

1 P.3d 262, 268 (Nev. 2017); *Brandom v. Coupled Prod., LLC*, 975 N.E.2d 382, 386 (Ind. Ct. App.
2 2012). Under California law, a prevailing defendant may recover fees and costs only for the
3 motion to strike, not the entire litigation. *S. B. Beach Properties v. Berti*, 138 P.3d 713, 717 (Cal.
4 2006). I predict¹ Nevada and Indiana would follow a similar rule. The statutory language refers
5 to awarding fees and costs to a defendant who prevails on the anti-SLAPP motion. The language
6 does not suggest the state legislatures intended to award a defendant a windfall by granting fees
7 and costs that were incurred defending against claims that are not covered by the statute.

8 In Nevada,² “the method upon which a reasonable fee is determined is subject to the
9 discretion of the court,” which “is tempered only by reason and fairness.” *Shuette v. Beazer*
10 *Homes Holdings Corp.*, 124 P.3d 530, 548-49 (Nev. 2005) (en banc) (quotation omitted). One
11 permissible method of calculation is the lodestar approach, which involves multiplying “the
12 number of hours reasonably spent on the case by a reasonable hourly rate.” *See id.* at 549 & n.98
13 (quotation omitted); *see also Sobel v. Hertz Corp.*, 53 F. Supp. 3d 1319, 1325-26 (D. Nev. 2014).
14 In most cases, the lodestar figure is a presumptively reasonable fee award. *Camacho v.*
15 *Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008).

16 In determining the reasonableness of a fee request, I am guided by the factors listed in
17 *Brunzell v. Golden Gate National Bank*:

18 (1) the qualities of the advocate: his ability, his training, education, experience,
19 professional standing and skill; (2) the character of the work to be done: its

20 ¹ “Where the state’s highest court has not decided an issue, the task of the federal courts
21 is to predict how the state high court would resolve it.” *Giles v. Gen. Motors Acceptance Corp.*,
22 494 F.3d 865, 872 (9th Cir. 2007) (quotation omitted). “In answering that question, this court
23 looks for ‘guidance’ to decisions by intermediate appellate courts of the state and by courts in
other jurisdictions.” *Id.* (quotation omitted).

² Indiana follows similar principles for reasonable attorney’s fees calculations, so I do not
separately cite Indiana law. *See Shepard v. Schurz Commc’ns, Inc.*, 847 N.E.2d 219, 226-27 (Ind.
Ct. App. 2006); *In re Estate of Inlow*, 735 N.E.2d 240, 250-51, 255-57 (Ind. Ct. App. 2000); Ind.
R. Prof. Conduct 1.5.

1 difficulty, its intricacy, its importance, time and skill required, the responsibility
2 imposed and the prominence and character of the parties where they affect the
3 importance of the litigation; (3) the work actually performed by the lawyer: the
skill, time and attention given to the work; [and] (4) the result: whether the
attorney was successful and what benefits were derived.

4 455 P.2d 31, 33 (Nev. 1969); *see also* *Haley v. Dist. Ct.*, 273 P.3d 855, 860 (Nev. 2012) (“[I]n
5 determining the amount of fees to award, the court is not limited to one specific approach; its
6 analysis may begin with any method rationally designed to calculate a reasonable amount, so
7 long as the requested amount is reviewed in light of the factors set forth in *Brunzell*” (quotation
8 and citation omitted)). I am also guided by the factors set forth in Local Rule 54-14(b). *See*
9 *Schneider v. Elko Cty. Sheriff’s Dep’t*, 17 F. Supp. 2d 1162, 1166 (D. Nev. 1998). That rule
10 provides that the motion must include the following:

- 11 (1) A reasonable itemization and description of the work performed;
- 12 (2) An itemization of all costs sought to be charged as part of the fee award and
not otherwise taxable pursuant to LR 54-1 through 54-13;
- 13 (3) A brief summary of:
 - 14 (A) The results obtained and the amount involved;
 - 15 (B) The time and labor required;
 - 16 (C) The novelty and difficulty of the questions involved;
 - 17 (D) The skill requisite to perform the legal service properly;
 - 18 (E) The preclusion of other employment by the attorney due to acceptance of the
case;
 - 19 (F) The customary fee;
 - 20 (G) Whether the fee is fixed or contingent;
 - 21 (H) The time limitations imposed by the client or the circumstances;
 - 22 (I) The experience, reputation, and ability of the attorney(s);
 - 23 (J) The undesirability of the case, if any;
 - (K) The nature and length of the professional relationship with the client;
 - (L) Awards in similar cases; and,
 - (4) Any other information the court may request.

21 LR 54-14(b).

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1 **A. Reasonable Rate**

2 Continental and Leapers seek the following rates for the attorneys and paralegals who
3 worked on the case: \$450 for partners Daniel McNutt, Jonathan Polak, Tracy Betz, and Anne
4 Cowgur; \$275 for associates Matthew Wolf, Jeffrey Stemerick, Manny Herceg, Cristina Costa,
5 and Brittan Shaw; and \$175 for paralegal Lisa Heller. They support their request with an
6 affidavit regarding the rates in Las Vegas for partners and associates with the level of experience
7 comparable to McNutt and Wolf, and paralegal Heller. ECF No. 60-1 at 3.

8 Banerjee and He respond that Continental and Leapers have not shown why every partner
9 and associate qualifies for the highest prevailing rates, particularly the associates who have a
10 wide range of experience, including one who is only two years out of law school. Banerjee and
11 He also assert that prevailing paralegal rates range from \$75 to \$125 per hour.

12 Continental and Leapers reply that Banerjee and He offered no evidence in support of
13 their challenge to the rates for Polak and Betz, who are both experienced partners. They also
14 argue that Banerjee and He offer no evidence to support a different rate for any of the associates.
15 Continental and Leapers indicate they would not object to the court using a lower rate for the less
16 experienced attorneys, although they do not provide evidence of what Costa and Shaw’s normal
17 billing rates are. They also do not object to a lower rate for paralegal Heller.

18 The reasonable hourly rate is the “rate prevailing in the community for similar work
19 performed by attorneys of comparable skill, experience, and reputation.” *Camacho*, 523 F.3d at
20 979 (quotation omitted). The party requesting fees bears the burden of producing evidence, such
21 as affidavits from attorneys, that the requested rates are in line with the prevailing market rate.

22 *Id.* at 980. “The party opposing the fee application has a burden of rebuttal that requires

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1 submission of evidence to the district court challenging the accuracy and reasonableness of the
2 . . . facts asserted by the prevailing party in its submitted affidavits.” *Id.* (quotation omitted).

3 This court previously has approved reasonable hourly rates of \$450 for partners and \$250
4 for experienced associates in the Nevada market. *See Crusher Designs, LLC v. Atlas Copco*
5 *Powercrusher GmbH*, No. 2:14-cv-01267-GMN-NJK, 2015 WL 6163443, at *2 (D. Nev. Oct.
6 20, 2015). The court has approved rates ranging from \$95 to \$200 for less experienced
7 associates. *See Home Gambling Network, Inc. v. Piche*, No. 2:05-cv-00610-DAE, 2015 WL
8 1734928, at *11 (D. Nev. Apr. 16, 2015). The prevailing rate two to three years ago for a very
9 experienced paralegal was \$125, and \$100 for less experienced paralegals. *Id.*; *Walker v. N. Las*
10 *Vegas Police Dep’t*, No. 2:14-cv-01475-JAD-NJK, 2016 WL 3536172, at *2 (D. Nev. June 27,
11 2016) (stating that “[i]n this forum, paralegals command rates between \$75 and \$125,” and
12 approving a \$100 rate for a paralegal with 2 years’ experience). In addition to the evidence
13 submitted and guidance from other rate determinations in this jurisdiction, I may rely on my own
14 knowledge and experience concerning customary rates in this market. *Ingram v. Oroudjian*, 647
15 F.3d 925, 928 (9th Cir. 2011).

16 I will apply a rate of \$450 for all of the partners. Although Banerjee and He contend
17 there is no basis to award the highest prevailing rate, they do not suggest an alternative rate nor
18 point to evidence that would support that rate. Each of the partners is experienced and their
19 requested rates are supported by the affidavits filed with the fee petition. The \$250 rate for
20 Wolf, Stemerick, and Herceg is unchallenged and is in line with the prevailing rate for
21 experienced associates in this market, so I will apply that rate. Finally, although Banerjee and
22 He dispute the rate for the less experienced associates, they do not identify what rate they think is
23 appropriate or support that rate with evidence. Given the lack of evidentiary response, and given

1 my own knowledge of customary rates in this market, I will apply the \$250 rate to all associates.
2 Additionally, I approve a rate of \$150 for paralegal Heller.

3 **B. Reasonable Hours**

4 Continental and Leapers assert they have reasonably spent 275.7 hours of partner time,
5 74.4 hours of associate time, and 7.3 hours of paralegal time on the anti-SLAPP motion. They
6 assert they have not billed for an additional 125.2 hours that were spent on tasks such as early
7 case administration, the motion to dismiss for failure to state a claim, the motion to consolidate,
8 and case administration. Banerjee and He raise a variety of objections, including that the time
9 requested includes time spent on tasks other than the anti-SLAPP motion, that the bills reflect
10 work done in other cases, and that block billing prevents them and the court from determining
11 whether the time spent on tasks was reasonable.

12 1. Billing for Only Anti-SLAPP

13 I agree with Banerjee and He that Continental and Leapers may recover only for time
14 spent on tasks related to the anti-SLAPP motion. Although Continental and Leapers claim they
15 have limited their bills to these tasks, the bills suggest otherwise. For example, paralegal Heller
16 block billed five hours of time on May 23, 2017 for finalizing both motions to dismiss, which
17 were filed on the same date. ECF No. 60-2 at 2. I cannot tell from the billing entry how much
18 time she spent on each motion. Likewise, Heller charges for finalizing a reply to the motion to
19 dismiss on July 3, 2017. *Id.* That more likely relates to the reply to the motion to dismiss, which
20 was filed on July 11, rather than the reply for the anti-SLAPP motion, which was filed on July
21 21. *See* ECF Nos. 33, 37. Indeed, Heller has a later entry on July 21 for finalizing the anti-
22 SLAPP reply brief. ECF No. 60-2 at 2.

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1 Similarly, several entries from Polak and Betz in May 2017 state that time was spent on
2 both the anti-SLAPP motion and the motion to dismiss. ECF No. 60-4 at 2-3. The records also
3 show block-billed time in relation to the reply briefs in late June. *Id.* Block-billed entries also
4 include time for motions unrelated to either the anti-SLAPP motion or the motion to dismiss.
5 For example, in mid-July, time was block-billed for drafting the anti-SLAPP reply along with
6 reviewing a reply brief filed in support of a motion to consolidate. ECF No. 60-4 at 4.

7 Finally, the billing records show that time was billed for work done on other cases,
8 including depositions conducted in another case and a separate anti-SLAPP motion that was to
9 be filed in a Michigan case. *Id.* at 2-3; ECF No. 60-5 (attempting to charge for partner Betz's
10 time in conducting depositions in *Leapers, Inc. v. Shi*); ECF No. 60-6 (charging costs for travel
11 to depositions conducted in *Leapers, Inc. v. Shi*). There are entries from May 24 to June 7, 2017
12 which refer to anti-SLAPP but the anti-SLAPP motion had already been filed in this case. ECF
13 No. 60-4 at 3. In sum, Leapers and Continental have included items in their fee request that
14 cannot be recovered in relation to their anti-SLAPP motion in this case. As a result, I am
15 denying the requested hours related to these entries as follows:

16 **Taft:**

17	2/24/17	Polak	0.55
	3/23/17	Polak	0.1
18	5/2/17	Polak	0.4
	5/11/17	Polak	0.4
19	5/15/17	Polak	0.7
	5/15/17	Betz	1.1
20	5/15/17	Betz	2.6 (Gwinn and Weiss depositions)
	5/16/17	Betz	13.9 (Gwinn and Weiss depositions)
21	5/16/17	Polak	0.4
	5/17/17	Polak	0.9
22	5/18/17	Polak	1.15
	5/19/17	Polak	1.25
23	5/22/17	Herceg	0.55
	5/22/17	Polak	4.1

1	5/22/17	Cowgur	0.4
	5/23/17	Polak	2.5
2	5/24/17	Shaw	1.1
	5/30/17	Betz	0.2
3	5/30/17	Polak	0.3
	6/6/17	Betz	0.4
4	6/7/17	Polak	0.4
	6/28/17	Polak	0.6
5	6/29/17	Polak	0.3
	6/30/17	Stemerick	0.2
6	7/1/2017	Polak	0.8
	7/27/17	Polak	0.4
7	8/1/17	Polak	1.2
	2/8/18	Stemerick	1.95
8	2/12/18	Betz	6.7
	2/13/18	Betz	9.1
9	2/13/18	Polak	9.2
	2/14/18	Polak	0.3
10	<hr/>		
	Total deducted:	59.15	x partner rate of \$450
		3.77	x associate rate of \$250

MLF:

12	5/23/17	Heller	2.5
13	7/3/17	Wolf	0.7
	7/3/17	Heller	0.1
14	<hr/>		
	Total deducted:	0.7	x associate rate of \$250
		2.6	x paralegal rate of \$150

2. Unreasonable Hours

17 Banerjee and He also argue that the amount of time spent was unreasonable because
18 Continental and Leapers claim 122.5 hours, including 93.3 hours of partner time, for the initial
19 anti-SLAPP motion even though two of the partners claim to be experienced in anti-SLAPP
20 matters. Banerjee and He also argue the 68.9 hours, including 49 hours of partner time, is
21 unreasonable for the anti-SLAPP reply brief. Finally, Banerjee and He argue the amount of time
22 expended in filing the fee request is excessive. They also suggest that no amount should be

1 *b. Time spent from time of opposition through filing of reply*

2 Continental and Leapers request the following hours for this category:

3 MLF:

4 0.6 paralegal

5 Taft:

6 47 partner

7 18.5 associate

8 I grant MLF's hours as reasonable. However, Taft's time spent on the reply is
9 unreasonable. The bulk of time was again billed at a partner rate. Because the partners are
10 experienced with anti-SLAPP motions (thus supporting their request for a higher prevailing rate),
11 it should not have taken 47 hours to prepare the 12-page anti-SLAPP reply. *See* ECF No. 37. I
12 therefore reduce the partner hours to 15. I will not reduce the associate hours.

13 *c. Time spent on supplements*

14 Continental and Leapers request the following hours for this category:

15 MLF:

16 1 associate

17 0.6 paralegal

18 Taft:

19 51.5 partner

20 I grant MLF's hours as reasonable. However, Taft's time spent on the supplements is
21 unreasonable. All the requested time was billed at a partner rate. It should not have taken 51.5
22 hours to prepare the 8-page opposition to the motion to supplement and the 3-page motion to
23 supplement (with less than one full page of actual text). *See* ECF Nos. 42, 50. I therefore reduce
the partner hours to 10.

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1 *d. Time spent on motion for fees*

2 Continental and Leapers request the following hours for this category:

3 MLF:

4 1 associate

1 paralegal

5 Taft:

6 53.05 partner

24.5 associate

7
8 I grant MLF's hours as reasonable. However, Taft's time spent on the fee motion is
9 unreasonable. The bulk of time was again billed at a partner rate. A fee motion can be handled
10 by associates and paralegals, with review by partners. It should not have taken 53 partner hours
11 to prepare the 17-page fee motion. *See* ECF No. 60. I therefore reduce the partner hours to 10. I
12 will not reduce the associate hours.

13 *e. Time spent on reply brief for fee motion*

14 Continental and Leapers request the following hours for this category:

15 Taft:

16 29.8 partner

3.3 associate

17 Taft's time spent on the fee reply is unreasonable. The bulk of time was again billed at a
18 partner rate. A fee reply can be handled by associates and paralegals, with review by partners. It
19 should not have taken nearly 30 partner hours to prepare the 13-page reply. *See* ECF No. 64. I
20 therefore reduce the partner hours to 10. I will not reduce the associate hours.

21 **C. Lodestar**

22 Taking the reasonable hours from above by the applicable reasonable rates, the lodestar is
23 calculated as follows:

1 65 hours x partner rate of \$450: \$29,250

2 74.65 hours x associate rate of \$250: \$18,662.50

3 4.7 hours x paralegal rate of \$150: \$705

4 Total: \$48,617.50

5 Neither side has asked that the lodestar be adjusted up or down. Accordingly, I award
6 \$48,617.50 in reasonable attorney's fees.

7 **D. Statutory Damages**

8 Continental and Leapers seek \$10,000 each against Banerjee and He under the statutory
9 damage provision. Banerjee and He respond that their lawsuit was not frivolous and the
10 defendants' conduct in initiating the criminal action against them in Indiana has cost them more
11 than what the defendants claim to have suffered. They also state that they are of limited means
12 and Banerjee has health issues, which they offer to establish through an *in camera* submission if
13 requested to do so.

14 The Nevada statute does not outline the parameters of when a court should award
15 statutory damages under § 41.670(1)(b), other than committing it to the court's discretion. Nev.
16 Rev. Stat. § 41.670(1)(b) (stating the court "may" award up to \$10,000); *see also Butler v. State*,
17 102 P.3d 71, 81 (Nev. 2004) (en banc) (interpreting the word "may" in a statute as conferring
18 discretion). However, the remainder of § 41.670 offers clues to when such an award is
19 warranted. A defendant whose anti-SLAPP motion is successful may bring a separate action
20 against the plaintiff for compensatory damages, punitive damages, and attorney's fees and costs
21 for the separate action. Nev. Rev. Stat. § 41.670(1)(c). That suggests that the statutory damage
22 award in the original action may be the analog to compensatory and punitive damages
23 recoverable in a separate action. Further, when a defendant's anti-SLAPP motion is

1 unsuccessful, the court may award reasonable fees and costs to the plaintiff if it finds the motion
2 was “frivolous or vexatious.” Nev. Rev. Stat. § 41.670(2). It may also award up to \$10,000
3 along with “such additional relief as the court deems proper to punish and deter the filing of
4 frivolous or vexatious motions.” Nev. Rev. Stat. § 41.670(3). Thus, it appears the \$10,000
5 statutory award is aimed at frivolous or vexatious conduct that warrants a type of punitive (and
6 perhaps in the right case, compensatory) award.

7 I find no basis to award statutory damages. The complaint was not frivolous or
8 vexatious. Indeed, although Leapers and Continental like to paint themselves as the victims,
9 another court found Leapers and Continental’s conduct in instigating a similar criminal
10 prosecution against a different individual so exceptional (and not in a good way) as to warrant an
11 award of attorney’s fees against them. *See* ECF No. 41-1.³ Vexatious conduct may be in the eye
12 of the beholder in the context of the parties’ overall history of disputes. In any event, the
13 substantial fee award amply serves the deterrence and compensation goals behind the anti-
14 SLAPP statute’s fee shifting provision. I therefore deny the request for statutory damages in any
15 amount.

16 **E. Costs**

17 Continental and Leapers cannot recover costs for the depositions conducted in a separate
18 case. I therefore deduct \$177.62 for the travel to the Weiss deposition and \$953.30 for the Weiss
19 and Gwinn deposition transcripts. ECF No. 60-6. Only copies of those transcripts would be

21 ³ That court referred to Leapers’ “hyper-aggressive strategy targeting its competitor
22 across multiple forums—including through successfully pursuing public arrest and criminal
23 prosecution in another state—at great expense to itself and Defendants.” ECF No. 41-1 at 6. The
Sixth Circuit overturned that decision on the merits of the district court’s trade dress rulings. *See*
Leapers, Inc. v. SMTS, LLC, No. 17-1007, 2018 WL 341880, at *7 (6th Cir. Jan. 10, 2018). On
remand, those parties settled their disputes. *Leapers, Inc. v. SMTS, LLC*, No. 2:14-cv-12290-
RHC-DRG, 2018 WL 2007073, at *1 (E.D. Mich. Jan. 26, 2018).

1 properly charged to this case. The other research and copying charges correlate to dates when
2 the anti-SLAPP motion was being drafted, so I will award those costs for a total award of
3 \$937.22.

4 **II. CONCLUSION**

5 IT IS THEREFORE ORDERED that defendants' motion for attorney's fees (**ECF No.**
6 **60**) is **GRANTED in part**. The clerk of court is instructed to enter judgment in favor of
7 defendant Continental Incorporated, Inc. and Leapers, Inc. and against plaintiffs Adrish Banerjee
8 and Yan He in the amount of \$49,554.72 (\$48,617.50 in attorney's fees and \$937.22 in costs).

9 DATED this 17th day of September, 2018.

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12 _____
13 ANDREW P. GORDON
14 UNITED STATES DISTRICT JUDGE
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