

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 ALEXANDER GRAHAM-SULT and DAVID
5 GRAHAM,

6 Plaintiffs,

7 v.

8 NICHOLAS P. CLAINOS, RICHARD L.
9 GREENE, LINDA McCALL, GREENE
10 RADOVSKY MALONEY SHARE & HENNIGH
11 LLP, BILL GRAHAM ARCHIVES LLC,
12 d/b/a WOLFGANG'S VAULT, NORTON
13 LLC and WILLIAM E. SAGAN,

14 Defendants.

No. CV 10-4877 CW

ORDER GRANTING
DEFENDANTS'
MOTIONS FOR
ATTORNEYS' FEES
AND COSTS

15 Defendant Nicholas P. Clainos and Defendants Richard Greene,
16 Linda McCall and Greene Radovsky Maloney Share & Hennigh LLP
17 (collectively, Greene Defendants) move for an award of attorneys'
18 fees and costs pursuant to California Code of Civil Procedure
19 section 425.16, commonly known as California's Anti-Strategic
20 Lawsuit Against Public Participation (Anti-SLAPP) statute.
21 Defendants Bill Graham Archives LLC, Norton LLC and William E.
22 Sagan (collectively, BGA Defendants) move for an award of
23 attorneys' fees and costs under the Copyright Act, 17 U.S.C.
24 § 505. Plaintiffs Alexander Graham Sult and David Graham oppose
25 all three motions.

26 After a full consideration of the evidence and declarations
27 filed in support and in opposition, the Court GRANTS Clainos's
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1 Motion for Attorneys' Fees and Costs and awards him \$126,431.50 in
2 fees incurred and reasonable fees for the reply; GRANTS Greene
3 Defendants' Motion for Attorneys' Fees and Costs and awards them
4 \$240,506 in fees incurred and reasonable "fees on fees"; and
5 GRANTS BGA Defendants' Motion for Attorneys' Fees and Costs and
6 awards them \$134,243.25 in fees and \$3,819.95 in costs incurred,
7 and reasonable "fees on fees."
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9 BACKGROUND

10 In its Order of June 24, 2011, the Court granted Clainos's
11 and Greene Defendants' anti-SLAPP motions to strike and for
12 attorneys' fees. Clainos and Greene Defendants now move the Court
13 for an award of attorneys' fees and fees incurred in filing
14 motions for anti-SLAPP fees (i.e. "fees on fees") pursuant to
15 California Code of Civil Procedure section 425.16(c), which
16 permits a prevailing defendant to recover his or her attorneys'
17 fees and costs. Clainos and Greene Defendants are requesting
18 amounts of \$133,431.50 and \$260,506.50, respectively. Plaintiffs
19 oppose both motions on the ground that the fees requested are
20 unreasonably high.
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22 Clainos argues that an award of \$133,431.50 for attorneys'
23 fees and costs is reasonable. The \$133,431.50 figure comprises
24 \$92,640.00 (approximately 235 hours) for the anti-SLAPP motion,
25 \$20,118.50 incurred with respect to indemnity issues, \$1,945.50
26 for case management matters, \$11,727.50 for the fee request and an
27 estimated \$7,000 for the reply. Clainos submits detailed billing
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1 records and declarations attesting to the reasonableness of the
2 rates of Clainos's attorneys. Norman Dec., Ex. A; Norman Supp.
3 Dec., Ex. A; Stratton Dec. and Stumpf Dec.

4 Greene Defendants request \$240,506.50 in attorneys' fees and
5 an estimated \$20,000 for "fees on fees." Greene Defendants submit
6 records and declarations in support of charges by their attorneys
7 at the Howard Rice and Hinshaw law firms. Falk Dec.; Hughes Dec.;
8 Mallen Dec. and Chivers Dec.

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10 Plaintiffs argue that the amounts requested by Clainos and
11 Greene Defendants are unreasonably high. With respect to
12 Clainos's motion, Plaintiffs contend that 235 hours spent on an
13 anti-SLAPP motion is excessive. Olson Dec. ¶ 14. Further, they
14 argue that Clainos should be entitled to fees only for the motion
15 to strike. They contend that an award in excess of \$71,857.50
16 would be improper. Johnston Dec. ¶ 5.

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18 Plaintiffs advance similar arguments in opposing Greene
19 Defendants' motion. They claim that the amount requested is
20 unreasonably high because of Greene Defendants' decision to retain
21 both the Howard Rice and Hinshaw law firms. Plaintiffs allege
22 that the involvement of the Howard Rice law firm was unnecessary
23 and, further, that the collaboration between the Howard Rice and
24 Hinshaw law firms created inefficiency. Accordingly, Plaintiffs
25 argue that the fees incurred by the Howard Rice law firm or
26 incurred as a result of the collaboration between the Howard Rice
27 and Hinshaw law firms should be excluded. Olson Dec. ¶¶ 7-13.

1 Moreover, Plaintiffs contend that the Court should not award fees
2 for tasks not related directly to the motion to strike, notably
3 the motion to dismiss. Lastly, Plaintiffs allege that \$10,000 to
4 \$15,000 would be a more reasonable amount for "fees on fees."

5 In the Order of June 24, 2011, the Court granted BGA
6 Defendants' motion to dismiss pursuant to Federal Rule of Civil
7 Procedure 12(b)(6) for failure to state a claim. Plaintiffs
8 invoked federal question jurisdiction (28 U.S.C. 1338(a)) and
9 brought five claims against BGA Defendants: conversion, unjust
10 enrichment, promissory estoppel, copyright infringement and
11 declaratory relief. The Court dismissed all five claims without
12 leave to amend. BGA Defendants now move, pursuant to section 505
13 of the Copyright Act, for an award of attorneys' fees in the
14 amount of \$177,366.75 (including \$43,123.50 in "fees on fees") and
15 costs in the amount of \$3,819.95. Ranahan Dec. and Ranahan Sec.
16 Supp. Dec.

17 Plaintiffs oppose the motion. They contend that BGA
18 Defendants are not entitled to a recovery of attorneys' fees and
19 costs under the Copyright Act because the only issue adjudicated--
20 ownership and title to the poster copyrights--does not arise under
21 the Copyright Act. In the alternative, Plaintiffs argue, the
22 Court should grant BGA Defendants fees incurred with respect only
23 to defending the copyright claim. Plaintiffs contend that the
24 Court should reduce the fee request by at least ninety percent.
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DISCUSSION

I. Legal Standard

California's anti-SLAPP statute provides that "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." Cal. Civ. Proc. Code § 425.16(c); see also Bernardo v. Planned Parenthood Fed. of Am., 115 Cal. App. 4th 322, 360-367 (2004) (explaining policy behind mandatory fees and costs provision of anti-SLAPP statute).

In the Ninth Circuit, reasonable attorneys' fees are determined by first calculating the "lodestar." Jordan v. Multnomah County, 815 F.2d 1258, 1262 (9th Cir. 1987). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." Morales v. City of San Rafael, 96 F.3d 359, 363 (9th Cir. 1996). There is a strong presumption that the lodestar figure represents a reasonable fee. Jordan, 815 F.2d at 1262.

In calculating the lodestar, the court must determine both a reasonable number of hours and a reasonable hourly rate for each attorney. Morales, 96 F.3d at 363. In calculating a reasonable number of hours, the applicant must justify his or her claim by submitting detailed time records. The court may adjust these hours down if it believes the documentation to be inadequate, if the hours were duplicative, or if the hours were either excessive or unnecessary. Chalmers v. City of Los Angeles, 796 F.2d 1205,

1 1210 (9th Cir. 1986). An upward adjustment of the lodestar is
2 appropriate only in extraordinary cases, such as when the
3 attorneys faced exceptional risks of not prevailing or not
4 recovering any fees. Id. at 1212.

5 Determining a reasonable hourly rate is also a critical
6 inquiry. Jordan, 815 F.2d at 1262 (citing Blum v. Stenson, 465
7 U.S. 886, 895 n.11). In establishing the reasonable hourly rate,
8 the district court should take into account (1) the novelty and
9 complexity of the issues, (2) the special skill and experience of
10 counsel, (3) the quality of representation, (4) the results
11 obtained and (5) the contingent nature of the fee agreement. City
12 of Burlington v. Dague, 505 U.S. 557, 562-63 (1992). These
13 factors are subsumed in the initial lodestar calculation, and
14 should not serve as independent bases for adjusting fee awards.
15 Morales, 96 F.3d at 363-64. Reasonable fees are generally
16 calculated according to the prevailing market rates in the forum
17 district. Gates v. Deukmejian, 987 F.2d 1392, 1405 (9th Cir.
18 1992).

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21 The Supreme Court has recognized that, while it is
22 appropriate for the district court to exercise its discretion in
23 determining an award of attorneys' fees, it remains important for
24 the court to provide "a concise but clear explanation of its
25 reasons for the fee award." Hensley v. Eckerhart, 461 U.S. 424,
26 437 (1983); Hall v. Bolger, 768 F.2d 1148, 1151 (9th Cir. 1985)
27 (in computing an award, the district court should provide a
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1 "detailed account of how it arrives at appropriate figures for
2 'the number of hours reasonably expended' and 'a reasonable hourly
3 rate'" (quoting Blum, 465 U.S. at 898).

4 Under the Copyright Act, an award of attorneys' fees to the
5 prevailing party is within the Court's discretion: "In any civil
6 action under this title, the court in its discretion may allow the
7 recovery of full costs by or against any party [T]he
8 court may also award a reasonable attorney's fee to the prevailing
9 party as part of the costs." 17 U.S.C. § 505. In Fogerty v.
10 Fantasy, Inc., 510 U.S. 517, 534 (1994), the Supreme Court held,
11 "Prevailing plaintiffs and prevailing defendants are to be treated
12 alike." The Court approved a list of "nonexclusive" factors to
13 guide the trial court's discretion in determining whether to award
14 attorneys' fees to a prevailing party in a copyright infringement
15 action: "frivolousness, motivation, objective unreasonableness
16 (both in the factual and in the legal components of the case) and
17 the need in particular circumstances to advance considerations of
18 compensation and deterrence." Id. at 534 n.19 (quoting Lieb v.
19 Topstone Indus., Inc., 788 F.2d 151, 156 (3d Cir. 1986)). The
20 Court stressed that such factors may be used so long as they are
21 "faithful to the purposes of the Copyright Act and are applied to
22 prevailing plaintiffs and defendants in an evenhanded manner."
23 Id.

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27 The Supreme Court confirmed that an award of attorneys' fees
28 pursuant to section 505 is within the discretion of the trial

1 court: "'There is no precise rule or formula for making these
2 determinations,' but instead equitable discretion should be
3 exercised 'in light of the considerations we have identified.'" Id.
4 Id. at 534 (quoting Hensley, 461 U.S. at 436-37).

5 The Ninth Circuit applies the factors prescribed by the Court
6 in Fogerty, noting that trial courts should focus on the "purposes
7 of the Copyright Act (to promote creativity for the public good)
8 and apply the factors in an evenhanded manner to prevailing
9 plaintiffs and prevailing defendants alike." Jackson v. Axton, 25
10 F.3d 884, 890 (9th Cir. 1994). The Ninth Circuit has also added
11 another factor to consider, "the degree of success obtained," id.
12 at 890, and has stressed that "blameworthiness" or "exceptional
13 circumstances" are not necessary for an award of attorneys' fees
14 to a defendant, see Fantasy, Inc. v. Fogerty, 94 F.3d 553, 558,
15 559 (9th Cir. 1996);¹ Historical Research v. Cabral, 80 F.3d 377,
16 378 (9th Cir. 1996). Moreover, the Ninth Circuit has stated that
17 the prevailing party in a copyright action may recover attorneys'
18 fees in defending that claim or any related claims. Traditional
19 Cat Ass'n, Inc. v. Gilbreath, 340 F.3d 829, 833 (9th Cir. 2003).

22 II. Clainos and Greene Defendants

23 A. Reasonable Hours

24 With respect to Clainos's motion, upon a thorough review of
25 the billing records and declarations, the Court finds that the 235
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27 ¹ This case stems from the Supreme Court's remand to the
28 Ninth Circuit, and subsequent trial and appellate proceedings.

1 hours Clainos's attorneys spent on the anti-SLAPP motion is not
2 unreasonably high. See Norman Dec., Ex. A and Norman Supp. Dec.,
3 Ex. A. Plaintiffs do not offer specific evidence to demonstrate
4 convincingly that Clainos's attorneys should have spent fewer
5 hours on the anti-SLAPP motion. Their assumption that Clainos's
6 attorneys could have benefitted from work done by Greene
7 Defendants' attorneys who filed their motion first is speculative.
8 Plaintiffs have not demonstrated persuasively that the fee award
9 Clainos is requesting is unreasonably high in light of the facts
10 of this particular case.
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12 With respect to Greene Defendants' motion, the Court finds
13 that the time expended by the attorneys involved is not
14 unreasonable. It is possible that the collaboration between the
15 two law firms may have led to duplication in some instances.
16 Here, however, Plaintiffs do not offer concrete examples or
17 evidence to show persuasively that the work of the Howard Rice law
18 firm was unnecessary or that the collaboration between the Howard
19 Rice and Hinshaw law firms created inefficiency. The Court is
20 satisfied with Greene Defendants' explanation and justification
21 that the involvement of the Howard Rice law firm was essential
22 and, further, that the collaboration between the Howard Rice and
23 Hinshaw law firms did not create inefficiency. See Falk Dec.,
24 Hughes Dec., Mallen Dec. and Chivers Dec.
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27 Plaintiffs also argue that Clainos and Greene Defendants
28 should be entitled to fees incurred only with respect to the

1 motion to strike. The Court disagrees. A prevailing party can
2 recover fees not incurred directly on the anti-SLAPP motion if the
3 work done is "based entirely on a common factual scenario" and the
4 issues are "inextricably intertwined." Kearney v. Foley &
5 Lardner, 553 F. Supp. 2d 1178, 1184 (S.D. Cal. 2008). Here,
6 Clainos and Greene Defendants defended successfully against a
7 SLAPP suit. Order Granting Clainos's and Greene Defendants' Anti-
8 SLAPP Motions to Strike and for Attorneys' Fees, Docket No. 93 at
9 20:2 and 21:14-15. The Court finds that the work of Clainos's
10 attorneys on indemnity and case management issues, as well as the
11 work of Greene Defendants' attorneys on the motion to dismiss, is
12 "based entirely on a common factual scenario" and "inextricably
13 intertwined" with the anti-SLAPP motion. See Kearney, 553 F.
14 Supp. 2d at 1184. Accordingly, Clainos and Greene Defendants'
15 reasonable defense fees are recoverable.

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18 B. Reasonable Hourly Rates

19 Plaintiffs do not object to the hourly rates of Clainos and
20 Greene Defendants' attorneys. Upon a review of the declarations
21 submitted by Clainos and Greene Defendants, the Court is satisfied
22 that the hourly rates of the attorneys involved are reasonable for
23 attorneys with comparable levels of experience working on similar
24 issues in this market.

25 For the foregoing reasons, the Court GRANTS the motions for
26 attorneys' fees and costs. The Court awards Clainos \$126,431.50
27 in fees incurred and reasonable fees for the reply. The Court
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1 awards Greene Defendants \$240,506 in fees incurred and reasonable
2 "fees on fees."

3 III. BGA Defendants

4 Based on the Fogerty factors, and an equitable exercise of
5 discretion, the Court finds that an award of attorneys' fees and
6 costs to BGA Defendants is warranted. BGA Defendants defended
7 successfully against an action brought under the copyright laws by
8 securing a dismissal without leave to amend. The fact that
9 Plaintiffs brought this action under the copyright laws even
10 though they did not own the copyrights in question does not prove
11 that Plaintiffs filed this action frivolously or that their motive
12 was improper. Nevertheless, this action is objectively
13 unreasonable because Plaintiffs could not meet the elements of a
14 copyright infringement claim or allege facts to demonstrate an
15 actual case or controversy with respect to the other four non-
16 copyright claims. An award of attorneys' fees and costs to BGA
17 Defendants will help deter similarly unreasonable lawsuits.

18 Contrary to Plaintiffs' argument, the Court determines that
19 BGA Defendants may recover all reasonable defense fees because the
20 copyright infringement claim is related to the claims of
21 conversion, unjust enrichment, promissory estoppel and declaratory
22 relief. See Traditional Cat Ass'n, Inc., 340 F.3d at 833.
23 Plaintiffs have failed to show that the four non-copyright claims
24 are unrelated to the copyright infringement claim. All five
25 claims stem from the same set of facts and relate to the core
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1 issue of ownership of the copyrights in question. The Court
2 awards fees to BGA Defendants for their successful defense of the
3 copyright infringement and related non-copyright claims.

4 Upon a careful review of the records submitted by BGA
5 Defendants, the Court is satisfied that the amount requested
6 represents a reasonable "lodestar" figure. The number of hours
7 BGA Defendants' attorneys expended on this litigation is not
8 excessive; and the hourly rate is reasonable because the evidence
9 indicates that the blended rate reduced the attorneys' fees by
10 approximately \$30,000. See Ranahan Dec. and Ranahan Sec. Supp.
11 Dec. Furthermore, BGA Defendants can recover "fees on fees" and
12 necessary costs for their successful defense.
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14 Thus, the Court awards BGA Defendants \$134,243.25 in fees and
15 \$3,819.95 in costs incurred, and reasonable "fees on fees."
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17 CONCLUSION

18 For the foregoing reasons, the Court GRANTS Clainos's Motion
19 for Attorneys' Fees and Costs and awards him \$126,431.50 in fees
20 incurred and reasonable fees for the reply; GRANTS Greene
21 Defendants' Motion for Attorneys' Fees and Costs and awards them
22 \$240,506 in fees incurred and reasonable "fees on fees"; and
23 GRANTS BGA Defendants' Motion for Attorneys' Fees and Costs and
24 awards them \$134,243.25 in fees and \$3,819.95 in costs incurred,
25 and reasonable "fees on fees." Within seven days, Clainos shall
26 submit documentation for fees incurred for the reply and Greene
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Defendants and BGA Defendants shall submit documentation for fees incurred for "fees on fees."

If necessary, Plaintiffs may file a response of five pages or less, seven days thereafter, addressing only the reasonableness of the additional hours claimed, without repeating their arguments. Defendants may file a reply with the same restrictions. A further order will issue thereafter.

IT IS SO ORDERED.

Dated: 3/23/2012


CLAUDIA WILKEN
United States District Judge