FILED
TARRANT COUNTY
11/21/2019 9:13 AM
THOMAS A. WILDER
DISTRICT CLERK

Cause No. 141-307474-19

VICTOR MIGNOGNA *Plaintiff,*	§ §	IN THE DISTRICT COURT
v.	§	141ST JUDICIAL DISTRCT
FUNIMATION PRODUCTIONS LLC, JAMIE MARCHI, MONICA RIAL, AND RONALD TOYE, *Defendants.*	§ §	TARRANT COUNTY, TEXAS

PLAINTIFF'S RESPONSE AND OBJECTIONS TO DEFENDANT JAMIE MARCHI'S MOTION TO DETERMINE SANCTIONS AND ATTORNEY'S FEES

NOW COMES Plaintiff, Victor Mignogna, and files his *Plaintiff's Response and Objections to Defendant Jamie Marchi's Motion to Determine Sanctions and Attorney's Fees* ("Response"). In support thereof, Plaintiff would respectfully show the following:

1. Plaintiff asks the Court to deny Defendant Jamie Marchi's ("Defendant") Motion to Determine Sanctions and Attorney's Fees ("Defendant's Motion") regarding the attorney's fees that are in excess of a reasonable attorney fees. Plaintiff asks the Court to deny Defendant's request for additional sanctions against Plaintiff because such a sanction is not necessary to deter Plaintiff from bringing similar actions. Further, Defendant seeks these sanctions only to punish Plaintiff for his public participation.

2. Additionally, Plaintiff opposes and objects to Defendant's billing entries for costs and attorney's fees offered by Defendant in support of Defendant's Motion. As detailed further herein, Defendant's billing entries include block charges, insufficient information due to heavy redactions,

and fees for tasks that were duplicative, excessive, and unnecessary attorney work. Accordingly, Defendant's billings for attorney's fees require a reduction of no less than thirty (30%) percent.

RESPONSE TO REQUEST FOR ATTORNEY'S FEES

3. Plaintiff opposes Defendant's request for attorney's fees and costs on the grounds that the fees and costs are in excess of a reasonable amount. The TCPA requires an award of only reasonable attorney's fees. A 'reasonable' attorney's fee "'is one that is not excessive or extreme, but rather moderate or fair.'" See Sullivan v. Abraham, 488 S.W.3d 2 (Tex. 2016).

4. The determination of what constitutes a reasonable attorney's fee involves two steps. First, the court must determine the reasonable hours spent by counsel in the case and a reasonable hourly rate for such work. *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 760 (Tex. 2012) see *Dinkins v. Calhoun*, 02-17-00081-CV, 2018 WL 2248572 at 8 (Tex. App.—Fort Worth May 17, 2018, no pet.) (Citing *El Apple* in finding that where there was no evidence regarding the *Anderson Factors* other than the time spent and hourly rate, the evidence was legally insufficient to support the amount awarded by the trial court.).

5. The court then multiplies the number of such hours by the applicable rate, the product of which is the base fee or lodestar. *El Apple I, Ltd*, 370 S.W.3d at 760. The court may then adjust the base lodestar up or down (apply a multiplier), if relevant factors indicate an adjustment is necessary to reach a reasonable fee in the case. *Id.*

6. The relevant factors when making a determination of a reasonable attorney's fee are provided in *Arthur Anderson v. Perry Equipment, Co.*, 945 S.W.2d 812, 818 (Tex. 1997). Those factors are:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;

(2) the likelihood ... that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

7. The movant seeking attorneys' fees bears the initial burden of submitting adequate documentation of the hours expended and hourly rates. *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S. Ct. 1933 (1983) ("The applicant should exercise 'billing judgment' with respect to hours worked ... and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims."). A party seeking attorney fees is charged with the burden of showing the reasonableness of the hours billed and, therefore, is also charged with proving that they exercised billing judgment. *Saizan v. Delta Concrete Prods. Co., Inc.*, 448 F.3d 795, 799 (5th Cir. 2006). The Court must review billing records and exclude all time that is excessive, duplicative, or inadequately documented. *Hensley*, 461 U.S. "The hours surviving this vetting process are those reasonably expended on the litigation." *Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993). "Billing judgment requires documentation of the hours charged and of the hours written off as unproductive, excessive, or redundant." *Saizan*, 448 F.3d at 799. The proper

remedy for omitting evidence of billing judgment ... does not include a denial of fees but, rather, a reduction of the award by a percentage intended to substitute for the exercise of billing judgment. *Id.*

8. In *Estate of Stokes*, the Fort Worth Court of Appeals noted that what is "reasonable" is the same as what is "reasonable and necessary." There, the Court considered a Defendant physician's award of attorney's fees, which were reduced from over $100,000 to $44,335 following a three day (3) bench trial, in light of the fact that the physician pursued discovery on the merits of his case rather than diligently pursuing dismissal pursuant to the Texas Medical Liability Act when Plaintiff failed to comply with requirement for a timely expert report. *Estate of Stokes*, 2019 WL 4048863 at 1 (Tex. App.—Fort Worth Aug. 28, 2019, no pet. h.) (citing *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019)). While that case was remanded for determination in accordance with *Rohrmoos Venture*, it confirms the rule that unnecessary attorney's fees—those which do not further the party's case—are not reasonable under the lodestar method. This applies here where **Defendant pursues a strategy of monitoring and attacking public statements made by Plaintiff and non-parties, and seeks sanctions as a means of silencing Plaintiff.** In other words, Defendant seeks to recover attorney's fees for its endeavor to deter Plaintiff from his own public participation, rather than offering any evidence that shows that additional sanctions are necessary to sufficiently deter Plaintiff from bringing similar actions described in this chapter. See Tex. Civ. Prac. & Rem. Code § 27.009(a).

9. In total, thirty percent (30%) of the award sought by Defendant for costs and attorney's fees are not supported by sufficient evidence.

10. Defendant's billing entries include block charges. That is, the billing entries do not

specify the amount of time spent on discrete tasks. When time records are block billed, the court cannot accurately determine the number of hours spent on any particular task, and the court is thus hindered in determining whether the hours billed are reasonable. Without detail about the work done, how much time was spent on the tasks, and how an attorney arrived at his proposed sum, an attorney's testimony lacks the substance required to uphold a fee award. *Rohrmoos Venture*, 578 S.W.3d at 483-87; 505 (Tex. 2019)(Embracing Federal case law applying lodestar method of determining attorney's fees; finding insufficient evidence where attorney's testimony was too general to establish that the requested fees were reasonable and necessary, specifically failing to provide sufficient detail of the work done); see also *Barrow v. Greenville Indep. Sch. Dist.*, 3:00-CV-0913-D, 2005 WL 6789456 at 4 (N.D. Tex. Dec. 20, 2005).

11. In the *Barrow* case, the United States District Court for the Northern District of Texas analyzed attorney's fees involving block billing under the *Anderson* factors. There, because of block billing, it was "impossible to conduct meaningful review and determine the precise number of hours that should be reduced in each time entry..." *Barrow*, 2005 WL 6789456 at 4. Following an extensive review of the attorneys' timesheets, the Court reduced each attorney's bill in the percentage of items that were "too vague to support an award of attorney's fees." *Id.*

12. There are several instances of block billing for every month of Defendant's billing statements. For instance, in an entry dated July 24, 2019, for 1.8 hours, Defendant described the task as "[redacted]; Receive and review Plaintiff's objections to Funimation's evidence. This illustrates three (3) problems common throughout Defendant's billing entries: (1) lumping together several discreet tasks without specifying how much time was spent on each discreet task, (2) redacting so much

information that the court cannot determine whether the task was reasonable (in this case, an entire discreet task), and (3) performing totally unnecessary tasks. To be clear, this indicates that Jamie Marchi wants to recover attorney's fees for work spent reviewing Plaintiff's objections to another Defendant's pleading. The contents of those objections are of no consequence to this Defendant. The 1.8 hours allegedly spent reviewing Plaintiff's objections to Funimation's evidence served no purpose for Defendant Jamie Marchi and the fees are not reasonable.

13. A single entry on September 2, 2019, states that the attorney worked for 4.6 hours and describes the tasks as "Draft reply to response to motion to dismiss; receive and review second amended petition; revise motion to strike; various email correspondence with [redacted]." Not only are these tasks blocked together, and again with another task that is substantively redacted, but the attorney has blocked together the drafting of several documents. Defendant attempts to avoid the court's scrutiny on each of these tasks by bundling them together with a large number of hours. Considering the minimal effort required to sufficiently document attorney time on discreet tasks, these fees should be reduced significantly.

14. Defendant's redactions prevent the Court from determining what task was performed. In attempting to conceal supposedly privileged information contained in the billing, without providing a corresponding privilege log, Defendant has redacted some tasks so completely that the Court cannot assess whether the task was reasonable or not, and in some incidents what the task was at all.

15. Defendant's practice of redacting entire tasks, combined with Defendant's block billing practice, leaves the Court with no way to determine the reasonableness or necessity of discreet tasks supposedly performed by Defendant's attorney. See *McGibney v. Rauhauser*, 549 S.W.3d 816, 827

(Tex. App.—Fort Worth 2018, pet. denied). In *McGibney*, the Court considered an attorney's redacted fee statements, where large portions or whole entries were redacted on the basis that they involved communications between clients and attorneys. The Court noted that "… the content of some of the redacted matters may have involved communications between attorney and client. **But a trial court is not at liberty to blindly assume that fees for every communication between counsel and client should, in fairness, be awarded in a lawsuit.:"** *Id.* (Emphasis added). On the basis that the trial court should not have awarded fees for portions in which the trial court cannot determine the propriety of the fees, and also noting that the attorney billed significant time for opposition research, the issue of fees was remanded back to the trial court. *Id.*

16. Defendant's entries contain redactions almost identical to those addressed in *McGibney*. Defendant's documents show entries throughout for "Phone conference with [redacted]" (See entry on May 10, 2019 and "Email correspondence with [redacted] regarding [redacted]" (See entry on May 27, 2019). While the information may be privileged, the Court cannot determine from the information provided whether the costs and fees were reasonable. In these instances, Defendant's billing requires that these entries be reduced or removed altogether.

17. Defendant's billing entries include duplicative, excessive, and unnecessary attorney work. A Court can reduce fees for duplicative, excessive, or unnecessary attorney work on the grounds that such fees are not reasonable. A Court can reduce time excessive conferences, if they are unreasonable considering the complexity of the issues being considered. *El Apple I*, 370 S.W.3d at 762 ("Charges for duplicative, excessive, or inadequately documented work should be excluded."). It should not be lost on the Court that Defendant is aligned with three other parties in this case. While

Defendant and its co-Defendants have acted in concert with one another throughout every step of this litigation, the Defendants in this case are represented by three (3) separate legal teams. For the month of August, Defendant billed 7.3 hours of attorney time for conferences, each with the subject matter redacted. *Each* of these Defendants seeks fees for months of conferencing among one another. To the extent that each Defendants' legal teams needlessly duplicate tasks, their fees for such tasks are subject to significant reduction. Defendant's fee statements, in addition to duplicating work across three (3) legal teams, demonstrates duplicative and unnecessary attorney work.

18. Defendant failed to establish the qualifications for its attorney's legal assistant. Under Texas law, legal assistant fees are a component of attorneys' fees and courts must consider a four-step test to assess whether a legal assistant's fees are recoverable. A party may separately assess and include in the award of attorneys' fees compensation for a legal assistant's work, if that assistant performs work traditionally done by an attorney. In order to recover such amounts, the evidence must establish:

> (1) the qualifications of the legal assistant to perform substantive legal work;
> (2) that the legal assistant performed substantive legal work under the direction and supervision of an attorney;
> (3) the nature of the legal work performed;
> (4) the legal assistant's hourly rate; and
> (5) the number of hours expended by the legal assistant.

See *Gill Sav. Ass'n v. Int'l Supply Co., Inc.*, 759 S.W.2d 697, 702–04 (Tex. App.—Dallas 1988, writ denied).

19. In *Gill Savings*, the Dallas Court of Appeals considered whether sufficient evidence had been provided to support an award for a legal assistant's fees. There, fee statements included: (1) the date the service was rendered; (2) a brief description of the work that was performed; (3) the time spent performing the particular task; (4) the initials of the person performing the work; and (5) the

total amount due as a result of the services which were rendered. Noting that the information provided did not provide any help in determining: (1) **the qualifications, if any, of the legal assistants**; (2) whether the tasks performed by the legal assistants were of a substantive legal nature or were the performance of clerical duties; and (3) the hourly rate being charged for the legal assistant. *Id* (Emphasis added). *Id*; see also *Clary Corp. v. Smith*, 949 S.W.2d 452, 469–70 (Tex. App.—Fort Worth 1997, pet. denied) (Denying fees for a legal assistant because, in part, the evidence provided did not explain how the legal assistant was qualified to participate in document production, or even that she was qualified at all).

RESPONSE TO REQUEST FOR SANCTIONS

20. In addition to seeking attorney's fees and costs, Defendant seeks a sanction award "that will account for the $260,000 GoFundMe" against Plaintiff and allegedly "to deter Plaintiff from bringing similar lawsuits in the future." Plaintiff asks the Court to deny Defendant's request for sanctions in its entirety on the grounds that the award will not serve to deter Plaintiff from filing similar lawsuits and because Defendant seeks to use sanctions to punish Plaintiff for his own public participation.

21. Defendant offers four (4) reasons why this Court should issue additional sanctions against Plaintiff: (1) Plaintiff said he may sue other people who he believes harmed his reputation (2) a third-party has raised funds supporting Plaintiff's effort; (3) Defendant objects to statements made about Defendant in Plaintiff's pleadings and the fact the Court dismissed Plaintiff's claims pursuant to TCPA; and (4) Defendant seeks less than its offered attorney fee bill.

22. A trial court abuses its discretion if the sanctions awarded are greater than necessary

to promote compliance. See *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007). The TCPA's purpose is to prevent the bringing of meritless lawsuits that discourage the exercise of certain constitutional rights. Tex. Civ. Prac. & Rem. Code §27.002. The consider the following non-exclusive list of factors to the extent that they are relevant:

(1) the good faith or bad faith of the offender;

(2) the degree of willfulness, vindictiveness, negligence, or frivolousness involved in the offense;

(3) the knowledge, experience, and expertise of the offender;

(4) any prior history of sanctionable conduct on the part of the offender;

(5) the reasonableness and necessity of the out-of-pocket expenses incurred by the offended person as a result of the misconduct;

(6) the nature and extent of prejudice, apart from out-of-pocket expenses, suffered by the offended person as a result of the misconduct;

(7) the relative culpability of client and counsel, and the impact on their privileged relationship of an inquiry into that area;

(8) the risk of chilling the specific type of litigation involved;

(9) the impact of the sanction on the offender, including the offender's ability to pay a monetary sanction;

(10) the impact of the sanction on the offended party, including the offended person's need for compensation;

(11) the relative magnitude of sanction necessary to achieve the goal or goals of the sanction;

(12) burdens on the court system attributable to the misconduct, including consumption of judicial time and incurrence of juror fees and other court costs.

Landry's, Inc. v. Animal Legal Def. Fund, 566 S.W.3d 41, 71 (Tex. App.—Houston [14th Dist.] 2018, pet. filed), reh'g denied (Dec. 31, 2018).

23. Defendant has not offered sufficient evidence, or any evidence whatsoever, to support sanctions based on these factors. And an award of these sanctions requires a finding *beyond* the simple fact that Plaintiff's claims were dismissed pursuant to an TCPA motion. Tex. Civ. Prac. & Rem. Code § 29.009.

24. There is no evidence of bad faith, willfulness, vindictiveness, negligence, or frivolousness on Plaintiff's part. Plaintiff alleged valid causes of action against Defendants' and plead sufficient facts to support those causes of action. It is Plaintiff's understanding that his claims were dismissed not on the basis that he didn't state viable claims, but rather the Court believed the evidence offered was not sufficient to prevent dismissal under the TCPA.

25. Defendant seeks to improperly infringe on Plaintiff's First Amendment Rights to Freedom of Speech and Association by seeking sanctions based on Plaintiff's public statements. Defendant complains about statements generally described but not particularly identified in Plaintiff's pleadings and motions. Moreover, she fails to explain how this goes to any culpability or vindictiveness on Plaintiff's part in bringing the suit. Defendant's statements and briefing are brimmed with attacks on three (3) public statements by Plaintiff and non-parties. Defendant offers this as her basis for levying additional sanctions against Plaintiff.

26. Defendant has made most of her arguments in every pleading filed about a third party who has raised funds for the purpose of paying Plaintiff's legal costs. However, as the various Defendants' in this case have regularly highlighted, the fund is not payable to Plaintiff. The existence of this cannot be considered regarding Plaintiff's ability to pay a monetary sanction. Defendant has not offered any evidence whatsoever on this factor.

27. Defendant offers Plaintiff's testimony from his deposition to support her allegation that Plaintiff must be sanctioned to deter him from filing similar suits. The fact is, if Plaintiff so desired, he could sue additional Defendants who have harmed his reputation, but has not done so. Moreover, such a statement does not support an allegation that any subsequent suits against people who harm Plaintiff's professional reputation would be subject to dismissal under the TCPA. Any sanction awarded on this basis would improperly deter Plaintiff from bringing valid lawsuits in Texas state courts and impinge on his First Amendment Rights.

28. In fact, the record before the Court on several of these factors weighs against imposing sanctions. For example, Defendant has shown no evidence of prejudice, apart from out of pocket expenses as a result of Plaintiff's conduct. Also, Plaintiff has no history of filing suits like this in the past.

29. The sanctions award should be denied in whole or, alternatively, reduced.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff asks the Court to deny Defendant's request for attorney's fees, to sustain Plaintiff's objections, to deny Defendant's request for sanctions against Plaintiff, and further relief to which Plaintiff may be entitled.

Dated: November 20, 2019

Respectfully submitted

BEARD HARRIS BULLOCK HUGHES
and MARTINEZ HSU

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served on all parties as required by Texas Rules of Civil Procedure.

Ryan Sellers