IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D., **Plaintiff,** **v.** **NATIONAL REVIEW, INC., *et al.*,** **Defendants.**	**2012 CA 008263 B** **Judge Alfred S. Irving, Jr.**

ORDER GRANTING IN PART COMPETITIVE ENTERPRISE INSTITUTE'S MOTION FOR ATTORNEYS' FEES AND SUPPLEMENTAL MOTION FOR "FEES ON FEES"

This matter is before the Court on *Defendants Competitive Enterprise Institute and Rand Simberg's Motion for Litigation Costs, Including Attorney's Fees, Under DC's Anti-SLAPP Act* [hereinafter "Mot. for Fees"] filed on March 11, 2024. Plaintiff Michael Mann, PhD filed an opposition on April 10, 2024, *see* Pl.'s Mem. of P. & A. in Opp'n to Defs. Competitive Enterprise Institute & Rand Simberg's Mot. for Litigation Costs, Including Att'ys' Fees Under DC's Anti-SLAPP Act [hereinafter "Mann Opp'n to Fees"], and Competitive Enterprise Institute ("CEI") and Mr. Simberg filed a reply on April 25, 2024, *see* Defs. CEI & Rand Simberg's Reply in Supp. of Their Mot. for Att'y's Fees Under the D.C. Anti-SLAPP Act [hereinafter "Reply in Supp. of Fees"].

Also before the Court is *Defendants Competitive Enterprise Institute and Rand Simberg's Supplemental Motion for Attorney's Fees Under the D.C. Anti-SLAPP Act* [hereinafter "Suppl. Mot."], filed on May 9, 2024. Dr. Mann filed an opposition on May 23, 2024, *see* Pl.'s Mem. of P. & A. in Opp'n to Defs. CEI & Simberg's Suppl. Mot. for Att'ys' "Fees on Fees" [hereinafter "Opp'n to Suppl. Mot."], and CEI & Mr. Simberg filed a reply on May 30, 2024, *see* Defs. CEI & Rand Simberg's Reply in Supp. of Their Suppl. Mot. for Fees on Fees [hereinafter "Reply in

Supp. of Suppl. Mot."]. For the reasons set forth below, the Court will grant in part each the *Motion for Fees* and the *Supplemental Motion*.

I. BACKGROUND

On October 22, 2012, Dr. Mann filed a *Complaint* asserting, *inter alia*, claims of libel and libel *per se* against CEI and Mr. Simberg. Compl. 14-24. On December 14, 2012, CEI and Mr. Simberg filed two motions to dismiss, *see* Defs. CEI & Rand Simberg's Mot. to Dismiss Pursuant to R.12(b)(6); Defs. CEI & Rand Simberg's Mot. to Dismiss Pursuant to the D.C. Anti-SLAPP Act. On January 18, 2013, Dr. Mann filed an opposition, *see* Pl.'s Consolidated Mem. of P. & A. in Opp'n to Defs.' CEI & Rand Simberg's Special Mot. to Dismiss Pursuant to the D.C. Anti-SLAPP Act & Mot. to Dismiss Pursuant to R. 12(b)(6), and on February 1, 2013, CEI and Mr. Simberg filed a reply, *see* Reply Br. in Supp. of Defs. CEI & Rand Simberg's Mots. to Dismiss Pursuant to the D.C. Anti-SLAPP Act & to R. 12(b)(6).

On July 10, 2013, Dr. Mann filed an *Amended Complaint* adding a seventh count of libel *per se* against all Defendants. On July 19, 2013, the Hon. Natalia Combs Greene denied the December 14, 2012 motions to dismiss. On July 24, 2013, CEI and Mr. Simberg filed a combined motion to dismiss the amended complaint and to reconsider the denial of the December 14, 2012 motions to dismiss (hereinafter "the *Combined Motion*"). *See* Defs. CEI & Rand Simberg's Special Mot. to Dismiss Pl.'s Am. Compl. Pursuant to the D.C. Anti-SLAPP Act, Mot. to Dismiss Pursuant to R. 12(b)(6), & Mot. to Reconsider. Judge Combs Greene denied the motion to reconsider on September 20, 2013, but left the remainder of the *Combined Motion* to be addressed by the Hon. Frederick H. Weisberg as the case had been transferred to the Civil I calendar.

On September 17, 2013, CEI and Mr. Simberg appealed Judge Combs Greene's denial of the December 14, 2012 motions to dismiss. On December 19, 2013, the Court of Appeals denied CEI and Mr. Simberg's appeal as Dr. Mann's *Amended Complaint* and the July 24 *Combined Motion* were pending with the trial court. On January 22, 2014, Judge Weisberg denied the remainder of the *Combined Motion*, which CEI and Mr. Simberg appealed on January 24, 2014.

On December 22, 2016, the Court of Appeals affirmed the denial of the special motions to dismiss the defamation claims arising out of language expressed in Mr. Simberg's article and reversed the trial court's denial of the special motions to dismiss Counts IV and V, the defamation claims purportedly arising out of statements expressed in Mr. Lowry's *Get Lost* editorial, and Count VI, the claim for intentional infliction of emotional distress, with direction to the trial court to dismiss those claims with prejudice on remand. *Competitive Enter. Inst. v. Mann* ("*CEI*"), 150 A.3d 1213, 1262 (D.C. 2016).

On May 31, 2019, the Hon. Jennifer Anderson accordingly issued an order dismissing Counts IV, V, and VI of Dr. Mann's *Amended Complaint*. On June 11, 2019, Defendants National Review, CEI, and Mr. Simberg filed a consent motion requesting to defer filing their motions for attorneys' fees under the D.C. Anti-SLAPP Act until after the entry of final judgment in the case. *See* Consent Joint Mot. to Defer Fee Application under the Anti-SLAPP Act. Judge Anderson granted the motion on June 13, 2019.

CEI and Mr. Simberg filed the instant *Motion for Fees* on March 11, 2024, and the *Supplemental Motion* on May 9, 2024.

II. DISCUSSION

The Court will first address CEI and Mr. Simberg's request for fees pursuant to the District of Columbia's Anti-SLAPP Act. *See* Mot. for Fees. The Court then will turn to CEI and Mr. Simberg's motion for "fees on fees." *See* Suppl. Mot.

A. Attorneys' Fees

CEI and Mr. Simberg seek a total award of $892,568.36 in fees and prejudgment interest. Mot. for Fees; *see also* Decl. of Mark W. DeLaquil in Supp. of Defs. CEI & Rand Simberg's Mot. for Litigation Costs, Including Att'y's Fees Under DC's Anti-SLAPP Act [hereinafter "DeLaquil Fees Decl."]; *id.* Ex. A (table comparing rates billed with *Laffey* Matrix rates); *id.* Ex. B (table of requested rates and corresponding time entries for work on the anti-SLAPP motion). CEI and Mr. Simberg contend they are presumptively entitled to such award, having prevailed upon their anti-SLAPP motion that resulted in the dismissal of two counts against them. Mot. for Fees 4-6. CEI and Mr. Simberg assert that, even though they did not prevail on appeal on every claim asserted against them, they are nevertheless entitled to a full award of fees because "the work on the successful and unsuccessful claims largely overlapped." *Id*. at 5 (citing *Wagner v. S. Cal. Edison Co.*, No. 2:16-cv-06259, 2019 WL 4257192, at *3, 2019 U.S. Dist. LEXIS 153457, at *9 (C.D. Cal. Sept. 9, 2019), *aff'd in part and vacated in part*, 840 F. App'x 993 (9th Cir. 2021)). In addition, CEI and Mr. Simberg assert that no "special circumstances" exist that would make an award of fees unjust. *Id*. at 6-7; *see Khan v. Orbis Bus. Intel. Ltd*., 292 A.3d 244, 253 (D.C. 2023).

In opposition, Dr. Mann asserts that CEI and Mr. Simberg are precluded from an award of fees because their success was achieved at the appeal stage of the case, not at the trial stage "on a motion." Mann Opp'n to Fees 8-10. Dr. Mann also asserts that CEI and Mr. Simberg

cannot be considered "prevailing parties" under the Anti-SLAPP Act because they did not "succeed on any significant issue[.]" *Id*. at 10-11 (quoting *District of Columbia v. Jerry M.*, 580 A.2d 1270, 1274 (D.C. 1990)). Dr. Mann further asserts that, notwithstanding the Court of Appeals' rulings, the overarching landscape of the litigation remained unchanged and that the "principal allegations" in the *Unhappy Valley* article proceeding through discovery must be deemed to be "special circumstances" that would render an award of attorneys' fees unjust. *Id*. at 12-14. Dr. Mann contends further that, even if the Court were to deem CEI and Mr. Simberg to be prevailing parties, their fee requests are unreasonable because they were at best minimally successful and that they have failed to demonstrate that their fees are otherwise reasonable. *Id*. at 14-18. Finally, Dr. Mann asserts that prejudgment interest is simply not available to the Defendants because his action did not arise out of a contract and that no liquidated debt exists. *Id*. at 19-20.

In reply, CEI and Mr. Simberg maintain that they are entitled to attorneys' fees because (1) they prevailed in part, (2) the Anti-SLAPP Act provides for recovery of "costs of litigation," and (3) no special circumstances exist that would make an award of fees unjust. Reply in Supp. of Fees 1-12. CEI and Mr. Simberg also maintain that their request for fees is reasonable both as to their claimed hourly rates and the hours of work that their attorneys performed, *id*. at 12-15, and that they are entitled to prejudgment interest on the award, *id*. at 15-16. For the reasons set forth herein, the Court finds that CEI and Mr. Simberg are entitled to attorneys' fees under the Anti-SLAPP Act.

1. Legal Standard

Courts in the District of Columbia adhere to the American Rule as to attorneys' fees, by which rule each party is responsible for paying its own fees for legal services absent an

"exception premised upon statutory authority, contractual agreement, or certain narrowly defined common law exceptions." *Hundley v. Johnston*, 18 A.3d 802, 806 (D.C. 2011). Unless otherwise provided, a motion for attorneys' fees must "specify the judgment and the statute, rule[,] or other grounds entitling the movant to the award; state the amount sought or provide a fair estimate of it and disclose . . . the terms of any agreement about fees for the services for which the claim is made." Super. Ct. Civ. R. 54(d)(2)(B)(ii)-(iv). Whether to award attorneys' fees is committed to the discretion of the trial court. *Jung v. Jung*, 791 A.2d 46, 51 (D.C. 2002).

Computing reasonable attorneys' fees begins with determining the lodestar, "the number of hours reasonably expended by counsel multiplied by a reasonable hourly rate," *Fed. Mktg. Co. v. Va. Impression Prods. Co.*, 823 A.2d 513, 530 (D.C. 2003), and then, "'in exceptional cases,' making upward or downward adjustments as appropriate," *id*. (quoting *Hampton Cts. Tenants Ass'n v. D.C. Rental Hous. Comm'n*, 599 A.2d 1113, 1115 (D.C. 1991)). In adjusting the lodestar for a fee determination, the court considers:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Frazier v. Franklin Inv. Co., 468 A.2d 1338, 1341 n.2 (D.C 1983).

It is "counsel's burden to prove and establish the reasonableness of each dollar, each hour, above zero." *Lively v. Flexible Packaging Ass'n*, 930 A.2d 984, 993 (D.C. 2007) (quoting *Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1210 (10th Cir. 1986)). "[T]he burden is on the fee applicant to produce satisfactory evidence . . . that the requested rates are in line with

those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984). The court must then determine "what constitutes a reasonable hourly rate for the services rendered, as measured by prevailing market rates in the relevant community for attorneys of similar experience and skill." *District of Columbia v. Jerry M.*, 580 A.2d 1270, 1281 (D.C. 1990).

The fee applicant must also provide documentation "sufficiently detailed to permit the [court] to make an independent determination whether or not the hours claimed are justified." *Hampton Cts. Tenants Ass'n*, 599 A.2d at 1117. However, as "cases may be overstaffed," *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983), the court "should compute the number of hours reasonably expended on the litigation, excluding any claimed hours that are excessive, redundant, or unnecessary," *Jerry M.*, 580 A.2d at 1281 (citing *Henderson v. District of Columbia*, 493 A.2d 982, 999 (D.C. 1985)).

2. Analysis

The Anti-SLAPP Act provides, in relevant part, as follows: "The court may award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 or § 16-5503 the costs of litigation, including reasonable attorney fees." D.C. Code § 16-5504. CEI and Mr. Simberg brought a special motion to dismiss pursuant to D.C. Code § 16-5502. *See* Defs. CEI & Rand Simberg's Special Mot. to Dismiss Pl.'s Am. Compl. Pursuant to the D.C. Anti-SLAPP Act, Mot. to Dismiss Pursuant to R. 12(b)(6), & Mot. to Reconsider. While the trial judge did not grant the motion, initially, CEI and Mr. Simberg pursued their position on appeal and were successful, thereby securing dismissal of two of the three counts of which they sought dismissal. *See CEI*, 150 A.3d at 1262 (reversing the trial court's denial of the anti-SLAPP

motion with respect to Dr. Mann's defamation claims arising from Mr. Lowry's *Get Lost* editorial and the claim for intentional infliction of emotional distress).

Dr. Mann maintains that a defendant must enjoy success at the motion stage of the litigation, before the trial judge, in order to show entitlement to an award of attorneys' fees on an anti-SLAPP motion. Mann Opp'n to Fees 8-10 (citing *Khan*, 292 A.3d at 259 (holding that the Anti-SLAPP Act "does not provide for fee awards to defendants who prevail at later stages of a lawsuit" such as after trial, absent a showing of bad faith), and *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1337 n.5 (D.C. Cir. 2015) (concluding that the D.C. anti-SLAPP Act "does not purport to make attorneys' fees available to parties who obtain dismissal by other means, such as under Federal Rule 12(b)(6)")). Dr. Mann's argument is without merit.

The Court of Appeals has interpreted the Anti-SLAPP Act as "not limited to trial work but generally encompass[ing] 'the costs of litigation,' and post-trial motions *and appeals* are quite clearly part of the litigation." *Jacobson v. Clack*, 309 A.3d 571, 585 (D.C. 2024) (internal citation omitted) (emphasis added). Here, CEI and Mr. Simberg were successful on the appeal of their anti-SLAPP motion and any other conclusion would be untenable under the terms of the statute and the Court of Appeals' construction of the statute. Accordingly, CEI and Mr. Simberg are indeed presumptively entitled to attorneys' fees.

Dr. Mann's assertion that CEI and Mr. Simberg were not "prevailing parties" is also not availing as the term, as he uses it, is simply not interchangeable with the term "prevailing in whole or in part." Mann Opp'n to Fees 10-11. When analyzing D.C.'s Freedom of Information Act, by way of further clarification and distinction, the Court of Appeals concluded that the statute's use of "prevails in whole or in part," D.C. Code § 2-537(c), as opposed to "'prevailing party,' . . . suggests that the D.C. Council intended to authorize attorney's fees in FOIA cases

more often than in other types of cases," *Frankel v. D.C. Off. for Planning & Econ. Dev.*, 110 A.3d 553, 557 (D.C. 2015). Similarly, in the anti-SLAPP context, the Court of Appeals held that the "deliberate" use of "'prevails, in whole or in part' . . . suggests the Council meant to give trial courts considerable leeway in granting fee awards." *Jacobson*, 309 A.3d at 581. Here, CEI and Mr. Simberg were successful on interlocutory appeal in securing dismissals of Counts V and VI of Dr. Mann's amended complaint. Accordingly, CEI and Mr. Simberg can be said to have *prevailed in part* on their motion. As the purpose of the Anti-SLAPP Act was to "create a substantive right not to stand trial and to avoid the burdens and costs of pre-trial procedures, a right that would be lost if a special motion to dismiss is denied and the case proceeds to discovery and trial," *CEI*, 150 A.3d at 1231, an award of fees must be proper when a party is successful on interlocutory appeal. As with other awards of attorneys' fees, such determination is a matter of the trial court's discretion. *See Lively*, 930 A.2d at 988. Whether such success "materially altered" the legal relationship with Dr. Mann is not relevant to the question of *entitlement* to fees. *See* Mann Opp'n to Fees 11 (citing *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992)). However, CEI and Mr. Simberg's degree of success *is* relevant when determining the *extent* of fees that should be awarded. *See Fells v. SEIU*, 281 A.3d 572, 588 n. 13 (D.C. 2022) ("An award of attorney's fees and costs is permitted even if an Anti-SLAPP motion to dismiss is only partially successful. D.C. Code § 16-5504(a). Because we have upheld the dismissal of three claims of Fells' four claims, the trial court may yet decide that some fee award is warranted.")

Finally, as CEI and Mr. Simberg assert, no "special circumstances" exist that would render an award of fees here unjust. Dr. Mann contends that an award of fees would be improper because the more serious defamation claims proceeded and CEI and Mr. Simberg "gained

virtually nothing from the dismissal of the IIED claim." Mann Opp'n to Fees 13-14. As Dr. Mann correctly notes, the purpose of the Anti-SLAPP Act was designed "to protect targets of [] meritless lawsuits" and "to create a substantive right not to stand trial and to avoid the burdens and costs of pre-trial procedures[.]" *CEI*, 150 A.3d at 1226, 1231. Despite some claims proceeding, the Court of Appeals determined that *some* of Dr. Mann's claims were indeed without merit, eliminating *all* of the claims against CEI related to its *own* speech that in turn significantly narrowed discovery and limited the remaining litigation to whether CEI could be held vicariously liable for Mr. Simberg's blog post. As a result, CEI did not have to engage in discovery or litigation regarding any of the elements of defamation and neither CEI nor Mr. Simberg had to proceed in defending the claim of intentional infliction of emotional distress, which by the way Dr. Mann elected to charge and which likewise required the mounting of a defense.

a) Fees Will be Awarded no Higher than the *Laffey* Rate

CEI and Mr. Simberg request an award of attorneys' fees that across the board are approximately 22 percent below the *Laffey* matrix rate. DeLaquil Fees Decl. Ex. A. The fees for all partners and counsel are requested at a discounted rate, but most fees requested for junior associates, law clerks, and paraprofessionals are requested at a rate $5 to $30 above the *Laffey* matrix rate. *Id*. CEI and Mr. Simberg contend that all requested rates are reasonable because they fall below the "prevailing rates in the relevant community." Mot for Fees 8-10. Dr. Mann maintains that any award of fees would be unjust but expresses no quarrel with CEI and Mr. Simberg's requested hourly rates. *See* Mann Opp'n to Fees 14-17.

The *Laffey* Matrix is an annual chart that the Civil Division of the United States Attorney's Office for the District of Columbia compiles which "provides a schedule of hourly

rates prevailing in the Washington, D.C. area in each year going back to 1981 for attorneys at various levels of experience." *Lively*, 930 A.2d at 988; *see also Laffey v. Nw. Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984). The Court of Appeals has deemed the *Laffey* matrix rates as not "excessive or out of tune with the market" and has repeatedly approved the use of such rates to "calculate the lodestar for attorneys' fees in private litigation." *Tenants of 710 Jefferson St.*, 123 A.3d at 182; *see also Campbell-Crane & Assocs. v. Stamenkovic*, 44 A.3d 924, 947-48 (D.C. 2012); *Lively*, 930 A.2d at 990. Accordingly, this Court, here, will apply the *Laffey* matrix in calculating attorneys' fees.

As noted above, the Anti-SLAPP Act allows for recovery of "*reasonable* attorney fees." D.C. Code § 16-5504 (emphasis added). "[T]he burden is on the fee applicant to produce satisfactory evidence . . . that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum*, 465 U.S. at 895 n.11. Aside from providing citations to U.S. District Court cases that intimate that the national and Washington, D.C. averages surpass the *Laffey* matrix rate, CEI and Mr. Simberg have failed to cite to similar caselaw from the District of Columbia Court of Appeals or any justification under the *Frazier* factors to cause this Court to stray from the *Laffey* matrix rates. *See Frazier*, 468 A.2d at 1341 n.2. What is perplexing to the Court is the absence of any justification for the enhanced rates for the work of junior and nonlegal staff, particularly when at the same time the more senior attorneys request a discounted rate. As CEI and Mr. Simberg have failed to provide any persuasive reason for an enhancement of certain rates, the Court will reduce the rates for junior legal staff and paraprofessionals to mirror that of the *Laffey* rates. Accordingly, the fees requested will be reduced by $4,428.50.

b) The Fees Requested will be Reduced

In addition to a summary of the work performed in this matter, Mot. for Fees 11-12; DeLaquil Decl., filed with the *Motion for Fees* is a table of hours worked that details a narrative account of all requested hours, *see* DeLaquil Decl. Ex. B. CEI and Mr. Simberg contend that all requested hours are reasonable, given the many issues of first impression and procedural complexities that arose in the case, Mot. for Fees 10-11, and that the overall amount of requested fees is consistent with recovery of attorneys' fees in anti-SLAPP cases in the District of Columbia and elsewhere, *id*. at 12-13.

Dr. Mann argues that, if fees are to be awarded, the Court must find the requested fees to be disproportionate to the "minimal at best" degree of success and asserts that a percentage reduction is therefore warranted here. Dr. Mann also asserts that CEI and Mr. Simberg have not sufficiently differentiated the hours worked between recoverable and nonrecoverable hours. Mann Opp'n to Fees 16-17. Dr. Mann also contends that both CEI and Mr. Simberg overstaffed the litigation and that several categories of fee requests are facially inappropriate, such as hours spent on: "joint representation issues," conferences with CEI's insurance carrier, press responses, amicus coordination, and "extraneous" items. *Id*. at 17-18.

In reply, CEI and Mr. Simberg contend that their billing records are sufficiently detailed, the case was staffed appropriately, and that Dr. Mann's objections to specific line items are groundless. Reply in Supp. of Fees 12-13. CEI and Mr. Simberg also contend that their requests are reasonable in light of the protracted nature of the subject appeal. *Id*.

i. Certain Requests Will not be Awarded

At the outset, Dr. Mann's critique of this matter as being overstaffed is not well received. Despite five partners reporting time throughout the prosecution of the relevant portions of the case, two partners only reported hours for three of the eight years at issue here, so the partner

overlap Dr. Mann takes issue with appears exaggerated. DeLaquil Fees Decl. Ex. A. In addition, Mr. DeLaquil reported less than ten hours of work. *Id*. Given the complexity and protracted nature of this case, the Court does not find that Dr. Mann's assertions, without any legal or factual support, indicate any unreasonable staffing by CEI and Mr. Simberg's attorneys.

The Court is also not persuaded by Dr. Mann's contention that CEI and Mr. Simberg's billing records are not adequately detailed. Filed with the *Supplemental Motion* in support of the requested fees and rates is the Mr. DeLaquil's Declaration. *See* DeLaquil Fees Decl. The Court has reviewed and considered Mr. DeLaquil's declaration and the attached time entry summaries and finds that CEI and Mr. Simberg have satisfied their burden to demonstrate the reasonableness of most of the requested award of "fees on fees." *Id*.

Once the fee applicant has met "the burden of . . . documenting the appropriate hours expended and hourly rates," *Hampton Courts Tenants Ass'n*, 599 A.2d at 1116 (quoting *Hensley*, 461 U.S. at 437), the

> burden of proceeding then shifts to the party opposing the fee award, who must submit facts and detailed affidavits to show why the applicant's request should be reduced or denied. Just as the applicant cannot submit a conclusory application, an opposing party does not meet his burden merely by asserting broad challenges to the application. It is not enough . . . simply to state, for example, that the hours claimed are excessive and the rates submitted too high.

Id. at n. 9 (quoting *Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319, 1337-38 (D.C. Cir. 1982) (Tamm, J., concurring)). As to certain line-item requests that Dr. Mann questions, CEI and Mr. Simberg have simply failed to address them to the Court's satisfaction. As such, the Court will decline to award such fees. For example, it is not clear why the Court should award attorney's fees for time expended addressing press inquiries ($450) and for two line-item expenses related to a policy forum at the Cato Institute ($1,085). The fees have no compensable bearing to the litigation and the Court must deny them. As to Dr. Mann's

remaining bare quarrel with line-item requests concerning research into factual matters and time allocated to amicus coordination, without more, the Court is not persuaded that the fees fall outside the scope of the "costs of litigation," and, thus, will award the requested fees. The Court will reduce CEI and Mr. Simberg's request by an additional $1,535.

In summary, CEI and Simberg request a total of $557,712.50. The Court will reduce the request by $1,535, the amount of the line items noted above, and $4,428, the amount sought above the *Laffey* matrix for certain of the professionals who worked the litigation. As explained further, below, the Court further will reduce the amount by 20 percent of the total corrected amount, accounting for the degree of success rate of 80 percent, for a total amount of $441,399.20.

ii. The Total Amount of Fees Awarded Will be Reduced in Proportion to the Degree of Success Obtained

The Court of Appeals has interpreted the District of Columbia's Anti-SLAPP statute to "entitle[] the moving party who prevails on a special motion to quash to a presumptive award of reasonable attorneys' fees on request, 'unless special circumstances would render such an award unjust.'" *Doe v. Burke*, 133 A.3d 569, 578 (D.C. 2016) (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416-17 (1978). Where "a [prevailing party] has achieved only partial or limited success," the court must consider: (1) whether "the [prevailing party] fail[ed] to prevail on claims that were unrelated to the claims on which he succeeded," and (2) whether "the [prevailing party] achieve[d] a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award." *Hensley*, 461 U.S. at 434. "[T]he failure to prevail on [a] count must be considered along with the successful [count or counts] in determining [the prevailing party's] overall degree of success." *Goos v. Nat'l Ass'n of Realtors*, 74 F.3d 300, 302 (D.C. Cir. 1996).

This Court cannot parse the two Defendants' Anti-SLAPP appeal into a "series of discrete claims" but must consider "the significance of the overall relief obtained." *Hensley*, 461 U.S. at 435. In adjusting a fee to reflect the level of success, a judge "may attempt to identify specific hours that should be eliminated, or . . . may simply reduce the award to account for the limited success," *Lively*, 930 A.2d at 993 (quoting *Hensley*, 461 U.S. at 436-37), by "across-the-board percentage cuts," *id*. (quoting *Gates v. Deukmejian*, 987 F.2d 1392, 1399 (9th Cir. 1992) (upholding a 25 percent reduction of requested attorneys' fees where the plaintiff was successful on one out of four claims all of which arose out of similar facts)). Moreover, a trial court is "not required to perform an in-depth analysis of the billing records," as it is "not for the [trial] court to justify each dollar or hour deducted from the total submitted by counsel, . . . [but] it is counsel's burden to prove and establish the reasonableness of each dollar, each hour, above zero." *Id*. (quoting *Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1210 (10th Cir. 1986)).

Hensley and its progeny offer somewhat muted guidance for courts called upon to address the partial success of an anti-SLAPP motion. *Hensley* assessed the propriety of fees at the end of trial, however, and evaluated the impact of the relief obtained. 461 U.S. at 436-40 (noting the respondent's "commendable effort" affected him, as well as "numerous other institutionalized patients similarly situated," in assessing the degree of success). In contrast, disposition of an anti-SLAPP motion comes early in the litigation and affects only the parties involved in the immediate suit. Furthermore, the Court of Appeals has yet to issue any published opinion passing on a fee request premised on an anti-SLAPP motion that was successful only in part—*i.e.*, an anti-SLAPP motion that did not result in the dismissal of all claims in a case. The Court of Appeals has recognized, however, that California has experienced the "most robust body of anti-SLAPP precedents," *Jacobson*, 309 A.3d at 582, and has repeatedly "relied on

California precedents in this arena given '[California's] similar anti-SLAPP statute,'" *id*. at 582 n.7 (citing *Am. Stud. Ass'n v. Bronner*, 259 A.3d 728, 746 (D.C. 2021)). Accordingly, this Court will look to California caselaw for guidance on fee awards for partial success on anti-SLAPP motions.

A California intermediate appellate court aptly identified the competing public policy concerns of attorney fee awards to a partially prevailing defendant on an anti-SLAPP motion, as follows:

> (1) the public policy to discourage meritless SLAPP claims by compelling a SLAPP plaintiff to bear a defendant's litigation costs incurred to eliminate the claim from the lawsuit; and (2) the public policy to provide a plaintiff who has facially valid claims to exercise his or her constitutional petition rights by filing a complaint and litigating those claims in court.

Mann v. Quality Old Time Serv., Inc., 42 Cal. Rptr. 3d 607, 618 (Cal. Ct. App. 2006). The California court concluded that instead of presumptively awarding fees as a matter of right, "the court should first determine the lodestar amount for the hours expended on the successful claims, and, . . . should then consider the defendant's relative success on the motion in achieving his or her objective, and reduce the amount if appropriate." *Id.*, *see also Woulfe v. Universal City Studios LLC*, No. 2:22-cv-00459-SVW-AGR, 2024 U.S. Dist. LEXIS 47663, at *19 (C.D. Cal. Feb. 8, 2024) ("Because it is often impossible to allot particular hours to particular claims, courts should consider the extent [to which] the motion changed the character of the lawsuit in a practical way[.]"). Any fees awarded to a partially successful anti-SLAPP defendant therefore "should be commensurate with the extent to which the motion changed the nature and character of the lawsuit in a practical way[.]" *Quality Old Time Serv., Inc.*, at 618-19 (reducing an award of attorneys' fees by 50 percent where the defendant was only successful on one of the four causes of action in anti-SLAPP motion). The court reasoned, as follows:

> Given the express legislative preference for awarding fees to successful anti-SLAPP defendants, a party need not succeed in striking every challenged claim to be considered a prevailing party within the meaning of [Cal. Civ. Proc. Code] section 425.16. A contrary conclusion would require a partially prevailing defendant to bear the entire cost of the anti-SLAPP litigation at the outset of the case. This would create a strong disincentive for a defendant to bring the motion, undermining the legislative intent to encourage defendants to utilize the anti-SLAPP procedure to eliminate SLAPP claims and to discourage plaintiffs from bringing meritless SLAPP claims. On the other hand, there is no reason to encourage a defendant to bring an anti-SLAPP motion where the factual and legal grounds for the claims against the defendant remain the same after the resolution of the anti-SLAPP motion. Where the results of the motion are "minimal" or "insignificant" a court does not abuse its discretion in finding the defendant was not a prevailing party.
>
> We thus hold that a party who partially prevails on an anti-SLAPP motion must generally be considered a prevailing party unless the results of the motion were so insignificant that the party did not achieve any practical benefit from bringing the motion.

Id. at 614 (internal citations omitted). *Compare City of Colton v. Singletary*, 142 Cal. Rptr. 3d 74, 101 (Cal. Ct. App. 2012) (upholding fee award because the defendant obtained a practical benefit in securing dismissals for three out of seven claims, namely, eliminating the request for specific performance), *and Maleti v. Wickers*, 298 Cal. Rptr. 3d 284, 327-28 (Cal. Ct. App. 2022) (reversing denial of request for attorneys' fees because the "practical benefit" of dismissing one of two causes of action merited an award of fees), *with Moran v. Endres*, 955, 37 Cal. Rptr. 3d 786, 788 (Cal. Ct. App. 2006) (affirming denial of award where the defendants' prevailing on one of eleven counts "accomplished nothing"). *But see also Kozlova v. Doubson*, No. H050512, 2023 Cal. App. Unpub. LEXIS 5648, at *27-30 (Cal. App. Ct. Sep. 25, 2023) (upholding reduced fee award where defendant partially prevailed but did not "achieve any practical benefit" and proceeding to trial instead of filing an anti-SLAPP motion would have been more expedient).

Here, all of the claims asserted against CEI and Mr. Simberg involved a "common core of facts" and the libel claims shared "related legal theories." *See Hensley*, 461 U.S. at 435. In

obtaining partial success on the anti-SLAPP motion, CEI and Mr. Simberg secured dismissals for two of the five claims against them: Count V, libel *per se* regarding Mr. Lowry's article, and Count VI, intentional infliction of emotional distress. Dr. Mann is mistaken to assert that CEI "gained virtually nothing" from the anti-SLAPP dismissals that it obtained. Mann Opp'n 14. As noted, the anti-SLAPP dismissal eliminated *all* of the claims against CEI based on its *own* speech, which significantly narrowed discovery and limited the remaining litigation to whether CEI could be held vicariously liable for Mr. Simberg's blog post. As a result, CEI did not have to engage in discovery or litigation regarding any of the elements of defamation or intentional infliction of emotional distress for its own speech. For example, it did not have to litigate the issue of "actual malice" for its own employees who were involved in the republication of the protected *Get Lost* editorial. Instead, it could focus solely upon defeating the false notions that it had an employment relationship with Mr. Simberg or somehow had advance knowledge of his post before he published it online. To be sure, CEI secured a practical benefit at the anti-SLAPP stage as the nature of the litigation changed in its favor as a result of its partial success. Admittedly, the change in posture did not result in complete success. Despite it being largely successful, CEI was still subject to a claim of vicarious liability for Mr. Simberg, which would expose it to the same damages as Mr. Simberg and which meant that CEI had to engage in the some of the discovery process. As the change in posture did not result in complete success, a reduction is warranted to reflect CEI's continuing liability and role in the case up until the dispositive motions stage and Mr. Simberg's continuing liability and role up to and through trial. Accordingly, the Court finds a reduction of 20 percent in the hours reported is appropriate here to account for CEI and Mr. Simberg's partial success and continuing need to participate in the litigation, post victory.

c) Prejudgment Interest is not Appropriate

On top of attorneys' fees, CEI and Mr. Simberg seek an award of prejudgment interest, compounded annually, that totals $334,855.86. Mot. for Fees 13; DeLaquil Decl. 12. The Court will deny the request for prejudgment interest for the same reasons the Court comprehensively set forth in its Order denying a similar request that National Review made in this case. *See* Am. Order Granting in Part Nat'l Review Inc.'s Mot. For Atty's' Fees and Suppl. Mot. For "Fees on Fees" (Jan. 7, 2025).

B. "Fees on Fees"

Finally, CEI and Mr. Simberg seek an award of $44,939.50 for "fees on fees"—the attorneys' fees incurred in litigating its motion for attorneys' fees for prevailing on the *Second Motion to Dismiss*. Suppl. Mot. 1. Dr. Mann asserts in opposition that the request for "fees on fees" must fail outright as the underlying *Combined Motion* was not successful on first instance at the trial level and that CEI and Mr. Simberg did not "prevail." Mann Opp'n to Suppl. Mot. 4-7. Dr. Mann contends that if the Court finds that "fees on fees" are appropriate here, CEI and Mr. Simberg have failed to establish that the requested fees are reasonable. *Id*. at 7-10. Dr. Mann also contends that any award must be proportional to CEI and Mr. Simberg's degree of success in the anti-SLAPP proceeding and asserts that the requested amount is surely unreasonable because CEI and Mr. Simberg overstaffed the case. *Id*. at 10-14.

1. Legal Standard

In the District of Columbia, "[t]he law is well established that, when fees are available to the prevailing party, that party may also be awarded 'fees on fees,' *i.e.*, the reasonable expenses incurred in the recovery of its original cost and fees." *Gen. Fed'n of Women's Clubs v. Iron Gate Inn, Inc.*, 537 A.2d 1123, 1129 (D.C. 1988); *see also Kaseman v. District of Columbia*, 444

F.3d 637, 640 (D.C. Cir. 2006) ("[O]ur general rule is that the court may award additional fees for 'time reasonably devoted to obtaining attorney's fees.'" (quoting *Env't Def. Fund v. Env't Prot. Agency*, 672 F.2d 42, 62 (D.C. Cir. 1982))). "[N]o award of fees is automatic." *Comm'r v. Jean*, 496 U.S. 154, 163 (1990) (internal quotations omitted). Similar to determining attorney's fees, calculation of "fees on fees" is accomplished by determining the lodestar which can then be "adjusted, as appropriate, with reference to a variety of factors to reflect 'the quality of representation and the contingent nature of success.'" *Id*. at 1130 (quoting *District of Columbia v. Hunt*, 525 A.2d 1015, 1016 (D.C. 1987)). While the presumption in favor of awarding fees to "prevailing defendants in Anti-SLAPP cases" also applies to awarding "fees on fees," *Khan*, 292 A.3d at 262, ultimately whether to grant "fees on fees" is a matter of trial court discretion, *Gen. Fed'n of Women's Clubs*, 537 A.2d at 1129.

2. Analysis

For the same reasons discussed above, Dr. Mann's assertion that CEI and Mr. Simberg's prevailing on appeal precludes any award of fees is not convincing. *See supra*, Part II-A-2; *see also Jacobson*, 309 A.3d at 585. Dr. Mann's further assertion that CEI and Mr. Simberg did not "prevail" is similarly misguided. Indeed, there is no need to explore whether CEI and Mr. Simberg prevailed on appeal—it is on the record. Unlike in *Jacobson*, where certain tests were required to determine whether the plaintiff prevailed in light of the defendant's voluntary dismissal, *Jacobson*, 309 A.3d at 582-85, here, this matter remained a live controversy throughout the entirety of the appeal and was only resolved by the Court of Appeals' ruling and subsequent remand to the trial court, *CEI*, 150 A.3d at 1262. Accordingly, the Court will award CEI and Mr. Simberg an amount representing reasonable "fees on fees," but not in the amount requested.

Filed with the Suppl. Mot. are declarations of attorneys Mark DeLaquil, Esq., and Mark Bailen, Esq., in support of the requested fees and rates. Decl. of Mark W. DeLaquil in Supp. of the CEI Defs.' Suppl. Mot. for Att'y's Fees Under the D.C. Anti-SLAPP Act; Decl. of Mark Bailen in Supp. of the CEI Defs.' Suppl. Mot. for Att'y's Fees Under the D.C. Anti-SLAPP Act. The Court has reviewed said declarations and finds that CEI and Mr. Simberg have satisfied their burden to demonstrate the reasonableness of the requested award of "fees on fees," particularly in light of the sizeable discount below the *Laffey* rate. *See* Suppl. Mot. Ex. B. Further, Dr. Mann's bare assertion that partner review of an associate attorney's work amounts to overstaffing, without legal or factual support, merits no discussion.

However, as with the *Motion for Fees*, the Court will similarly reduce the "fee on fee" award. *See supra* Part II-A-2-b. "[F]ees for fee litigation should be excluded to the extent that the applicant ultimately fails to prevail in such litigation." *Jean*, 496 U.S. at 163 n.10; *see also McAllister v. District of Columbia*, 160 F. Supp. 3d 273, 280 (D.D.C. 2016) (awarding 50 percent of the requested "fees on fees" where the movant "received less than 50% of their requested fees in the underlying administrative action."); *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec*., 982 F. Supp. 2d 56, 61 (D.D.C. 2013) (awarding "the same percentage of fees for fee litigation as it [did] for fees on the merits."); *Hudson v. Am. Federation of Gov't Employees*, Civ. Act. No. 17-2094 (JEB), 2023 U.S. Dist. LEXIS 104680, at *10 (D.D.C. June 16, 2023) ("Courts reduce 'fees on fees' by the same proportion as they have reduced the total award." (citation omitted)). Here, the hours reported in the request for attorneys' fees were reduced by 20 percent to account for CEI and Mr. Simberg's partial success on the *Second Motion to Dismiss*. Therefore, the hours reported in the request for "fees on fees" will be similarly reduced.

III. CONCLUSION

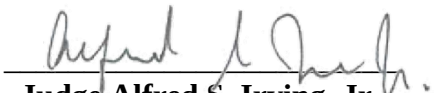
For the reasons set forth herein, the Court will reduce the requested award amount of $557,712.50 for attorneys' fees as follows: $4,428.50 representing work requested above the *Laffey* rate and $1,535 in disallowed fee line items will not be awarded, and the hours reported will be reduced by 20 percent to account for CEI and Mr. Simberg's partial success on the *Combined Motion*. The requested award of $44,939.50 for "fees on fees" will be reduced as follows: the hours reported will be reduced by 20 percent to account for CEI's partial success on the *Combined Motion*.

ACCORDINGLY, it is by the Court this 22nd day of May, 2025, hereby

ORDERED that *Defendants Competitive Enterprise Institute and Rand Simberg's Motion for Litigation Costs, Including Attorney's Fees, Under DC's Anti-SLAPP Act* filed on March 11, 2024 is **GRANTED IN PART** and **DENIED IN PART**; it is further

ORDERED that *Defendants Competitive Enterprise Institute and Rand Simberg's Supplemental Motion for Attorney's Fees Under the D.C. Anti-SLAPP Act* filed on May 9, 2024 is **GRANTED IN PART**; and it is further

ORDERED that Plaintiff shall within 30 days of the date of this Order pay Competitive Enterprise Institute and Rand Simberg the sum of $477,350.80, representing $441,399.20 in attorneys' fees and $35,951.60 in "fees on fees."



Judge Alfred S. Irving, Jr.

Copies to:

John B. Williams, Esq.
Peter J. Fontaine, Esq.
Patrick J. Coyne, Esq.
Fara N. Kitton, Esq.
Amorie I. Hummel, Esq.
Counsel for Plaintiff

William J. Murphy, Esq.
John J. Connolly, Esq.
Counsel for Plaintiff,
Mr. Williams, and Mr. Fontaine as to
March 12, 2025 sanctions award

Andrew Grossman, Esq.
Mark I. Bailen, Esq.
Mark W. DeLaquil, Esq.
Renee Knudsen, Esq.
Victoria L. Weatherford, Esq.
Counsel for Defendants Competitive Enterprise Institute and Rand Simberg

H. Christopher Bartolomucci, Esq.
Counsel for Defendant Mark Steyn

Anthony J. Dick, Esq.
Jonathan E. DeWitt, Esq.
Counsel for National Review, Inc.