \$300 per hour. Accordingly, the reasonable attorney fee award for Mr. Duckers is \$10,656, which is the
10 sum \$300 an hour multiplied by 35.52 hours.

11 **MID Defendants’ Motion**

12 The MID defendants request a total of \$12,895.50 in connection with the anti-SLAPP motion
13 to strike, the motion to dismiss, and the instant motion for attorneys fees. The Court finds that the
14 hourly rates charged by Lamore, Brazier are reasonable for the community. Those hourly rates are as
15 follows: (1) \$150 per hour for Mr. Brazier; (2) \$135 per hour for his associate attorney; and (3) \$75 an
16 hour for the paralegal.

17 Lamore, Brazier billed a total of 107.7 hours for the motions to dismiss and anti-SLAPP motion
18 collectively. Of the 107.7 hours billed, Mr. Brazier billed 20 hours, the paralegal billed 84.9 hours and
19 the associate billed 2.8 hours. Accordingly, the total bill for the two motions is \$9,745.50.

20 As discussed more fully above, Lamore, Brazier is entitled to recover for the attorneys fees
21 associated with the anti-SLAPP motion to strike only. The motion to dismiss and anti-SLAPP motion
22 to strike did not rely on similar facts or legal theories. In determining a reasonable award and
23 apportionment, the Court notes that the MID defendants did not move to strike separately from the Stoel
24 Rives defendants. Rather, the MID defendants joined in the Stoel Rives defendants’ motion. The MID
25 defendants’ memoranda were nearly identical to the Stoel Rives defendants’ motion. The MID
26 defendants replaced their names, where appropriate, and removed analysis that pertained solely to the
27 Stoel Rives defendants. As a result, this Court finds that the proper apportionment is 50% of fees are
28 attributable to the motion to dismiss and 50% of the fees are attributable to the motion to strike.

1 Accordingly, the MID defendants are entitled to recover \$4,872.75.

2 Although Mr. Brazier declares that Lamore, Brazier spent 41.3 hours for the motion for attorneys
3 fees, the Court's review of the bill attached to Mr. Brazier's record demonstrates that Lamore, Brazier
4 billed a total of 13.8 hours for this motion. This total includes 9.3 hours of work by Mr. Brazier and 4.5
5 hour of work by the paralegal. Accordingly, the MID defendants are entitled to recover \$2,467.50 for
6 this motion. This total is the sum Mr. Brazier's charges (\$150 per hour multiplied by 11.8 hours) and
7 the paralegal's work (\$75 multiplied by 9.3 hours).

8 **CONCLUSION AND ORDER**

9 For the foregoing reasons, this Court:

- 10 1. GRANTS in part and DENIES in part the Stoel Rives defendants' request. The Stoel
11 Rives defendants are entitled to recover fees for the motion to strike only, which
12 comprises 60% of the fees requested. Moreover, this Court adjusted the award
13 downward to reflect a reasonable hourly fee according to the prevailing rate in this
14 community;
- 15 2. AWARDS the Stoel Rives defendants \$11,451 in fees for the instant motion, \$25,190.70
16 in fees for the motion to strike, and \$10,656 for Mr. Duckers' charges, for a total of
17 \$47,297.70 in attorneys fees;
- 18 3. GRANTS in part and DENIES in part the MID defendants' request. The MID defendants
19 are entitled to recover for fees for the motion to strike only, which comprises 50% of the
20 fees requested; and
- 21 4. AWARDS the MID defendants \$2,467.50 for the motion for attorneys fees and
22 \$4,872.75 in fees for the motion to strike, for a total of \$7,340.25.

23
24 IT IS SO ORDERED.

25 Dated: February 6, 2009

26 /s/ Lawrence J. O'Neill

27
28 UNITED STATES DISTRICT JUDGE