

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

The Honorable Karen L. Strombom

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KEN ARONSON,)	No. 3:10-CV-05293-KLS
)	
Plaintiff,)	DEFENDANT’S MOTION FOR
)	ATTORNEYS’ FEES AND COSTS
v.)	UNDER RCW 4.24.525
)	
DOG EAT DOG FILMS, INC.,)	NOTE ON MOTION
)	CALENDAR: OCTOBER 8, 2010
Defendant.)	
)	
)	
)	

I. RELIEF REQUESTED

Pursuant to the Court’s order of August 31, 2010 and RCW 4.24.525 (Washington Anti-SLAPP Act), Dog Eat Dog Film, Inc. (“Defendant”) respectfully moves this Court to enter an award in favor of Defendant for \$46,965 in attorneys’ fees and \$697.80 in costs that Defendant reasonably incurred in bringing its Special Motion to Strike under Washington’s Anti-SLAPP Act, and for \$10,000 statutorily prescribed by RCW 4.24.525(6)(a).

II. STATEMENT OF FACTS

1 On August 31, 2010, the Court granted Defendant's Special Motion to Strike
2 Plaintiff's Claims of Misappropriation of Likeness and Invasion of Privacy Claims under
3 Washington's newly-enacted Anti-SLAPP Act, RCW 4.24.525.¹ In its Order, the Court
4 found that Ken Aronson's ("Plaintiff's") claims of misappropriation of likeness and
5 invasion of privacy fell within the ambit of the Washington Anti-SLAPP Act because they
6 arose from the use of video footage in a documentary film about the healthcare debate, an
7 issue of public concern. Declaration of Bruce E.H. Johnson, Ex. A at 5-9. The Court
8 awarded Defendant its reasonable attorneys' fees and costs incurred in presenting that
9 motion as well as the statutorily prescribed amount of \$10,000. *Id.* at 17. This was the
10 first substantive decision to apply the newly-enacted Washington Anti-SLAPP Act.
11 Defendant now moves this Court to enter an award for the attorneys' fees and costs it
12 incurred in bringing its successful motion.²

13 III. ARGUMENT AND AUTHORITY

14 A. Defendant is entitled to recover its reasonable attorneys' fees and costs 15 incurred in bringing its successful Special Motion to Strike.

16 The Court granted Defendant's Special Motion to Strike and dismissed Plaintiff's
17 claims of invasion of privacy and misappropriation of likeness, making Defendant a
18 prevailing party under the Washington Anti-SLAPP Act. Accordingly, Defendant is
19 entitled to recover "[c]osts of litigation and any reasonable attorneys' fees incurred in
20 connection with each motion on which the moving party prevailed." RCW 4.24.525(6)(a).

21 ¹ A true and correct copy of the Court's Order of August 31, 2010 is attached as Exhibit A
to the Declaration of Bruce E.H. Johnson.

22 ² Plaintiff has filed a Notice of Appeal of the Court's August 31st Order to the Ninth
23 Circuit, as well as a Motion for Reconsideration. Defendant is likely to continue to incur
fees and costs in connection with its Special Motion to Strike as a result of either or both
Plaintiff's appeal and Motion for Reconsideration. Defendant reserves the right to bring a
motion at a later date for the award of any such subsequent fees and costs it incurs.

1 Defendant's Special Motion to Strike required the Court to examine the newly-
2 enacted Washington Anti-SLAPP law for the first time. As such, this will be the first fee
3 award under this statute. To guide this Court in its determination of the amount of the fee
4 award, both the statute itself and legislative history show the fee-shifting provision is a
5 fundamental part of the Washington Anti-SLAPP Act. The Washington legislature made a
6 fee and cost award *mandatory* to the prevailing party, limited only by the reasonableness of
7 such fees and costs. RCW 4.24.525(6)(a). This shows the Legislature's intent to
8 discourage SLAPP lawsuits by imposing the litigation costs on any party seeking to "chill
9 the valid exercise of the constitutional rights of freedom of speech and petition for the
10 redress of grievances." Laws of 2002, ch. 232, § 1.

11 Additionally, though not yet addressed under Washington law, it is well-settled that
12 the mandatory fee-shifting provisions of anti-SLAPP statutes in other states are applicable
13 in actions in federal court. *See, e.g., Verizon Del., Inc. v. Covad Comm'ns Co.*, 377 F.3d
14 1081, 1091 (9th Cir. 2004); *United States ex rel. Newsham v. Lockheed Missiles & Space*
15 *Co., Inc.*, 190 F.3d 963, 971-73 (9th Cir. 1999).

16 **B. The attorneys' fees and costs Defendant seeks are reasonable.**

17 Because the Washington Anti-SLAPP Act mandates that Defendant recover its
18 attorneys' fees and costs incurred in connection with its anti-SLAPP motion, the only issue
19 remaining for the Court to determine is the reasonableness of the fees and costs Defendant
20 seeks. Under Washington law, typically the party requesting attorneys' fees must establish
21 that the amount of the attorneys' fees is reasonable. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d
22 141, 151 (1993). The amount of a reasonable award of attorneys' fees is generally left to
23

1 the sound discretion of the trial court.³ See, e.g., *Absher Constr. Co. v. Kent Sch. Dist.*, 79
2 Wn. App. 841, 847 (1995). Where a Washington statute is silent on how reasonable fees
3 are to be determined (as here), a Washington court generally follows the lodestar method.
4 See, e.g., *Sanders v. State*, 2010 Wash. LEXIS 810 (Wash. 2010) (applying lodestar
5 method to determine reasonability of attorneys' fees request in Public Records Act case);
6 *Scott Fetzer Co. v. Weeks*, 114 Wn.2d 109 (Wash. 1990) (award of attorneys' fees under
7 Washington's long-arm statute). The lodestar is determined by multiplying a reasonable
8 number of hours by a reasonable hourly rate. *Bowers v. Transamerica Title Ins. Co.*, 100
9 Wn. 2d 581, 597 (1983); *Scott Fetzer Co.*, 114 Wn. 2d at 150. To reach the lodestar
10 amount, the court will look at the reasonableness of the hours expended, determine if the
11 hourly fees charged were reasonable, and then multiply the number of hours by the hourly
12 fee. See, e.g., *Sanders*, 2010 Wash. LEXIS 810 at 56-57; *Scott Fetzer Co.*, 114 Wn.2d at
13 150.

14 This fee request is based upon the actual invoices reflecting the recorded daily time
15 entries for each attorney or paralegal who performed services in connection with
16 Defendant's Motion to Strike, multiplied by the agreed upon billing rate at the time that the
17 services were performed. Declaration of Bruce E.H. Johnson at ¶ 9. DWT's time entry
18 practices are described in detail in the Johnson Declaration at ¶¶ 10-11. The Johnson
19 Declaration likewise details the services and costs for which Defendant seeks recovery.
20 Johnson Decl. *Id.* at ¶ 9.

21 ³ Likewise, this court may find instructive that federal courts awarding fees under
22 California's anti-SLAPP act's mandatory fee-shifting provision have found "[t]he court
23 has broad discretion in determining the reasonable amount of attorney fees and costs to
award to a prevailing defendant." *Metabolife Int'l, Inc. v. Wornick*, 213 F. Supp. 2d 1220,
1222 (S.D. Cal. 2002) (calculating fee award under California Anti-SLAPP act); see also
Kearney v. Foley and Lardner, 553 F. Supp. 2d 1178 (S.D. Cal. 2008) (same).

1 **1. Defendant’s lawyers worked a reasonable number of hours in**
2 **bringing the Special Motion to Strike.**

3 Defendant’s counsel spent a reasonable number of hours to bring the Special
4 Motion to Strike, and managed the work load efficiently and economically. Johnson Decl.
5 at ¶ 5. A third-year associate attorney, Noelle Kvasnosky, was primarily responsible for
6 preparing the motion, spending 90.9 hours on legal research, strategy and analysis, drafting
7 the Special Motion to Strike and related matters. *Id.* Senior partner Bruce Johnson worked
8 32.1 hours to provide legal analysis and strategy, review and edit the Special Motion to
9 Strike and the reply to plaintiff’s opposition. *Id.* Paralegal Jennifer Chermoshnyuk
10 worked 29.4 hours to provide support in coordinating and preparing the motion’s
11 supporting declarations and filing the motion. *Id.* Defendant is not requesting
12 reimbursement for the fees of other DWT attorneys—including DWT media attorneys
13 well-versed in litigating anti-SLAPP motions in federal court— or for the librarians and
14 document clerks who assisted in bringing the Special Motion to Strike and whose time was
15 charged to Defendant. Johnson Decl. at ¶ 7. The fact that Defendant is not seeking
16 reimbursement for such time underscores the reasonableness of its request.

17 **2. Defendant’s lawyers charged a reasonable fee to bring the**
18 **Special Motion to Strike.**

19 DWT’s billing rates are generally near the midpoint of the range of rates for
20 attorneys and paralegals of similar tenure at comparable firms, according to surveys of
21 billing rates for Seattle area law firms. Declaration of L. Keith Gorder at ¶ 3. The Gorder
22 Declaration provides greater detail about the reasonability of Mr. Johnson and Ms.
23 Kvasnosky’s individual rates in relation to peer lawyers in the Seattle market. *Id.*

1 For this engagement, Davis Wright Tremaine (“DWT”) billed Defendant for Mr.
2 Johnson and Ms. Kvasnosky’s services at a “blended” hourly rate of \$340. Johnson Decl.
3 at ¶ 6. This blended rate reflects the relative experience of Mr. Johnson and Ms.
4 Kvasnosky and how the activities associated with research are most efficiently undertaken.
5 Gorder Decl. at ¶ 4. For instance, in connection with the Motion to Strike for which fees
6 are sought, Ms. Kvasnosky worked 90.9 hours and Mr. Johnson worked 32.1 hours. *Id.*
7 Based upon this proportion of work performed multiplied by the standard rates the
8 weighted rate would be \$328, 3.6% lower than the blended rate charged of \$340. *Id.* at ¶ 4.
9 The hourly rate for paralegal Jennifer Chermoshnyuk was \$175. *Id.* at ¶ 3.

10 **3. The lodestar amount is reasonable.**

11 After calculating a lodestar fee, the court may consider whether the lodestar should
12 be adjusted to reflect factors not already taken into consideration. *See, e.g., Bowers*, 100
13 Wn. 2d at 598-99; *Allard v. First Interstate Bank of Wash.*, 112 Wn. 2d 145, 149 (1989).
14 Under Ninth Circuit precedent, “[t]here is a strong presumption that the lodestar figure
15 represents a reasonable fee.” *Morales v. City of San Rafael*, 96 F.3d 359, 363 n.8. “Only
16 in rare instances should the lodestar figure be adjusted on the basis of other
17 considerations,” *Harris v. Marhoefer*, 24 F.3d 16, 18 (9th Cir. 1994), and then only if
18 doing so is necessary in light of factors not already subsumed in the initial lodestar
19 calculation. *Morales*, 96 F.3d at 363-64 & n.10; *accord, Ballen v. City of Redmond*, 466
20 F.3d 736, 746 (9th Cir. 2006). Additional factors relevant to the lodestar in this case are
21 discussed in turn below.

22 1. **Novelty and Complexity of Issues:** Bringing Defendant’s Special Motion
23 to Strike under the newly-enacted Washington Anti-SLAPP Act involved specialized legal

1 expertise, and required an understanding of the interplay between and among constitutional
2 mandates, statutory privileges, federal and state procedure, and case law. Johnson Decl. at
3 ¶ 8. Indeed, Mr. Johnson assisted in drafting Washington's Anti-SLAPP Act. *Id.*
4 Defendant's counsel spent significant time and resources to research the newly-enacted
5 statute, its legislative history, and comparable statutes in other jurisdictions with
6 comparable legislation. *Id.*

7 2. **Quality of Representation:** Given Defendant's lawyers' experience in
8 defending media entities (as detailed in the Johnson Declaration), Defendant received
9 efficient, quality representation in litigating this issue of first impression.

10 3. **Customary fees.** Defendant seeks an award for fees that are in line with
11 the customary rates DWT charges for similar services. *Id.* at ¶ 13.

12 4. **Awards in similar cases.** Because this is an issue of first impression, there
13 are not yet any attorneys' fees awards under Washington's Anti-SLAPP act against which
14 to compare the reasonability of the fees Defendant requests here. However, numerous
15 awards under California's anti-SLAPP act show that the fees Defendant requests are well
16 below those that have been considered reasonable in other circumstances. For example,
17 last year in *Fleming v. Coverstone*, 2009 U.S. Dist. LEXIS 53825 (S.D. Cal. 2009), the
18 court found a rate of \$425.00 for a partner and \$ 245.00 for a senior associate to be
19 reasonable for an anti-SLAPP Motion in San Diego, the average of which (\$335) is just
20 five dollars different than the blended rate Defendant's counsel has charged here (\$340).
21 Additionally, numerous awards under other states' laws show that court have regularly
22 affirmed the reasonableness of fee requests that are similar to, or much greater than, the
23 amount requested by Defendant. *See, i.e., Metabolife Int'l, Inc. v. Wornick*, 213 F. Supp.

1 2d 1220, 1228 (awarding \$318,687.99 in attorneys' fees under California's anti-SLAPP
2 act, including fees incurred in appeal to Ninth Circuit Court of Appeals); *Ketchum v.*
3 *Moses*, 24 Cal. 4th 1122, 1139 (Cal. 2001) (affirmed a lodestar amount of more than
4 \$70,000 in attorneys' fees and costs for a prevailing SLAPP defendant); *Rosenaaur v.*
5 *Scherer*, 88 Cal. App. 4th 260, 281 (Cal. App. 2001) (affirming an award of over \$65,000
6 to a prevailing SLAPP defendant.)

7 8 **IV. CONCLUSION**

9 The above criteria demonstrate that Defendant seeks reasonable fees and costs for
10 prevailing on its Special Motion to Strike under Washington's Anti-SLAPP Act.

11 Accordingly, the Defendant respectfully requests this Court award it \$46,965 in attorneys'
12 fees, \$697.80 in costs, and the statutorily prescribed amount of \$10,000.

13 DATED this 22 day of September, 2010.

14
15 By DAVIS WRIGHT TREMAINE LLP
16 Attorneys for Defendant Dog Eat Dog
17 Films, Inc.

18 /s/ Bruce E. H. Johnson

Bruce E. H. Johnson, WSBA # 7667

Noelle Kvasnosky, WSBA # 40023

Suite 2200

1201 Third Avenue

Seattle, Washington 98101-3045

Telephone: (206) 757-8069

20 Fax: (206) 757-7069

21 E-mail: brucejohnson@dwt.com

noellekvasnosky@dwt.com

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 22 day of September, 2010, I caused to be filed
3 electronically the above and foregoing document with the court, using the CM/ECF
4 system, which will send email notification of such filing to the below addressees, and I
5 served a true and correct copy of the following documents by the method indicated below
6 and addressed as follows:

7 **Attorneys for Plaintiff:**

8 Thomas Brian Vertetis
9 Brian D. Doran
10 Pfau Cochran Vertetis Kosnoff PLLC
11 911 Pacific Avenue
12 Suite 200
13 Tacoma, WA 98402

_____ U.S. Mail
_____ Hand Delivery
_____ Overnight Mail
_____ Facsimile
X Email
X CM/ECF Notification via email
service to: tom@pcvklaw.com and
bryan@pcvklaw.com

14 Philip Talmadge
15 Talmadge Fitzpatrick
16 18010 Southcenter Parkway,
17 Tukwila, WA 98188-4630

X U.S. Mail
_____ Hand Delivery
_____ Overnight Mail
_____ Facsimile

18 Declared under penalty of perjury dated at Seattle, Washington this 22nd day of
19 September, 2010.

20 /s/ Noelle H. Kvasnosky
21 Noelle H. Kvasnosky
22
23