

<p>DISTRICT COURT CITY &amp; COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202</p> <p>AUONTAI "TAY" ANDERSON, Plaintiff, v. BLACK LIVES MATTER 5280, a Colorado non-profit organization; MARY KATHERINE BROOKS-FLEMING; APRYL ALEXANDER; ARI LIPSCOMB; AMY BROWN; MICHAEL DIAZ RIVERA; and JEEVA SENTHILNATHAN, Defendants.</p>	<p>DATE FILED: March 1, 2024 4:21 PM CASE NUMBER: 2021CV33673</p> <p>▲ COURT USE ONLY ▲</p> <p><b>Case Number:</b> 2021CV33673 <b>Courtroom:</b> 280</p>
<p><b>ORDER RE: DEFENDANTS BLACK LIVES MATTER 5280 AND AMY BROWN'S MOTION FOR ATTORNEYS' FEES AND COSTS</b></p>	

This matter is before the Court on Defendant Black Lives Matter 5280 ("BLM") and Amy Brown's ("Brown") (collectively, "Defendants") request for an award of attorney fees. Having reviewed the motion, response, reply, and exhibits thereto, the file, applicable law, as well as the arguments of counsel, and being fully advised in the premises, the Court finds and concludes as follows:

#### **PROCEDURAL HISTORY**

Plaintiff asserted nine claims for relief against these Defendants for defamation and other related torts. Defendants briefed two motions to dismiss: (1) Defendants Black Lives Matter 5280 and Amy Brown's Special Motion to Dismiss Under C.R.S. § 13-20-1101 (the "Special Motion to Dismiss") and (2) Defendant Amy Brown's Motion to Dismiss Director Anderson's Complaint (the "12(b)(5) Motion"). The Special Motion to Dismiss sought dismissal of Plaintiff's Complaint pursuant to Colorado's anti-SLAPP statute, C.R.S. § 13-20-1101 (the "Anti-SLAPP Statute"); the 12(b)(5) Motion sought dismissal of Plaintiff's Complaint for failure to state a claim.

There was extensive briefing on the Special Motion to Dismiss, including (1) Plaintiff's Combined Response to Defendants' Special Motions to Dismiss Under § 13-20-1101 (the "Combined Response"); (2) Reply in Support of Defendants Black Lives Matter 5280 and Amy Brown's Special Motion to Dismiss Under C.R.S. § 13-20-1101 (the "Reply"); and (3) Plaintiff's Amended Combined Response to Defendants' Special Motions to Dismiss Under § 13-20-1101 (the "Amended Combined Response").

On February 23, 2022, the Court held a hearing on the Special Motion to Dismiss and granted the Defendants' Special Motion to Dismiss and dismissing all claims against them, with prejudice (the "Order"). Based on the Order, Defendants contend they are the "prevailing parties" in this litigation and entitled to recovery of attorney fees and costs in accordance with the fee-shifting provision in the Anti-SLAPP Statute, C.R.S. § 13-20-1101(4)(a) and C.R.C.P. 12(b).

## **ANALYSIS**

### **I. Recovery of Attorney Fees**

#### **(a) C.R.S. § 13-20-1101 and C.R.C.P. 12(b)**

The Anti-SLAPP Statute provides that "a prevailing defendant on a special motion to dismiss is entitled to recover the defendant's attorney fees and costs." C.R.S. § 13-20-1101(4)(a); *Addison Ins. Co. v. Veverka*, No. 19-cv-03008-RBJ, 2020 WL 12043542, at \*1 (D. Colo. June 19, 2020). "In order to be a 'prevailing party,' a party must succeed on a significant issue in the litigation and achieve some of the benefits sought." *Anderson v. Pursell*, 244 P.3d 1188, 1194 (Colo. 2010).

Defendants moved to dismiss Plaintiff's claims pursuant to the Anti-SLAPP Statute and C.R.C.P. 12(b)(5). On April 13, 2022, this Court entered an Order granting the Special Motion to Dismiss in its entirety, and Plaintiff's claims against Defendants were dismissed with prejudice. "A trial court is given broad discretion to determine who is a prevailing party in multiple claim cases because of its unique opportunity to observe the course of litigation." *Archer v. Farmer Bros. Co.*, 90 P.3d 228, 230, 231 (Colo. 2004). Having had all of the claims asserted against the Defendants, which Order survived scrutiny by the Colorado Court of Appeals, the Court finds that Defendants are the prevailing parties and are entitled to an award of their attorneys' fees and costs under the Anti-SLAPP Statute and Rule 12(b).

"In all actions brought as a result of a death or an injury to person or property occasioned by the tort of any other persons, where any such action is dismissed on motion of the defendant prior to trial under rule 12 (b) of the Colorado rules of civil procedure, such defendant shall have judgment for his reasonable attorney fees in defending the action." C.R.S. § 13-17-201.

#### **(a) The Lodestar**

The Court reviews the reasonableness of the requested attorney fees and hourly rates to determine a lodestar amount. The lodestar amount "represents the number of hours reasonably expended multiplied by a reasonable hourly rate and carries a strong presumption of reasonableness." *Id.* The court further "should exclude from [the] initial [lodestar] calculation hours that were not 'reasonably expended.'" *Payan v. Nash Finch Co.*, 310 P.3d 212, 218 (Colo. App. 2012) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (alterations in original)). These deductions include "deductions for overstaffing and for hours that are 'excessive, redundant, or otherwise unnecessary.'" *Id.* (quoting *Hensley*, 461 U.S. at 434).

Upon determination of the lodestar amount, that amount may be adjusted upward or downward by application of the factors set forth in Rule 1.5 of the Colorado Rules of Professional Conduct and consideration of the degree of success achieved. *Tallitsch*, 926 P.2d at 147; *People v. Shifrin*, 342 P.3d 506, 525 (Colo. App. 2014). The court also may consider the amount in controversy and the damages sought in the matter. *Id.*

Rule 1.5 provides the following factors in considering the reasonableness of a fee: “(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, 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.”

The Colorado Court of Appeals has acknowledged the deference given to District Courts in awarding attorneys’ fees:

The fee applicant . . . must . . . submit appropriate documentation to meet “the burden of establishing entitlement to an award.” . . . [T]rial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees . . . is to do rough justice, not to achieve auditing perfection so trial courts may take into account their overall sense of a suit and may use estimates in calculating and allocating an attorney’s time. And appellate courts must give substantial deference to these determinations, in light of “the district court’s superior understanding of the litigation.” We can hardly think of a sphere of judicial decision making in which appellate micromanagement has less to recommend it.

*Payan v. Nash Finch Co.*, 310 P.3d 212, 219 (Colo. App. 2012)(quoting *Fox v. Vice*, 131 S.Ct. 2205, 2216 (2011)).

In arriving at the lodestar, the Court first determines the reasonable number hours expended by counsel. *Id.* at 217. This figure is then multiplied by the reasonable hourly rate to calculate the lodestar. *Id.*

### **REASONABLE NUMBER OF HOURS**

Defendants seek an award of fees in the amount of \$60,424. This amount was arrived at by taking the number of hours invested in defending the case 213.1 hours and subtracting 62 hours for a total of 165.6 hours. In support of the Firm’s request, the Firm provided the court with an Affidavit of Attorney Fees (“Affidavit”) from Joesph A. Murr. The Affidavit and exhibits thereto evidence the hours invested in this case and the hourly rates charged by the timekeepers in this matter. Counsel for Defendants are not seeking to recover billable hours incurred in successfully

defending the dismissal before the Colorado Court of Appeals. The Court finds and concludes the reasonable number of hours is 165.6 hours.

### **REASONABLE HOURLY RATE**

Having determined the reasonable number of hours invested into this case, the Court turns to the reasonable hourly rates of the timekeepers. Counsel for the Defendants represented to the Court that the law firm lowered the billable hourly rates for the attorneys working on this matter to arrive at a blended rate of \$365 per hour. Notably, two of the attorneys that invested the most time in this case, Michael Plachy and Elliott Reaven, charge well in excess of \$365 per hour. The Court is advised that the law firm lowered the billable hourly rates because BLM is a non-profit corporation.

The Court has entered numerous attorney fee orders and is familiar with rates charged by attorneys in the Denver-metropolitan area. The Court finds the hourly rates charged in this case are reasonable in all respects.

### **LODESTAR CALCULATION**

As noted, the lodestar calculation is the number of reasonable hours multiplied by the reasonable hourly rate. The Court arrives at the lodestar of \$60,424.

### **ADJUSTMENTS**

Having determined the lodestar amount, the Court considers the appropriateness of an upward or a downward adjustment to that amount based on the factors set forth in Rule 1.5.

The first factor the Court must consider is the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly. As far as the scope of the dispute is concerned, the claims were expansive, however, the SLAPP dismissal was discrete and focused. The Court find that the difficulty and skill required to dismiss the claims does not warrant an upward or downward departure from the lodestar amount.

The second factor is the likelihood, if apparent to the client, that the acceptance of the employment will preclude other employment by the lawyer. The Court did not receive any evidence on this factor and is not able to determine whether the acceptance of employment precluded other employment. No upward or downward departure from the lodestar amount will be made based on this factor.

The third factor is the fee customarily charged in the locality for similar legal services. As the Court has found, the fees charged in this matter are reasonable in all respects.

The fourth factor is the amount involved and the results obtained. Counsel for Defendants achieved an excellent result. Notwithstanding the foregoing, the Court declines to depart from the lodestar amount based on the ultimate result obtained.

The fifth factor involves the time limitations imposed by the client or the circumstances. The Court finds that there were no unusual time limitations imposed by or the circumstances of the case.

The sixth factor is the nature and length of the professional relationship with the client. The Court has no evidence on this factor.

The seventh factor is the experience, reputation, and ability of the lawyers performing the services. The Court is familiar with counsel and the law firm. Counsel enjoy excellent reputations in the legal community and were thorough and professional in every respect. The attorneys are experienced and ably defended this case.

The final factor is whether the fee is fixed or contingent. As noted above, the fee was hourly.

Considering these factors, the Court finds that there is no justification for a departing from the lodestar amount.

## **II. Costs**

As a threshold matter, a trial court has wide discretion in determining whether costs should be awarded to a prevailing party and the amount of costs to be awarded. *Cherry Creek Sch. Dist. No. 5 v. Voelker*, 859 P.2d 805, 812-14 (Colo. 1993). A prevailing party is entitled to recover only those costs that were reasonably and necessarily incurred in the course of litigation – not all costs incurred. *Wark v. McClellan*, 68 P.3d 574, 582 (Colo. App. 2003). While a court has discretion in awarding costs, any such award must be based on competent evidence. *Haystack Ranch, LLC v. Fazzio*, 997 P.2d 548, 556-57 (Colo. 2000). Moreover, a trial court should make specific findings regarding the basis for awarding costs to a party. *Brody v. Hellman*, 167 P.3d 192, 206 (Colo. App. 2007). When costs are necessarily incurred in preparing for trial, and as a result of litigation, reasonable costs may be awarded to the prevailing party. The trial court may exercise its discretion in awarding such costs under C.R.C.P. 54(d). *Bainbridge, Inc. v. Douglas County Bd. of Comm'rs*, 55 P.3d 271, 274 (Colo. App. 2002).

When a party prevails on some but not all claims in an action, the party is not, as a matter of course, entitled to recover any and all costs incurred in the litigation. The party's award should be limited to only those costs incurred to prosecute or defend the claims on which the party prevailed unless all claims in the case are so inextricably intertwined that apportionment or allocation is not possible or not required. *Am. Water Dev., Inc. v. City of Alamosa*, 874 P.2d 352, 383, 387 (Colo. 1994) (discussing apportionment of both attorney fees and costs). Stated differently, when faced with multiple claims not all of which provide a basis for recovery of fees or costs, a trial court should try to apportion costs by claim unless the party would have incurred the same costs regardless of whether one or all of the claims had been pursued. *Haystack Ranch*, 997 P.2d at 556; *Regency Realty Inv., Inc. v. Cleary Fire Protection, Inc.*, 260 P.2d 1, 8-9 (Colo. App. 2009).

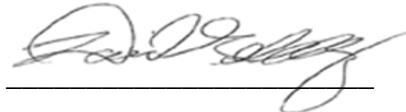
Having reviewed the costs incurred in this case, the Court finds that the costs incurred were reasonable and necessary in all respects. The Court award Defendants the sum of \$639 in costs.

**ORDER AND JUDGMENT**

Accordingly, the Court enters judgment in favor of Black Lives Matter 5280 and Amy Brown in the amount of \$61,060 for attorney fees and costs incurred in this matter.

SO ORDERED: March 1, 2024.

BY THE COURT:



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David H. Goldberg  
Denver District Judge