

1 William N. Hebert (SBN 136099)
2 CALVO & CLARK, LLP
3 One Lombard Street
4 San Francisco, California 94111
5 Telephone: (415) 374-8370
6 Facsimile: (415) 374-8373

7 Charles L. Babcock (Texas SBN 01479500)
8 *Admitted Pro Hac Vice*
9 Amanda L. Bush (Texas SBN 24042161)
10 *Admitted Pro Hac Vice*
11 JACKSON WALKER L.L.P.
12 1401 McKinney, Suite 1900
13 Houston, Texas 77010
14 Telephone: (713) 752-4200
15 Facsimile: (713) 752-4221

16 ATTORNEYS FOR DEFENDANTS
17 MARK CUBAN AND DALLAS
18 BASKETBALL, LTD.

19 **UNITED STATES DISTRICT COURT**
20 **NORTHERN DISTRICT OF CALIFORNIA**

21 RICHARD ROE, RICHARD ROE, II and DON A.
22 NELSON, Individuals,

23 Plaintiffs,

24 vs.

25 JOHN DOE, MARK CUBAN, an individual; and
26 DALLAS BASKETBALL, LTD., a partnership,
27 and DOES 1 through 10,

28 Defendants.

) Civil Action No. 3:09-CV-682 PJH
) ECF

) Hearing: August 26, 2009
) Time: 9:00 a.m.
) Courtroom: 5, 17th Floor

) **DEFENDANTS MARK CUBAN**
) **AND DALLAS BASKETBALL,**
) **LTD.'S MOTION FOR ATTORNEYS'**
) **FEES AND MEMORANDUM OF**
) **COSTS; DECLARATION OF**
) **AMANDA L. BUSH**

29 **TO THE HONORABLE COURT:**

30 PLEASE TAKE NOTICE that on August 26, 2009 at 9:00 a.m., or as soon thereafter as the
31 matter may be heard, Defendants Mark Cuban and Dallas Basketball, Ltd. ("Defendants") will and
32 hereby do move this Court, pursuant to California Code of Civil Procedure § 425.16(c), for an
33 order that Plaintiff Don A. Nelson ("Nelson") shall reimburse Defendants \$71,224.78 in attorneys'

1 fees and costs, which Defendants incurred in pursuing their Special Motion to Strike, plus
2 additional attorneys' fees and costs incurred in preparing this Motion, reviewing Plaintiff's
3 Response thereto, preparing a Reply Brief, and preparing for and attending a hearing on this
4 Motion. Defendants will file a supplemental memorandum prior to the hearing to account for the
5 attorneys' fees and costs associated with this Motion.
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7 This Motion is based on the Declaration of Amanda L. Bush and attached exhibits, all
8 pleadings, papers, and records on file in this case at the time of the hearing, and such other
9 arguments as may be presented to the Court at the hearing on this Motion.
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11 Defendants respectfully request that the Court grant this motion and award Defendants
12 their attorneys' fees and costs incurred in filing and prevailing on their Special Motion to Strike in
13 the amount of \$71,224.78, plus their attorneys' fees and costs relating to this Motion.
14

15 Dated: July 13, 2009
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17 By: s/Amanda L. Bush
18

19 William N. Hebert
20 **CALVO & CLARK, LLP**

21 Charles L. Babcock
22 Amanda L. Bush
23 **JACKSON WALKER L.L.P.**

24 ATTORNEYS FOR DEFENDANTS
25 MARK CUBAN AND DALLAS
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MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

Nelson filed this lawsuit against Defendants arising out of a September 21, 2007 radio show called “The Murph & Mac Show” (the “Broadcast”) on which Defendant Mark Cuban (“Cuban”) appeared as a guest to discuss his upcoming appearance on Dancing with the Stars. On February 17, 2009, Defendants filed a Special Motion to Strike Plaintiff’s Complaint pursuant to California Code of Civil Procedures § 425.16, asserting that Nelson could not prove a probability of success on the merits of his sole claim for defamation against Defendants.

After extensive briefing by both parties, the Court determined that Cuban’s statements during the Broadcast fall within California Code of Civil Procedure § 425.16 and that Nelson failed to prove a probability of success on his defamation claim against Defendants. (Ex. “A” at pp. 10-22). On June 30, 2009, the Court entered an Order Granting Defendants’ Special Motion to Strike Complaint (Ex. “A”) and a Judgment dismissing with prejudice all of Nelson’s claims against Defendants. (Ex. “B”).

As a “prevailing party,” the Court must award Defendants’ reasonable costs and attorneys’ fees and costs to be determined by the Court under California Code of Civil Procedure § 425.16(c), which mandates that “a prevailing defendant on a special motion to strike *shall* be entitled to recover his or her attorneys’ fees and costs.” CAL. CIV. PROC. CODE § 425.16(c) (emphasis added). By this motion and memorandum of costs, Defendants ask this Court to award them \$71,224.78 as reimbursement for their attorneys’ fees and costs relating to their Special Motion to Strike plus the attorneys’ fees incurred in filing this motion. Defendants’ fee request is within the range of awards affirmed by appellate courts relating to SLAPP motions, is supported by the Declaration of Amanda L. Bush and counsels’ billing statements (Exs. “C” and “D”) and should be awarded in full.

1 **II. AN AWARD OF ATTORNEYS' FEES IS MANDATORY IN THIS CASE**

2 As the Court stated in its June 30, 2009 Order, “Defendants sued in federal courts can bring
3 anti-SLAPP motions to strike state law claims and are *entitled to attorneys’ fees and costs when*
4 *they prevail.*” (Ex. “A” at p. 8) (citing *Verizon Delaware, Inc. v. Covad Comm’n Co.*, 377 F.3d
5 1081, 1091 (9th Cir. 2004)); *see also Metabolife Int’l, Inc. v. Wornick*, 213 F.Supp.2d 1220, 1221
6 (S.D. Cal. 2002); *United States v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 972-73 (9th
7 Cir. 1999). Moreover, an award of attorneys’ fees is mandatory. *Id.*; *eCash Techs., Inc. v.*
8 *Guagliardo*, 210 F. Supp. 2d 1138 1154 (C.D. Cal. 2001) (holding that the attorneys’ fees
9 provision of section 425.16 applies in federal court and that an award of attorneys’ fees to a
10 prevailing defendant is mandatory); CAL. CODE CIV. PROC. § 425.16(c).

11 This principle is consistent with the policy behind the Anti-SLAPP statute, which is to
12 deter civil actions brought primarily to chill the exercise of free speech. As the California
13 Supreme Court has explained, an award of attorneys’ fees under the SLAPP statute is designed to
14 discourage anti-speech litigation “by imposing the litigation costs on the party seeking to ‘chill the
15 valid exercise of the [C]onstitutional right[] of freedom of speech.” *Ketchum v. Moses* (2001) 24
16 Cal.4th 1122, 1139. “The legislative aim in including the attorney fee provision was apparently to
17 strengthen enforcement of certain [C]onstitutional rights, including freedom of speech . . . , by
18 placing the financial burden of defending against so-called SLAPP actions on the party abusing the
19 judicial system.” *Id.* at 1137. In *Ketchum*, the Court specifically noted the absence of any intent
20 by the legislature to limit fee awards in anti-SLAPP actions and approved an award of
21 approximately \$70,000 in fees and costs to the prevailing defendant under section 425.16(c), plus a
22 contingency fee enhancement that potentially doubled the award. *Id.* at 1129, 1139-41.

23 In addition, a prevailing defendant’s award must include the fees incurred in enforcing the
24 right to mandatory fees under California Code of Civil Procedure 425.16(c), and if the order
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1 granting the motion to strike or the award of attorneys' fees is appealed, the defendant's attorneys'
2 fees and costs associated with the appeal. *Lockheed Missiles & Space Co., Inc.*, 190 F.3d at 972-
3 73; *Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, 1404; *Ketchum*, 24 Cal.4th at 1141; *Dove*
4 *Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 785. The Ninth Circuit and
5 the California Supreme Court have held that counsel should be compensated for time reasonably
6 spent in obtaining a fee award. *See Davis v. City and County of San Francisco*, 976 F.2d 1536,
7 1544 (9th Cir. 1992), *vacated in part on other grounds*, 984 F.2d 345 (1993); *Serrano v. Unruh*
8 (1982) 32 Cal.3d 621, 639; *see also Metabolife Int'l, Inc.*, 213 F. Supp. 2d at 1222.
9

10 Thus, Defendants are entitled to recover their reasonable attorneys' fees and costs incurred
11 in connection with their Special Motion to Strike, including the attorneys' fees and costs incurred
12 in seeking reimbursement of fees and costs, as well as any appellate attorneys' fees and costs
13 should Nelson appeal either the Court's Order Granting Defendants' Special Motion to Strike or its
14 fee award pursuant to this Motion.
15

16 **III. DEFENDANTS' ATTORNEYS' FEES AND COSTS ARE REASONABLE**
17 **AND SHOULD BE AWARDED IN FULL**

18 Since California Code of Civil Procedure § 425.16(c) mandates a fee award to a prevailing
19 defendant, the only issue before the Court is the amount of Defendant's fee award. *See Church of*
20 *Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 658-59, *disapproved on other grounds*,
21 *Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal.4th 53, 68 n.5 (2002). The Court has broad
22 discretion in determining the amount of attorneys' fees and costs to award to a prevailing
23 defendant. *Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 898 (9th Cir. 2006);
24 *Metabolife Int'l, Inc.*, 213 F. Supp. 2d at 1222. A trial court's attorneys' fee award will not be set
25 aside "absent a showing that it is manifestly excessive in the circumstances." *Children's Hosp. &*
26 *Med. Ctr. v. Bonta* (2002) 97 Cal.App.4th 740, 782.
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1 The Ninth Circuit and California Supreme Court have upheld the lodestar method for
2 determining the appropriate amount of attorneys' fees for a prevailing defendant on an anti-SLAPP
3 motion. *Ketchum*, 24 Cal.4th at 1136; *Fisher v. SJB-PD, Inc.*, 214 F.3d 1115, 1119 (9th Cir.
4 2000); *see also Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A lodestar figure is based upon
5 the reasonable hours spent, multiplied by the hourly prevailing rate for attorneys in the community
6 conducting similar litigation. *Ketchum*, 24 Cal.4th at 1133; *Fisher*, 214 F.3d at 119; *Yahoo!, Inc.*
7 *v. Net Games, Inc.*, 329 F. Supp. 2d 1179, 1181-84 (N.D. Cal. 2004). It may be adjusted by the
8 Court based upon factors including the nature of the litigation, i.e., the novelty or difficulty of the
9 issues involved, the amount involved, the skill required and the skill employed in handling the
10 litigation, the attention given, the success of the attorney's efforts, their learning, age, and
11 experience in the particular type of work demanded, the intricacies and importance of the
12 litigation, and the time consumed. *Ketchum*, 24 at 1131-32.

15 Applying these criteria, Defendants' attorneys' fees and costs in the amount of \$71,224.78
16 are reasonable based upon the hours spent and counsels' hourly rates, which are comparable to the
17 hourly rates for attorneys in the community who practice First Amendment and media litigation.
18 Defendants' counsel and paralegals spent approximately 178 hours conducting legal research,
19 preparing Defendant's Special Motion to Strike and supporting declarations and exhibits,
20 reviewing Nelson's response thereto, preparing Defendants' reply brief, reviewing and responding
21 to Nelson's sur-reply brief and motion to strike, responding to Nelson's written discovery requests
22 and defending two depositions on the issue of "actual malice" pursuant to the Court's order,
23 reviewing Nelson's supplemental brief, and preparing a supplemental reply brief. (Bush Decl. at
24 ¶¶ 5-7, 9; Exs. "C" and "D"). As the invoices attached to the Declaration of Amanda L. Bush
25 reflect, time billed on this matter was not duplicative among Defendants' lead counsel at Jackson
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1 Walker, LLP or of Defendants' local counsel. (Bush Decl. at Exs. "C" and "D"). To the contrary,
2 legal research, briefing, and other tasks were allocated among counsel and the two firms. (*Id.*)

3 Standard billing rates in 2009 for these kinds of cases for Defendants' lead counsel,
4 Charles "Chip" Babcock and Amanda Bush, are \$675/hour and \$335/hour, respectively. (Bush
5 Decl. at ¶¶ 5-6; Ex. "C"). Defendants' paralegals who worked alternatively in this matter, Kathy
6 Adair, Christa Liczbinski, and Larry Bales, have billing rates of \$225/hour, \$225/hour, and
7 \$190/hour, respectively. (Bush Decl. at ¶ 7; Ex. "C"). Defendant's local counsel, William Hebert,
8 has a standard billing rate of \$500/hour. (Bush Decl. at ¶ 9; Ex. "D"). Thus, the hourly rates
9 described above are similar to the market rates for media litigation and First Amendment attorneys
10 of their tenure in California.

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13 Further, Defendants' attorneys' fees and costs are reasonable given the "importance of the
14 litigation." *See Church of Scientology*, 42 Cal.App.4th at 659. As the Court acknowledged, in
15 prevailing on their Special Motion to Strike, Defendants protected essential First Amendment
16 rights in connection with a matter of widespread public interest. (Ex. "A" at pp. 11-12). In
17 addition, Defendants' motion was completely successful as to the *only* claim Nelson asserted
18 against Defendants and resulted in a Judgment of dismissal. (Exs. "A" and "B").

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20 Defendants' attorneys' fees and costs are also reasonable because the case was managed
21 efficiently and economically given the complexity of the legal issues implicated, the extensive
22 briefing, and the limited discovery on the issue of "actual malice" allowed by the Court. A
23 majority of the research, briefing, and discovery was performed by senior associate Amanda L.
24 Bush at a lower rate than that of lead counsel. (Bush Decl. at ¶ 6). Further, Defendants filed their
25 Special Motion to Strike a mere 6 days after removing the case to federal court and filing an
26 Answer to Plaintiffs' First Amended Complaint, before any discovery had been conducted.
27 Defendants responded to discovery as ordered by the Court on April 20, 2009 by responding to
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1 Nelson's requests for production and defending two depositions. Defendants did not serve any
2 written discovery or take any depositions although they could have under the Court's order.

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4 Finally, courts have affirmed the reasonableness of fee requests similar to and much greater
5 than the amount requested by Defendant here. In 1996, for example, the Second District Court of
6 Appeal affirmed an award of over \$130,000.00 to a prevailing defendant in a SLAPP case. *See*
7 *Church of Scientology*, 42 Cal.App.4th at 659. More recently, the California Supreme Court
8 affirmed a lodestar amount of more than \$70,000.00 in attorneys' fees for a prevailing SLAPP
9 defendant. *See Ketchum*, 24 Cal.4th at 1139. An award of over \$65,000.00 to a prevailing SLAPP
10 defendant has also been affirmed. *Rosenaur v. Scherer* (1991) 88 Cal.App.4th 260, 281 (1991).
11 Finally, in *Metabolife Int'l, Inc.*, the Court awarded \$318,687.00 in attorneys' fees under section
12 425.16(c), including the related appeal to the Ninth Circuit Court of Appeals. *Metabolife Int'l,*
13 *Inc.*, 213 F. Supp. 2d at 1228. In sum, Defendants' attorneys' fees and costs are reasonable and
14 should be awarded in their entirety.
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16 **IV. CONCLUSION**

17 Pursuant to California Code of Civil Procedure § 425.16, Defendants Mark Cuban and
18 Dallas Basketball, Ltd. respectfully request that this Court award them \$71,2324.78 in attorneys'
19 fees and costs relating to their Special Motion to Strike plus additional attorneys' fees and costs
20 incurred in connection with this Motion for Attorneys' Fees and Memorandum of Costs.
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1 Dated: July 13, 2009

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3 By: s/Amanda L. Bush

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5 William N. Hebert
6 **CALVO & CLARK, LLP**

7 Charles L. Babcock
8 Amanda L. Bush
9 **JACKSON WALKER L.L.P.**

10 ATTORNEYS FOR DEFENDANTS
11 MARK CUBAN AND DALLAS
12 BASKETBALL, LTD.
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1 **DECLARATION OF AMANDA L. BUSH**

2 I, Amanda L. Bush, declare:

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4 1. I am an attorney licensed to practice law before all courts of the State of Texas and
5 before this Court, having been admitted to appear in this matter *pro hac vice* on February 25, 2009.
6 I am a senior associate in the law firm of Jackson Walker L.L.P. (“JW”) and am a counsel of
7 record for Defendants Mark Cuban and Dallas Basketball, Ltd. (“Defendants”). The matters stated
8 below are true of my own personal knowledge. If called as a witness, I could and would testify
9 competently thereto.

10
11 2. Attached hereto as Exhibit “A” is a true and correct copy of the June 30, 2009
12 Order Granting Defendants’ Special Motion to Strike Plaintiff’s Complaint.

13
14 3. Attached hereto as Exhibit “B” is a true and correct copy of the June 30, 2009
15 Judgment dismissing all of Plaintiff Don A. Nelson’s claims against Defendants.

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17 4. Attached hereto as Exhibit “C” are true and correct copies of Jackson Walker
18 L.L.P.’s billing statements for legal services rendered in connection with Defendants’ Special
19 Motion to Strike. The billing statements have been redacted to remove irrelevant time entries to
20 protect privileged and/or confidential information. The total amount of attorneys’ fees and costs
21 incurred by Defendant’s Jackson Walker L.L.P. counsel relating to Defendant’s Special Motion to
22 Strike is \$68,839.46.

23
24 5. Jackson Walker L.L.P. partner Charles L. Babcock served as lead counsel for
25 Defendants in this case. His standard hourly rate for this type of case is \$675. Mr. Babcock has
26 extensive experience in media and First Amendment litigation and has litigated numerous anti-
27 SLAPP motions. As reflected in the billing records attached as Exhibit “C,” Mr. Babcock spent
28 approximately 23 hours preparing Defendants’ Special Motion to Strike and supporting
29 declarations and exhibits, reviewing Plaintiff’s response thereto, preparing Defendants’ reply brief,

1 reviewing and responding to Plaintiff's sur-reply brief and motion to strike, responding to
2 Plaintiff's requests for production and preparing witnesses for depositions pursuant to Court-
3 ordered limited discovery on the issue of actual malice, reviewing Plaintiff's supplemental
4 response, preparing Defendants' supplemental reply, and working on related matters.

6 6. I am a senior associate with Jackson Walker L.L.P. and performed a majority of the
7 work related to Defendant's Special Motion to Strike for economic and efficiency reasons. My
8 standard hourly rate for this type of case is \$335. I also have extensive experience in media and
9 First Amendment litigation and have litigated several anti-SLAPP motions. As reflected in the
10 billing records attached as Exhibit "C," I spent approximately 143.5 hours conducting legal
11 research, preparing Defendants' Special Motion to Strike and supporting declarations and exhibits,
12 reviewing Plaintiff's response, preparing Defendants' reply brief, reviewing and responding to
13 Plaintiff's sur-reply brief and motion to strike, responding to Plaintiff's requests for production,
14 producing responsive documents, and defending two depositions pursuant to Court-ordered limited
15 discovery on the issue of actual malice, reviewing Plaintiff's supplemental response, preparing
16 Defendants' supplemental reply, and working on related matters.

19 7. Jackson Walker L.L.P. paralegals Kathy Adair, Christa Liczbinski, and Larry Bales
20 have hourly rates of \$225, \$225, and \$190, respectively. As reflected in the billing records
21 attached as Exhibit "C," Ms. Adair, Ms. Liczbinski, and Mr. Bales collectively spent
22 approximately 7 hours working on Defendants' Special Motion to Strike and supporting
23 declarations and exhibits, conducting legal research, assisting with and preparing for two
24 depositions relating to Court-ordered limited discovery on the issue of actual malice, and working
25 on related matters.


27 8. Attached hereto as Exhibit "D" are true and correct copies of Calvo & Clark LLP's
28 billing statements for legal services rendered as local counsel in connection with Defendants'

1 Special Motion to Strike. The billing statements have been redacted to remove irrelevant time
2 entries to protect privileged and/or confidential information. The total amount of attorneys' fees
3 incurred by local counsel relating to Defendants' Special Motion to Strike is \$2385.32.
4

5 9. Defendant's local counsel, William Hebert, has a standard billing rate of \$500. Mr.
6 Hebert spent approximately 5 hours conducting legal research, working on Defendants' Special
7 Motion to Strike, reviewing Plaintiff's response, working on Defendants' reply brief, reviewing
8 Plaintiff's sur-reply brief and motion to strike, reviewing Plaintiff's supplemental response,
9 working on Defendants' supplemental reply, and working on related matters.
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11 I declare under perjury under the laws of the State of California that the foregoing is true
12 and correct.

13 Dated: July 13, 2009

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17 Amanda L. Bush
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