

PROVIDING COMPETENT REPRESENTATION:

The Ethical Dimension of the Lawyer's "Knowledge, Skill, Thoroughness and Preparation"

Willamette Valley
American Inn of Court

April 17, 2008

April Team

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I. Introduction

Visitor, on a New York sidewalk:
"Pardon me, sir, but how do I get to Carnegie Hall?"

Arthur Rubenstein: "Practice, practice, practice."

A lawyer's personal pride in the quality of their professional performance commonly supplies the motivation to serve the client's interests with competence and diligence. However, lawyers should bear in mind at all times that *competent representation is the lawyer's ethical obligation*. Taking on a client's representation with insufficient preparation or skill can lead to ethical complaints and professional discipline. Thus, compliance with the duty of competent representation not only satisfies the reasonable expectation of every client, it also meets the ethical mandate of the Oregon State Bar regarding every lawyer's expected performance, as the following quotation illustrates:

"We have, out of the early ages, six hundred years before Christ nearly, a sentence from a Chinese legislator. 'In all things,' he said, 'success depends on previous preparation, and without such preparation there is sure to be failure.'"

Ralph Waldo Emerson, quoting Confucius, Lecture, "Public and Private Education," November 27, 1864.

II. Client-Lawyer Relationship: The Pertinent Rules Regarding Competent Representation

Several provisions of the Oregon Rules of Professional Conduct (ORCP) govern aspects of the client-lawyer relationship that are beyond the scope of this discussion of competent representation. These include Rule 1.6 Confidentiality of Information; Rules 1.7, 1.8, 1.9, 1.10, and 1.11, regarding conflicts of interest and duties to former clients; Rule 1.12, regarding representation by third-party neutrals; Rule 1.13 Organization as Client; and rule 1.14 Client with Diminished Capacity.

The following provisions pertain generally to the level of skill and preparation that the lawyer must bring to bear at all times during the representation of the client:

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.2 Scope of Representation and allocation of authority between client and lawyer

(a) Subject to paragraphs (b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Rule 1.3 Diligence

A lawyer shall not neglect a legal matter entrusted to the lawyer.

Rule 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.5 Fees

(a) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses.

(b) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(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.
- (c) A lawyer shall not enter into an arrangement for, charge or collect:
- (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of spousal or child support or a property settlement; or
 - (2) a contingent fee for representing a defendant in a criminal case.
- (d) A division of a fee between lawyers who are not in the same firm may be made only if:
- (1) the client gives informed consent to the fact that there will be a division of fees, and
 - (2) the total fee of the lawyers for all legal services they rendered the client is not clearly excessive.
- (e) Paragraph (d) does not prohibit payments to a former firm member pursuant to a separation or retirement agreement, or payments to a selling lawyer for the sale of a law practice pursuant to Rule 1.17.

III. Commentary on Competent Representation

An inquiry in the disciplinary context into whether the lawyer displayed the necessary knowledge, skill, thoroughness and preparation for competent representation will involve consideration of several factors:

- 1. Whether the matter is simple or complex, including whether specialized knowledge is required;
- 2. The lawyer's general or specialized experience in handling similar matters;
- 3. The lawyer's specific preparation activities; and
- 4. Whether the lawyer had a reasonable opportunity to consult with an associate or specialist on the case, or refer the case to another lawyer with the required expertise.

These considerations apply whether the lawyer is retained by the client or court-appointed to represent an indigent client.

A lawyer's response to an emergency should be limited to the steps reasonably necessary to address the emergency until referral to or consultation with another lawyer with greater competence is possible. The emergency does not justify taking steps that defeat or jeopardize the client's interests.

A competent investigation involves use of the methods that competent practitioners would employ under similar circumstances.

A lawyer is expected to know about and be familiar with the requirements of the rules of the courts before which the lawyer practices.

Efficient management of the law office is an important part of competent representation. Inadequate staff supervision that leads to lost files, deadline violations, and other caseload management problems can result in lawyer discipline. Secretarial problems are not an excuse for the neglect of client matters.

The burden of the rule requiring competent representation can fall disproportionately on new, inexperienced lawyers. Schwartz, *Lawyers and the Legal Profession* 389 (1979), suggests that the competent representation requirement should obligate the law firm to implement an apprenticeship system for new lawyers before assigning them independent responsibility for client matters.

"Getting ahead in a big law firm means a hefty amount of evening and weekend work. Wall Street lawyers still like to recall an anecdote about the late Hoyt A. Moore, a partner in Cravath, Swain & Moore. A colleague once told Moore that the firm ought to hire more associates because the staff was overworked. 'That's silly,' Partner Moore replied. 'No one is under pressure. There wasn't a light on when I left at 2 o'clock this morning.'"

--- Time Magazine, January 24, 1964

If the law is unsettled in a particular area, the lawyer's duty is to exercise reasonable professional judgment even if the lawyer's ultimate advice is debatable and, in retrospect, incorrect. Lawyers are not required to predict successfully how the courts will resolve doubtful points of law.

Except where the client appear to be suffering from a mental disability (*see* Rule 1.14), the lawyer has a duty to abide by a client's decisions concerning the objectives of representation, and must consult with the client about the means by

which the objectives will be pursued. A lawyer must avoid counseling a client to engage in conduct that is criminal or fraudulent. In general, the law of agency governs the allocation of responsibility within the lawyer-client relationship.

A lawyer must provide services within a reasonable time without unnecessary delay. The lack of competence frequently is the chief cause of a lack of diligent representation.

An instance of legal malpractice does not necessarily demonstrate an unethical neglect of a legal matter.

A failure to communicate with the client and to respond to client inquiries are often signs of the neglect of a legal matter. But note that Rule 1.4 separately requires the lawyer to communicate with the client and answer client inquiries; the lawyer's compliance with the duty to refrain from neglecting a legal matter will not preclude the Bar from pursuing a charge that the lawyer failed to communicate with the client. It is no defense that the client's resulting ignorance of important information produced no other concrete harm. So long as the lawyer-client relationship exists, the duty to communicate applies even if the relationship is a disagreeable one.

A point of frequent disagreement between lawyers and clients is the client's obligation to pay attorney fees. Written contracts narrow but do not eliminate the potential areas of disagreement. Rule 1.5 Fees prohibits a lawyer from entering into an agreement for, or charging or collecting an illegal or clearly excessive fee or a clearly excessive amount of expenses. Subsection (b) of that rule sets out several factors that help determine whether a fee is reasonable.

The recent cases attached as appendices to this memorandum illustrate how Oregon federal courts have used the criteria in ORPC 1.5(b) and ORS 20.075(1) and (2) to determine whether a particular requested attorney fee is clearly excessive. *See Northon v. Rule*, 494 FSupp 2d 1183 (D. Or. 2007) (Mosman, J.); *Gardner v. Martin*, 2006 WL 2711777 (D. Or. 2006) (Brown, J.) (unpublished).

III. Cases Addressing Competent Representation

In re Chambers, 292 Or 670, 642 P2d 286 (1982) dealt with the question of adequate preparation for a criminal case. Chambers was appointed to represent the defendant in an attempted murder case. Chambers failed to properly investigate the case. As an example, this court noted that he failed to request copies of the medical reports on the victims, which "would have shown the number of gunshot wounds and the angles at which the bullets entered the bodies," information that "may have been important to a self-defense theory." Chambers

also failed to prepare a jury instruction on self-defense. *Id.* at 678. This court noted that it appeared that Chambers had prepared and tried the case "by the seat of his pants," and held that Chambers had handled a legal matter "without preparation adequate in the circumstances." *Id.* at 679.

***In re Sassor*, 299 Or 720, 705 P2d 736 (1985)** dealt with the dissolution of a marriage. Sassor apparently advised his client that she was not eligible for spousal support under Oregon law, because she and her husband had been married for less than fifteen years. The trial panel found that Sassor "had not properly prepared himself to advise his client." This court agreed. *Id.* at 727.

***In re Magar*, 335 Or 306, 66 P3d 1014 (2003)** also dealt with the dissolution of a marriage. However, unlike earlier cases, *Magar* announced a few principles governing the question of whether an attorney has acted competently and diligently. First, the court held that it would measure competence and diligence by objective standards; an attorney's mental state was irrelevant. *Id.* at 319. Second, the court noted that the outcome of the matter in which the lawyer had acted incompetently or negligently was "not a pertinent consideration." *Id.* Third, the court drew a distinction between incompetence and negligence. Negligence focuses on specific missteps made by the lawyer, while incompetence focuses on "the reasonableness of the accused lawyer's conduct in the broader context of the representation." *Id.* at 320. Likewise, the court also distinguished between neglect and negligence: neglect is "the failure to act or the failure to act diligently," and requires the court to view the lawyer's conduct "along a temporal continuum, rather than as discrete, isolated events." *Id.* at 321.

In the instant case, Magar had erroneously determined that his client's dissolution case involved only a short-term marriage. Magar settled on that theory "quickly, almost matter-of-factly, and without the benefit of substantial legal research." Magar ended up altering that theory shortly before trial; to the court, that fact suggested "that his earlier preparation was inadequate." Nonetheless, the court determined that, in light of the record as a whole, Magar had not made his initial determination in a neglectful or incompetent matter. The court noted that at the time that he made that determination, Magar was familiar both with his client and with divorce cases in general. *Id.* at 321-22.

The court then addressed the question of Magar's preparation for trial:

"By all accounts, the accused did not begin trial preparation until the weekend before the Monday setting and only after having reported ready at trial call on Friday morning. That timing suggests a lack of reasonable preparedness. * * * Moreover, the work that remained to be completed that weekend was not limited to memorializing legal

arguments and preparing exhibits for trial. The accused still needed to review, as an initial matter, some of [his client's] documents. That fact, and the fact that the accused ultimately offered no citation in support of his position, suggests in this context a lack of reasonable thoroughness."

Id. at 323-24. However, the court then noted that the divorcing couple was "of modest means" and had little property to distribute, and that "the issues of contention were few." The court concluded that it could not describe the case as legally complicated, and in that context, it concluded that Magar had acquired a sufficient understanding of the pertinent legal issues at trial to avoid violating DR 6-101. *Id.* at 324.

***In re Bettis*, 342 Or 232, 149 P3d 1194 (2006)** dealt with another criminal case. Bettis was assigned to represent Pinto-Roman, who was charged with assault. Bettis arranged to meet Pinto-Roman at the jail, but the jail staff erroneously brought him another defendant, Gonzalez-Cordona. Bettis presented Gonzalez-Cordona with a jury trial waiver, and Gonzalez-Cordona signed it. The Bar charged Bettis with incompetence, noting that (1) if he had adequately prepared for the meeting, Bettis would have realized that the person that he was speaking with was not his client, and that (2) Bettis had advised Gonzalez-Cordona to waive his right to a jury trial without first conducting discovery, research, or factual investigation. *Id.* at 238-39.

This court held that, in light of the fact that Pinto-Roman was facing a prison sentence, Bettis was "obligated to fully acquaint himself * * * with the legal and factual issues of the case as soon as possible." *Id.* at 239. Bettis had not reviewed any discovery or conducted any investigation; he had "sought his client's waiver of a fundamental constitutional right without any basis to conclude that such a waiver was in the client's best interest." *Id.* at 240. The court concluded that Bettis' actions fell below the standard of competence mandated by DR 6-101(A).

The foregoing cases permit us to draw a few conclusions about how a court determines whether a lawyer's preparation is adequate.

1. **A court's inquiry into preparation is objective.** The court will focus on the actions of the lawyer, and not his or her mental state.

2. **Malpractice does not equal incompetence.** The court considers a lawyer's actions in the context of the whole representation. A lawyer may commit individual acts of malpractice

without necessarily providing incompetent representation. Likewise, a lawyer may avoid malpractice—by obtaining a positive result for his client -- and still be found incompetent, based on his preparation and handling of the case

3. The required level of preparation depends on the complexity and stakes of the case. *Magar* appeared to conclude that, while *Magar*'s preparation for trial lacked "reasonable thoroughness," it was not ultimately inadequate in light of the fact that the trial concerned a divorce with little property at stake and few complex issues. On the other hand, in *Bettis*, the court appears to base its finding of inadequate preparation on the fact that the client's right to a jury trial was at stake.

4. Examples of individual acts that may support a finding of lack of preparation. Such acts include: (1) failure to conduct discovery or adequately investigate the facts of a case (*Chambers*, *Magar*, *Bettis*); (2) failure to spend adequate time reviewing a case before trial (*Magar*); (3) giving a client clearly erroneous advice (*Sassor*); (4) failure to offer a necessary jury instruction (*Chambers*). Note that some of these activities are direct examples of lack of preparation, while others (erroneous advice; lack of jury instruction) are actions by which a court may infer a lack of preparation.

Northon v. Rule
D.Or.,2007.

United States District Court,D. Oregon.
Liysa NORTHON, et al., Plaintiffs,
v.
Ann RULE, et al., Defendants.
No. CV 06-851-MO.

July 11, 2007.

Background: Murderer and her family members brought action against author for defamation and false light. After plaintiffs' claims were stricken under Oregon's anti-strategic lawsuit against public participation (anti-SLAPP) statute, author moved for attorney fees and costs.

Holding: The District Court, Mosman, J., held that requested attorney fee award was unreasonable.

Motions granted in part and denied in part.

West Headnotes

[1] Federal Courts 170B ⚡415

170B Federal Courts

170BVI State Laws as Rules of Decision

170BVI(C) Application to Particular Matters

170Bk415 k. Damages, Interest, Costs and Fees. Most Cited Cases

In diversity cases, attorney fee awards are governed by state law.

[2] Costs 102 ⚡194.25

102 Costs

102VIII Attorney Fees

102k194.24 Particular Actions or Proceedings

102k194.25 k. In General. Most Cited Cases

Number of hours claimed by counsel in obtaining dismissal of defamation claims against author pursuant to Oregon's anti-strategic lawsuit against public participation (anti-SLAPP) statute was unreasonable, and thus requested award of over \$200,000 would be reduced to \$40,000, even though plaintiffs' complaint challenged over 100 individual statements in book, where motion was filed within 60 days of serving complaint, issues presented were not particularly difficult, attorneys spent 334 hours for factual investigation, majority of legal research was performed by senior attorney, firm representing author had recently handled similar case, and allocation of

writing was inefficient and unnecessarily duplicative. West's Or.Rev. Stat. Ann. § 31.152(3).

*1183 Anna S. Raman, Ashcroft Wiles Ammann LLP, Portland, OR, Lynn E. Ashcroft, Ashcroft Wiles Ammann, LLP, Salem, OR, Carleton Lee Briggs, Attorney and Counselor at Law, Santa Rosa, CA, for Plaintiffs.

Duane A. Bosworth, II, Carol A. Noonan, Davis Wright Tremaine, LLP, Portland, OR, for Defendants.

OPINION & ORDER RE: ATTORNEY FEES & COSTS

MOSMAN, District Judge.

In February 2007, I granted defendants' special motion to strike claims pursuant to *1184Or.Rev.Stat. § 31.150. Thereafter, defendants filed a bill of costs and a motion for attorney fees. Plaintiffs have not responded to either. Because I find the amount of time reportedly spent by defendants' counsel in this case was unreasonable, I GRANT IN PART AND DENY IN PART the motion for fees (# 29) in the amount of \$40,000. Defendants' bill of costs (# 27) is GRANTED in full.

BACKGROUND

Defendant Ann Rule wrote a true-crime book, entitled *Heart Full of Lies*, about the events surrounding plaintiff Liysa Northon's murder of her husband. Ms. Rule related the events of the crime based on extensive research she conducted of both public and private sources. At the end of the book, Ms. Rule included an Afterword where she presented her own opinions concerning the events. In particular, she stated that she did not believe Ms. Northon's claim that she was a battered wife. Ms. Northon and two members of her family filed suit against Ms. Rule and her publishing company for defamation and false light based on 126 separate statements made in the book. Thereafter, defendants filed a special motion to strike plaintiffs' claims under Oregon's anti-SLAPP ^{FN1} statute, Or.Rev.Stat. § 31.150, specifically responding to each of defendants' allegations. I granted the motion to strike on February 5, 2007.

FN1. "Anti-SLAPP" is an abbreviation for "Anti-Strategic Lawsuit Against Public Participation."

Defendants now seek their attorney fees under Or.Rev.Stat. § 31.152(3) in the amount of \$209,334.36 and their costs in the amount of \$1,627.10. Defendants are represented by three attorneys from Davis Wright Tremaine, LLP. Lead counsel, Duane Bosworth, is a partner at the firm with over 20 years experience in media law. The other two attorneys are litigation associates; Carol Noonan with five years experience, and Derek Green with two years experience. At the hearing held on April 30, 2007, to discuss the motion for fees, counsel represented that collectively they spent 192 hours doing legal research, 222 hours drafting court documents, and 334 hours investigating the facts of the case. Counsel further clarified that Mr. Bosworth spent 139/65/179 hours doing research/drafting/investigation, Ms. Noonan spent 21/102/60 hours, and Mr. Green

spent 32/55/95 hours.

DISCUSSION

1.) *Motion for Attorney Fees*

[1] In diversity cases, attorney fee awards are governed by state law. Gardner v. Martin, 2006 WL 2711777, *2 (D.Or. Sept. 19, 2006) (unpublished). Or.Rev.Stat. § 31.152(3) provides that a “defendant who prevails on a special motion to strike made under ORS 31.150 shall be awarded reasonable attorney fees and costs.” (emphasis added). Thus, the defendants’ entitlement to fees and costs is not at issue here, only the amount. Gardner, 2006 WL 2711777, *3. To determine a reasonable amount of fees, the court considers the factors set out in Or.Rev.Stat. § 20.075(1)^{FN2} & (2).^{FN3}

FN2. (a) The conduct of the parties in the transactions or occurrences that gave rise to the litigation, including any conduct of a party that was reckless, willful, malicious, in bad faith or illegal.

(b) The objective reasonableness of the claims and defenses asserted by the parties.

(c) The extent to which an award of an attorney fee in the case would deter others from asserting good faith claims or defenses in similar cases.

(d) The extent to which an award of an attorney fee in the case would deter others from asserting meritless claims and defenses.

(e) The objective reasonableness of the parties and the diligence of the parties and their attorneys during the proceedings.

(f) The objective reasonableness of the parties and the diligence of the parties in pursuing settlement of the dispute.

(g) The amount that the court has awarded as a prevailing party fee under ORS 20.190.

(h) Such other factors as the court may consider appropriate under the circumstances of the case.

FN3. (a) The time and labor required in the proceeding, the novelty and difficulty of the questions involved in the proceeding and the skill needed to properly perform the legal services.

(b) The likelihood, if apparent to the client, that the acceptance of the particular employment by the attorney would preclude the attorney from taking other cases.

- (c) The fee customarily charged in the locality for similar legal services.
- (d) The amount involved in the controversy and the results obtained.
- (e) The time limitations imposed by the client or the circumstances of the case.
- (f) The nature and length of the attorney's professional relationship with the client.
- (g) The experience, reputation and ability of the attorney performing the services.
- (h) Whether the fee of the attorney is fixed or contingent.

***1185 A. Subsection (1) Factors**

Defendants rely on three subsection (1) factors in support of their request for fees. First, they argue the plaintiffs' claims and arguments were unreasonable. In the amended complaint, plaintiffs identified 126 separate statements from defendant Ann Rule's book that they claim were defamatory or unlawfully placed plaintiffs in a false light. Upon review, it is clear plaintiffs' claims were unreasonable on numerous grounds as to several of the challenged statements. In fact, in their response to defendants' special motion to strike, plaintiffs did not refute defendants' individualized responsive arguments as to each statement, instead conceding "many of these inaccuracies are not defamatory individually." Pls.' Resp. to Defs.' Anti-SLAPP Mot. at 6. Plaintiffs then proceeded to argue the "cumulative effect" of the statements was defamatory. However, this more generalized argument was previously rejected as insufficient in this case. Thus, I find this factor favors defendants.

Second, defendants argue an award of fees "will deter meritless claims while encouraging the defense of a speaker's first amendment rights." Def.'s Mem. in Supp. Mot. for Atty. Fees at 4. The statutory scheme makes clear that at least one purpose for awarding fees in this context is to deter meritless claims challenging the exercise of free speech. However, there must be a balance between discouraging illegitimate claims and discouraging legitimate ones, and here, I find the extraordinary amount requested by defendants tips the balance towards the latter. The motion to strike was intended to be a time-saving and a *cost-saving* mechanism. Gardner, 2006 WL 2711777, *7. This is evidenced by the fact that discovery is stayed pending resolution of such a motion. Or.Rev.Stat. § 31.152(2). It is beyond comprehension, let alone reasonableness, that litigating a case only as far as a special motion to strike costs over \$200,000 in legal fees, especially considering these motions must be filed within 60 days of serving the complaint and are essentially the first thing the defendant does in the case. Id. § 31.152(1). Were such an extraordinary request granted without comparably extraordinary circumstances, certainly some litigants with meritorious claims would be deterred from bringing suit knowing they risk such a monumental fee award should they lose at the first stage of their case. Gardner, 2006 WL 2711777, *5; Card v. Pipes, 2004 WL 1403007, *4 (D.Or. June 22, 2004) (unpublished). This

factor favors plaintiffs.

***1186** Finally, defendants argue plaintiffs acted unreasonably and were not diligent in litigating this case. Or.Rev.Stat. § 20.075(1)(e). Defendants primarily point to plaintiffs' repeated failure to adequately plead their claims, necessitating multiple amended complaints and a motion to dismiss. However, all of this activity occurred in a prior action that was ultimately dismissed. Defendants agreed as a condition of the dismissal not to seek fees in relation to the earlier action and in fact they are not seeking such fees. Defs.' Mem. in Supp. Atty. Fees at 5. Thus, I find this history of little relevance to the issue at hand. I also find that apart from some of the arguments asserted by plaintiffs, discussed above, there was nothing particularly unreasonable or dilatory about their actions here. As such, this factor is neutral.

B. Subsection (2) Factors

Next, I consider the factors in § 20.075(2). At the outset, I note that many of these considerations, including time limitations imposed by the client, the nature of counsels' relationship with the client, and the fee arrangement, have no apparent relevance here. The time and skill required in light of the issues presented, however, is particularly relevant. Defendants' primary argument on this point is that plaintiffs' decision to challenge over 100 individual statements necessitated that they spend a significant amount of time responding to each individual allegation. It was certainly appropriate for defendants to respond to each of plaintiffs' allegations specifically, and this undoubtedly took more time than might be required in other cases. However, even in light of plaintiffs' pleading strategy, I find the amount of time counsel spent in this case was unreasonable.

To begin with, the issues presented here, though numerous, were not particularly difficult. Plaintiffs pled basic tort claims with some First Amendment implications, and defendants' lead counsel has significant experience in this area of the law, and has litigated at least one other anti-SLAPP motion on behalf of a media client. *See Gardner, 2006 WL 2711777*. Thus, to the extent the issues might be novel or unfamiliar to other lawyers, that is certainly not the case here.

Defendants contend there was significant difficulty because “[b]ringing and supporting a special motion to strike ... is very similar to obtaining a complex summary judgment.” Defs.' Mem. in Supp. Mot. for Atty. Fees at 8. A similar argument was rejected by this court in *Gardner, 2006 WL 2711777, *7-8*. There, Magistrate Judge Hubel explained that the motion to strike is a “a tool to dispose of lawsuits ... before a great deal of time and money has been expended,” and in fact the statute equates the motion to strike with a motion to dismiss. *Id. at *7* (citing Or.Rev.Stat. § 31.150(1)). The court went on to explain that even though “some evidentiary investigation and presentation” is necessary to bring a special motion to strike, “[i]t is the plaintiff responding to the motion ... who has the laboring oar. A defendant's burden is simply to make a prima facie showing.” *Id. at *8*. Here, even though defendants' task was perhaps more difficult than usual given plaintiffs' numerous allegations, it is beyond my understanding how it could take 334 hours of factual investigation to establish a prima facie case. Mr. Bosworth alone spent 179 hours investigating the facts of the case. Assuming he works 60-hour weeks, that means he spent the

equivalent of three weeks doing nothing but investigation, which in this case consisted largely of reviewing Ms. Rule's book and her supporting research. And that is just the time spent by Mr. Bosworth; his colleagues spent *another* 155 hours investigating facts. I think it is fair to say that many true-crime books have been researched*1187 and written in less time than was spent on factual investigation in this case. Not only is awarding fees for this amount of time unreasonable, it would directly undermine the legislature's purpose in creating the special motion to strike to allow an early and efficient resolution of certain cases involving the exercise of important public rights. Thus, I find the difficulty of the issues presented, particularly in light of the relevant statutory scheme, does not support the amount of hours for which defendants seek to recover their fees.

Additionally, the imbalance between the time spent by the senior attorney in relation to the junior attorneys unreasonably inflated defendants' fee request. It is expected that litigation is often performed in teams and that the team leader delegates responsibility according to the talent of each team member and oversees the entire project. It is also expected that senior attorneys are more efficient than their less-experienced counter-parts. See *id.* at *11. Here, there was apparently little delegation in relation to legal research and fact investigation. As stated above, Mr. Bosworth reportedly spent 179 hours investigating facts, compared to Ms. Noonan's 60 hours and Mr. Green's 95 hours. Likewise, Mr. Bosworth spent 139 conducting legal research, whereas Ms. Noonan and Mr. Green only spent 21 hours and 32 hours, respectively. This is surprising, especially as relates to legal research, because this is a task that even inexperienced lawyers are generally thought competent to handle.

Of course, the client or the lawyer can make their own decisions about how to staff the case, but such decisions must be reasonable. As stated in *Gardner*, where the more senior attorney decides to do most of the work himself, the court "expect[s] to see fewer hours billed than would be reasonably expended by a more junior attorney at a lower hourly rate." 2006 WL 2711777, *11. The court expects to see efficiency in correlation with the attorney's experience. Here, I am not persuaded Mr. Bosworth's billed hours represent efficient use of time in relation to his level of experience. Based on my own review,^{FN4} it appears he spent 61 hours doing legal research for defendants' initial anti-SLAPP motion and supporting memorandum. This is a significant amount of time for any case and is certainly much more than would be expected for a case within the lawyer's specific expertise. If this billing is to be believed, a senior partner who justifiably presents himself as an Anti-SLAPP expert spent a long week learning the law related to this relatively narrow statute. And did so in a case that was not legally complicated; and did so within a few months of concluding a very similar case in this courthouse.^{FN5}

FN4. In their initial pleading, defendants did not identify how much time was spent by each attorney or how much time was spent category of activity. This failure spurred the court to hold a hearing on the motion for fees in April 2007. In preparation for that hearing, the court instructed:

[D]efendants should be prepared to state the hours attributable to each attorney, and break out those hours by categories, including research, factual investigation, and

drafting. Defendants should also provide some further justification for this extraordinary request, in light of the purposes of Or.Rev.Stat. 31.150 and the court's opinion in *Gardner v. Martin*.

At the hearing, defense counsel did provide an oral explanation of the time allocation requested by the court, but no further written documentation or explanation was ever received.

FN5. In this case, I am solely addressing the *amount of time* asserted by counsel, and not counsel's proffered reasonable hourly rate. In *Gardner*, Judge Hubel rejected counsel's requested commercial litigator rate in favor of the lower general civil defense rate on the basis that these type of anti-SLAPP cases do not present sufficient difficulty to warrant the higher rate. *Id.* at *10-11. Here, I assume counsel's requested specialty rate is reasonable. But this is another reason I find the amount of time reflected in this fee petition is excessive. Counsel certainly has sufficient experience warranting the higher specialty rate, but this experience also dictates counsel will act more efficiently. Counsel cannot have it both ways. He cannot seek the higher rate and then bill a number of hours that far exceeds that which would be expected from someone entitled to such rate.

***1188** I also find there are other examples of inefficiency and duplicative efforts. Again, focusing specifically on the initial motion to strike, it appears counsel spent 167.5 collective hours drafting the motion and supporting memorandum and declaration. Together these pleadings comprise approximately 100 pages. Thus, counsel spent an average of an hour and a half writing each page. This is dumbfounding, especially in a case like this where many of the issues were interrelated and repetitive. The supportive memorandum is 88 pages long. In addressing plaintiffs' defamation claim, counsel detailed each of their clients' defenses in general terms and then proceeded to discuss each of the challenged statements individually, identifying which defenses applies to each statement. As previously stated, there is nothing inherently unreasonable or improper about this format. But, it is beyond credulity that counsel reasonably spent an hour and a half writing each page given that this format calls for a significant amount of repetition. It is not as if there were a 100 separate issues; rather, there were a handful of issues applied to numerous individual statements, many of which were very similar or even identical. In fact, in addressing the individual statements, counsel often simply identified the relevant defenses in just a few sentences, with little or no analysis.

Counsel's allocation of the writing was also inefficient and unnecessarily duplicative. It appears that all three attorneys worked on each issue briefed. For example, defendants' memorandum in support of the motion to strike encompassed 35 pages responding to plaintiffs' false light claim. Ms. Noonan initially spent 10.5 hours drafting this section. Then Mr. Green took over, spending 18.4 hours drafting and revising, after which Ms. Noonan spent 3.3 hours "insert[ing] fact information for false light analysis." Bosworth Decl., Ex. 1 at 6. Then Mr. Bosworth spent significant time reviewing and revising the entire document before it was filed.^{FN6} This hot-potato approach to writing undoubtedly increased the amount of time ultimately spent on the project as

each lawyer had to familiarize and refamiliarize himself or herself with the specific legal issues and related facts.^{FN7} As already discussed, it is expected that litigation is often performed in teams where the senior partner oversees the work of less-experienced associates. But where the division of labor causes unnecessary overlap or waste, it is unreasonable to impose on the opposing party the full monetary extent of counsel's actions.

FN6. There are numerous other entries that are likely related to this section of the memorandum, but I have only focused on the ones specifically identifying "false light."

FN7. I shall save for another day any comment on how this systems affects the *quality* of the writing. For now, I focus only on the *efficiency* of this method. But as a major consumer of legal writing, I have seen how this approach robs writing of clarity, brevity, and power.

[2] For these reasons, I find the amount of hours claimed by counsel is unreasonable. Based on counsel's billing sheets, there is no principled way for me to identify and separate out the time reasonably expended from that which was unreasonable. I can only say that I consider the excess here to be very large. *1189 Thus, in an effort to reduce the inefficiencies and excesses identified above, I award the defense team attorney fees of \$40,000. I have selected this amount because I believe the factors listed above reflect work at about one-fifth of the billed amount.

There is a significant disparity between counsel's request and my assessment of what is reasonable in this case. I recognize the possibility that I am missing something. But, even if there is some explanation for this extraordinary fee request that I am missing, counsel has failed to point out what it is, as is their burden. As explained previously, the pleadings here failed to explain or justify the extent of counsel's request. Even after the court alerted counsel of its concerns and requested further guidance, counsel only gave an oral accounting and categorization of their time. No further satisfactory explanation was provided. Thus, an award limited to \$40,000 is the only reasonable outcome based on the record before me.

2.) *Bill of Costs*

Defendants also seek recovery of their costs in the amount of \$1,627.10 for court filing fees, docket fees, and photocopying fees. As previously stated, Or.Rev.Stat. § 31.152(3) provides for recovery of costs. Further, all of these fees are properly recoverable under 28 U.S.C. §§ 1920 and 1923. Defendants' bill of costs is GRANTED in total.

CONCLUSION

For the foregoing reasons, defendants' motion for attorney fees (# 29) is GRANTED IN PART AND DENIED IN PART in the amount of \$40,000, and defendants' bill of costs (# 27) is GRANTED in full.

Gardner v. Martin
D.Or.,2006.

Only the Westlaw citation is currently available.

United States District Court,D. Oregon.

John M. GARDNER and Susan L. Gardner, husband and wife, and Mt. Hood Polaris, Inc., an
Oregon Corporation, Plaintiffs,

v.

Tom MARTIN, dba The Tom Martino Show; Westwood One, Inc., a Delaware corporation; and
Clear Channel Communications, Inc., a Texas corporation, Defendants.

No. 05-CV-769-HU.

Sept. 19, 2006.

Linda L. Marshall, Lake Oswego, OR, for Plaintiffs.

Charles F. Hinkle, Brad S. Daniels, Stoel Rives LLP, Portland, OR, for Defendants Tom Martino
& Westwood One, Inc.

Duane A. Bosworth, Kevin H. Kono, Davis Wright Tremaine LLP, Portland, OR, for Defendant
Clear Channel Communications, Inc.

ORDER

BROWN, Judge.

*1 Magistrate Judge Dennis James Hubel issued Findings and Recommendation (# 88) on June 15, 2006, in which he recommended the Court grant in part and deny in part Defendants' Motions for Attorney's Fees (# 49, # 54) and Supplemental Motions for Attorney's Fees (# 77, # 80). Defendants Martino and Westwood One, Inc., filed objections to the Findings and Recommendation. The matter is now before this Court pursuant to 28 U.S.C. § 636(b)(1) and Fed.R.Civ.P. 72(b).

When any party objects to any portion of the Magistrate Judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1). See also United States v. Bernhardt, 840 F.2d 1441, 1444 (9th Cir.1988); McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc., 656 F.2d 1309, 1313 (9th Cir.1981), *cert. denied*, 455 U.S. 920 (1982). This Court has carefully considered the Objections of Defendants Martino and West One and concludes Defendants' Objections do not provide a basis to modify the Findings and Recommendation. The Court also has reviewed the pertinent portions of the record *de novo* and does not find any error in the Magistrate Judge's Findings and Recommendation.

CONCLUSION

The Court **ADOPTS** Magistrate Judge Hubel's Findings and Recommendation (# 88) and,

therefore, **GRANTS in part** and **DENIES in part** Defendants' Motions for Attorney Fees (# 49, # 54) and Supplemental Motions for Attorney Fees (# 77, # 80). Accordingly, the Court awards Defendants Martino and Westwood a total of \$20,982.50 in attorneys' fees and awards Defendant Clear Channel a total of \$6,517.50 in attorneys' fees.

IT IS SO ORDERED.
HUBEL, Magistrate Judge.

FINDINGS & RECOMMENDATION

Plaintiffs John Gardner, Susan Gardner, and Mt. Hood Polaris, Inc ., brought this tort action against defendants Tom Martino, dba The Tom Martino Show, Westwood One, Inc., and Clear Channel Communications, Inc. Plaintiffs brought claims for false light invasion of privacy, defamation, intentional interference with economic relations, and intentional interference with prospective economic advantage. All of plaintiffs' claims arose out of statements made by Martino, a syndicated radio talk show host, during an on-air broadcast, about Mt. Hood Polaris, which is owned and operated by John and Susan Gardner.

Defendants moved to "strike" all claims pursuant to Oregon's "Anti-SLAPP" statute, Oregon Revised Statute § (O.R.S.) 31.150. In a September 19, 2005 Findings & Recommendation, I recommended that defendants' motions be granted. In a December 13, 2005 Order, Judge Brown adopted the Findings & Recommendation. A Judgment of Dismissal was entered on that same date.

On December 23, 2005, defendants moved for awards of attorney's fees. Also on December 23, 2005, plaintiffs moved to amend Judge Brown's Order and the Judgment, and sought to amend the Complaint. I stayed defendants' attorney's fee motions pending resolution of plaintiffs' motion by Judge Brown.

***2** On April 12, 2006, Judge Brown denied plaintiffs' motions. Subsequently, defendants filed supplemental motions for attorney's fees. Plaintiffs have responded to both the original attorney's fee motions and the supplemental motions. I recommend granting the motions in part and denying them in part.

STANDARDS

In a diversity case, the availability and amount of attorney's fees are governed by state law. Elston v. Toma, No. CV-01-1124-KI, 2005 WL 696900, at *1 (D.Or. Mar. 24, 2005). Here, state law provides that "[a] defendant who prevails on a special motion to strike made under ORS 31.150 shall be awarded reasonable attorney fees and costs." O.R.S. 31.152(3).

Under Oregon law, attorney's fees are to be awarded following the factors specified in O.R.S. 20.075. Elston, 2005 WL 696900, at *1-2. Although set out in two separate subsections, the statute

requires the court to examine the following factors in determining an appropriate fee. First are the factors recited in O.R.S. 20.075(1):

- (a) The conduct of the parties in the transactions or occurrences that gave rise to the litigation, including any conduct of a party that was reckless, willful, malicious, in bad faith or illegal.
- (b) The objective reasonableness of the claims and defenses asserted by the parties.
- (c) The extent to which the award of an attorney fee in the case would deter others from asserting good faith claims or defenses in similar cases.
- (d) The extent to which an award of an attorney fee in the case would deter others from asserting meritless claims and defenses.
- (e) The objective reasonableness of the parties and the diligence of the parties and their attorneys during the proceedings.
- (f) The objective reasonableness of the parties and the diligence of the parties in pursuing settlement of the dispute.
- (g) The amount that the court has awarded as a prevailing party fee under ORS 20.190.
- (h) Such other factors as the court may consider appropriate under the circumstances of the case.

O.R.S. 20.075(1); Elston, 2005 WL 696900, at *1-2 (citing *Preble v. Department of Rev.*, 331 Or. 599, 602, 19 P.3d 335 (2001)).

Next, the court must consider eight additional factors as specified in O.R.S. 20.075(2):

- (a) The time and labor required in the proceeding, the novelty and difficulty of the questions involved in the proceeding and the skill needed to properly perform the legal services.
- (b) The likelihood, if apparent to the client, that the acceptance of the particular employment by the attorney would preclude the attorney from taking other cases.
- (c) The fee customarily charged in the locality for similar legal services.
- (d) The amount involved in the controversy and the results obtained.
- (e) The time limitations imposed by the client or the circumstances of the case.
- (f) The nature and length of the attorney's professional relationship with the client.

(g) The experience, reputation and ability of the attorney performing the services.

*3 (h) Whether the fee of the attorney is fixed or contingent.

O.R.S. 20.075(2); Elston, 2005 WL 696900, at *2 (citing *McCarthy v. Oregon Freeze Dry, Inc.*, 327 Or. 185, 188, 957 P.2d 1200 (1998)).

As Judge King explained in *Elston*:

The objection of the party opposing an award of attorneys' fees should "play an important role in framing any issues that are relevant to the court's decision." [*McCarthy*, 327 Or. at 188, 957 P.2d 1200]. A court must include in its order a brief description of or citation to the factors on which it relies when granting or denying an award of attorney's fees. *Id.* A court is under no obligation however, to make findings about irrelevant or immaterial factual matters or legal criteria. *Id.*

Even if there is no objection to either the rate or the hours, the court has an independent duty to review the petition for reasonableness. *Gates v. Deukmejian*, 987 F.2d 1392, 1401 (9th Cir.1993). To determine the reasonable hourly rate, this court uses the most recent Oregon State Bar Economic Survey ... as its initial benchmark, taking into consideration any adjustment for inflation between the date the economic survey was published and the dates the legal services were performed.

Elston, 2005 WL 696900, at *2 (footnote omitted).

DISCUSSION

Martino and Westwood were both represented in this action by Charles Hinkle and Brad Daniels of Stoel Rives, LLP. They move for an award of \$84,024 in fees for the initial motion to dismiss, and for an additional fee award of \$28,984.50, for work done in regard to plaintiffs' post-judgment motions, for a total of \$113,008.50.

Clear Channel was separately represented by Duane Bosworth and Kevin Kono of Davis Wright Tremaine, LLP. Clear Channel seeks an award of \$19,251 in fees for the initial motion to dismiss, and seeks an additional fee award of \$17,257.50, for work done in regard to plaintiffs' post-judgment motions, for a total of \$36,508.50.

I. Entitlement to Fees

As defendants note, O.R.S. 31.152(3) mandates an award of fees for a defendant who prevails on a special motion to strike made under O.R.S. 31.150. Although O.R.S. 20.075 suggests that a court should examine the factors in O.R.S. 20.075(1) in initially assessing the propriety of a fee award, those factors apply only when the "court has discretion to decide whether to award attorney fees." O.R.S. 20.075(1). Here, O.R.S. 31. 152(3), by use of the word "shall," directs the court to

make an award of fees without discretion, other than as to the reasonableness of the amount. Thus, I do not apply the O.R.S. 20.075(1) factors to determine whether to make an award. They are used only as factors in determining the reasonable amount to be awarded.

Plaintiffs concede defendants' entitlement to fees. However, plaintiffs take issue with the amount claimed.

II. O.R.S. 20.075(1) Factors

Defendants contend only five of the eight subsection (1) factors are relevant: the objective reasonableness of the claims under (1)(b), the deterrence of meritorious or meritless claims under (1)(c) and (1)(d), the objective reasonableness during the proceedings under (1)(e), and the reasonableness and diligence in pursuing settlement under (1)(f). The only one addressed by plaintiff is the deterrence of meritorious cases under (1)(c). I agree with the parties that the other subsection (1) factors are not relevant or applicable here.

A. O.R.S. 20.075(1)(b)

*4 Defendants urge the court to consider that after counsel for Martino and Westwood sent a copy of the proposed special motion to strike to plaintiffs' counsel, plaintiffs filed an amended complaint which still contained meritless claims. Thus, defendants note, plaintiffs had an opportunity to eliminate those meritless claims before defendants even filed their motion, and did not do so.

Moreover, defendants state, in responding to the motion to strike, plaintiffs made no defense of their claim that Martino defamed them by saying "these people suck," they conceded that a corporation cannot bring a privacy claim, and their own employees' declarations indicated that Martino had tried to call plaintiffs three times during the program in an attempt to get their side of the story. Defendants argue that the facts that plaintiffs did not attempt to justify their false light claim for the corporation or their libel claim based on the word "suck," and had no evidence of actual malice, show that at least some of plaintiffs' claims were not objectively reasonable.

While I find no error in defendants' recitation of the facts regarding the timing of the filing of the amended complaint or the arguments plaintiffs made, or failed to make, in opposition to the motion to strike, I do not agree with defendants' conclusion that as a result of these undisputed facts, plaintiffs' claims must be seen as objectively unreasonable.

Plaintiffs' false light claim was brought against all three defendants. Plaintiffs' concession that it could not sustain the false light claim brought by the corporation does not undermine the reasonableness of the claim brought by the two individuals. While the evidence may be undisputed that Martino tried to call plaintiffs three times during the show to allow their response to the complaint being made against them, that is not a definitive determination of Martino's reckless conduct, but is a fact relevant to the analysis. Finally, while plaintiff chose not to rely on the

comment using the word “sucks” in opposing defendants' motion as to the defamation claim, plaintiffs expressly reserved the right to rely on it later in litigation and, more importantly, the claim was based on several comments and thus, it was not objectively unreasonable for plaintiff to pursue it after reading defendants' proposed motion.

B. O.R.S. 20.175(1)(c) and (1)(d)

Defendants argue that an award of attorney's fees would not deter meritorious claims because, by definition, a motion to strike under the anti-SLAPP statute is granted only when the claim lacks merit. Defendants contend that an award of attorney's fees would operate to deter meritless claims, which is the very purpose of the statute: “to allow early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation.” *Vess v. Ciba-Geigy Corp., USA*, 317 F.3d 1097, 1109 (9th Cir.2003).

The problem with defendant's argument is that O.R.S. 20.175(1)(c) and (1)(d), like all of the O.R.S. 20.175 factors, apply to all cases in which an award of attorney's fees may be made, not just those in which an Anti-SLAPP motion to strike has been litigated. Because the Anti-SLAPP statute allows for early dismissal of claims that might otherwise not be subject to dismissal on a Rule 12(b)(6) motion, the merits of the claims but for the Anti-SLAPP context is never assessed. Thus, I conclude that the factors in O.R.S. 20.175(1)(c) and (1)(d) are of minimal importance in analyzing a fee request made under O.R.S. 31.152(3).

***5** If I more fully consider the factors, I agree with plaintiffs that the requested amount is so large that it will likely deter meritorious claims. Plaintiffs note that two of the largest media companies in the country seek a “stunning” \$103,275 ^{FN1} from the individual plaintiffs and their small, family run business located in Boring, Oregon. Plaintiffs argue that a fee award in an “amount anywhere close to the amount sought here would deter any victim of defamation by a media defendant from contemplating an action for damages no matter how meritorious the claim, no matter how egregious the conduct, and no matter how devastating the result, because the consequence of seeking help from the courts could be utter financial devastation.” Pltfs' Obj. at p. 7.

FN1. This is the total amount sought in the initial attorney's fees motions, not considering the additional amounts sought in the supplemental motions.

I agree with plaintiffs. The court must evaluate the relative balance between deterring meritless claims on the one hand and preserving the right to pursue meritorious claims on the other. While a fee award of some amount may be warranted in a particular case, one that goes too far will invariably deter not only claims without merit, but claims with merit as well, simply because the risk that some court, somewhere, might disagree with the claimant and conclude that the claim lacks merit, is too great given that the plaintiff could be subject to complete financial ruin as a result of filing the claim. Defendants' combined total request of \$149,517 is unreasonable because it tips that balance much too far against putative plaintiffs with meritorious claims and it could result in encouraging tortious behavior by those with far greater financial resources.

I note that in a 2004 decision, Judge Hogan explained that a large award may “discourage others from filing meritorious claims, while a small award may encourage meritless claims and/or frustrate the purposes of the anti-SLAPP statute.” Card v. Pipes, No. CV-03-6327-HO, 2004 WL 1403007, at *4 (D. Or. June 22, 2004). He concluded that the requested amount of \$58,712.90 for 268.6 hours spent on an anti-SLAPP motion directed at a three-claim complaint, was unreasonable. *Id.* at *2. He awarded \$5,000 as a reasonable fee. *Id.* at *4. Here, the amount sought, \$149,517, like the \$58,712.90 in *Pipes*, is unreasonably high. These factors, when examined, weigh in favor of plaintiff.

C. O.R.S. 20.075(1)(e)

Defendants contend that plaintiffs' position on the issue of whether Martino's statements constituted conduct in furtherance of the exercise of the constitutional right of free speech within the meaning of O.R.S. 31. 150(2)(d), was objectively unreasonable given that the Ninth Circuit had applied the California Anti-SLAPP statute to pure speech and two California courts had applied the California statute to on-air conversations on radio talk shows.

I disagree. While the cases construing California's statute were relevant and troubling for plaintiffs, they were not determinative of Oregon law. As the parties know, at the time the motion to strike was briefed and argued, there were no Oregon appellate court or Ninth Circuit cases interpreting the Oregon statute. While the California cases were strong persuasive authority for defendants, it does not make plaintiffs' pursuit of claims based on Oregon's statute, objectively unreasonable.

D. O.R.S. 20.075(1)(f)

*6 Defendants state that in early June 2005, plaintiffs' counsel communicated a settlement offer of \$500,000 to defense counsel. In late June 2005, defense counsel told plaintiffs' counsel that defendants would be interested in offering free radio advertising to plaintiffs as a way of settling the case. In early July 2005, defense counsel told plaintiffs' counsel that the offer included several thousand dollars of radio advertising as well as the opportunity for plaintiff John Gardner to appear on the Tom Martino show to discuss his business and the situation with the customer that prompted the acts forming the basis of the litigation. Plaintiffs rejected the offer.

I do not consider plaintiffs' rejection of defendants' offer as a justification for the amount of fees sought by defendants. The offers by both parties were made extremely early in the case. While neither offer was unreasonable, I note that defendants' offer failed to include any monetary damages whatsoever, making it more likely that plaintiffs would reject it. Plaintiffs' conduct was not unreasonable. One can understand why a business in plaintiff Mt. Hood Polaris's position might not relish the uncontrolled discussion of these issues on the air with defendant Martino.

Lastly, I place little weight on this factor given the policy expressed in both Federal Rule of Civil

Procedure 408 and Oregon Evidence Code Rule 408. As explained in the Advisory Committee Notes to the federal rule, public policy favoring the compromise and settlement of disputes is the basis for the rule which provides that compromise and offers to compromise are not admissible to prove liability. Fed.R.Evid. 408, Advisory Comm. Notes to 1972 Proposed Rule. Although defendants do not offer the evidence of settlement proposals to prove liability, the public policy cautions against putting too much weight on this factor, especially in the context of an Anti-SLAPP fee motion.

III. O.R.S. 20.075(2) Factors

Several of these factors present no issue in this case: the attorney's fees for all defense counsel were fixed, neither firm had a long-standing professional relationship with their respective clients, and no unusual time limitations were imposed by the clients or the circumstances of the case. It also appears that defense counsels' employment by defendants in this case did not preclude counsel from taking other cases. O.R.S. 20.075(2)(b), (e), (f), (h).

The remaining factors to consider are: the time, labor, and skill required and difficulty of issues under (2)(a), the fee customarily charged in the locality for similar legal services under (2)(c), the amount involved in the controversy and the results obtained under (2)(d), and the experience, reputation, and ability of the attorney performing the services under (2)(g). The time, labor, skill, and difficulty of issues is appropriately considered along with the amount involved and the results obtained in an assessment of the reasonableness of the number of hours. The fee customarily charged in the locality and the experience, reputation, and ability of the attorney involved are appropriately considered together in an assessment of the reasonable hourly rate.

A. Initial Motion

1. Reasonable Number of Hours

*7 In their initial motion, Martino and Westwood seek fees for 233.4 hours of time Hinkle spent on the case. They do not seek fees for 3 .8 hours of time Hinkle spent on preliminary matters, for 9.2 hours spent by an associate attorney, or 1.3 hours spent by a litigation assistant.

Bosworth seeks time for 62.1 hours he spent from the inception of the case until October 18, 2005, when he spent time finalizing Clear Channel's response to plaintiff's objections to the Findings & Recommendation.

I have carefully examined Hinkle's Declaration and Bosworth's Declaration which contain all the time entries. I have segregated this time into five categories: (1) drafting of motions, memoranda, declarations, or reviewing such filings by the plaintiff or co-defendants; (2) legal research; (3) factual investigation; (4) formal discovery; and (5) other, including time spent conferring with co-counsel, communicating with opposing counsel, communicating with clients, etc.

Both counsel have done a very good job of recording time spent on individual tasks and there is no serious “block billing” problem. Occasionally, time that I segregated into two separate categories was not separately recorded as such by counsel. I have taken the liberty of dividing that time using my judgment.^{FN2}

FN2. For example, on June 3, 2005, Hinkle spent 1.2 hours on reviewing an email from opposing counsel, communicating with opposing counsel by phone regarding a settlement demand, and reviewing case citations. Hinkle did not further segregate the time. I awarded 1.0 hour to legal research based on the fact that Hinkle reviewed case citations and his email from opposing counsel related to her legal argument regarding the relevance of a Ninth Circuit case. I attributed 0.2 hour to “other” as a communication with opposing counsel. Dec. 23, 2005 Hinkle Declr. at p. 12.

Another example is found on January 30, 2006, in Bosworth's records. There, Bosworth states he spent 1.7 hours reviewing and researching plaintiff's reply memorandum in support of plaintiff's motion to amend. Apr. 18, 2006 Bosworth Declr. at p. 5. In my calculations, I allotted 0.9 hours to reviewing the memorandum and 0 .8 hours to research.

The amount of time expended by counsel in the five categories is as follows: (1) 130.8 hours by Hinkle and 15.6 hours by Bosworth in drafting of motions, memoranda, declarations, or reviewing the same filed by the opposing party or co-defendant; (2) 58.1 hours by Hinkle and 31.1 hours by Bosworth on legal research; (3) 22.6 hours by Hinkle and 8.3 hours by Bosworth on factual investigation; (4) 9.6 hours by Hinkle on formal discovery; and (5) 18.5 hours by Hinkle and 7.1 hours by Bosworth on “other,” including time spent conferring with co-counsel, communicating with opposing counsel, and communicating with clients.^{FN3}

FN3. My calculation of the total numbers for Bosworth, 62.1, is the same as what Clear Channel seeks in its motion. My calculation for the total number for Hinkle, 239.6, is 6.2 hours more than the 233.4 hours Martino and Westwood seek. I cannot explain the discrepancy. I have performed my calculations twice, double checking them against the time entries, and cannot find a source of error. I note that on at least one occasion, I found a time keeping error by Hinkle that resulted in an additional hour claimed, but not documented as worked. Dec. 23, 2005 Hinkle Declr. at p. 13 (time entry for July 2, 2005 shows 6.2 hours on revising and editing the motion and 2.3 hours on research, for a total of 8.5 hours, but the total time claimed is 9.5 hours). While this error would tend to support a total number of hours sought by these defendants higher than my calculations, I note this error only to underscore that even the most perfect time keeping system, and performance of calculations, is not error free.

Defendants argue that “[p]reparing and responding to a Special Motion to Strike under the anti-SLAPP statute requires virtually the same degree of time and effort on the part of all parties as does preparation for a trial.” Martino and Westwood Mem. at p. 7. Defendants contend that the

Amended Complaint presented a number of complicated legal issues that needed to be addressed in the dismissal motion, and that a thorough factual investigation was required as well.

As plaintiffs note, contrary to defendants' representation that a Special Motion to Strike requires preparation in the magnitude of trial preparation, the statute is intended to avoid that level of time and expense. The purpose of the statute is to allow early dismissal of claims. Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 837 n. 7 (9th Cir.2001); see also Vess, 317 F.3d at 1109.

By expressly stating that an Anti-SLAPP statute motion to strike is to be treated as a motion to dismiss, and by expressly stating that discovery is stayed while the motion is pending, the Oregon Legislature has indicated that the motion is a tool to dispose of lawsuits as a matter of law, early in the proceeding, before a great deal of time and money has been expended. O.R.S. 31.150(1) (the special motion to strike is to be treated as a motion to dismiss under ORCP 21A); O.R.S. 31.152(2) (all discovery in the proceeding is stayed pending resolution of the motion).

*8 In contrast to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), an Anti-SLAPP motion to strike does require some evidentiary investigation and presentation. It is the plaintiff responding to the motion, however, who has the laboring oar. A defendant's burden is simply to make a prima facie showing that the claims to which the motion are directed arise out of one of the categories of civil actions described in O.R.S. 31.150(2). O.R.S. 31.150(3). If a defendant meets that burden, the burden shifts to the plaintiff to show, by substantial evidence supporting a prima facie case, that there is a probability the plaintiff will prevail on the claim. *Id.*

In total, defendants spent more than thirty hours on factual investigation. While some appears reasonable (for example, listening to the tape recording of the broadcast), other time was not related to the motion arguments (for example, time spent investigating the radio affiliates and hours of broadcast).

Defendants point to several legal arguments addressed in the briefing, including whether the broadcast was speech or conduct, whether the statements were fact or opinion, whether the statements were capable of a defamatory meaning, and whether a corporation can bring a false light invasion of privacy claim, that required research. Defendants also note that plaintiffs' stated intention to file a motion to strike Feroglia's declaration which was submitted by defendants in support of their motion, required research regarding hearsay issues, and that plaintiffs' opposition memorandum raised additional legal issues.

Defendants' arguments were well researched and thoroughly briefed. Nonetheless, by my calculations, defendants spent approximately 85 hours on legal research and over 130 hours on the briefing (excluding time spent on the attorney fee motion). I recognize that a second round of briefing was necessitated by the case assignment to a Magistrate Judge. I also recognize that there were numerous legal issues requiring research and briefing. However, spending the equivalent of more than five weeks of full-time work researching, preparing, and briefing the motion is unreasonable for any attorney, especially ones who seek to justify hourly rates of \$310 and \$360

per hour.^{FN4}

FN4. I note that \$360 per hour is \$1 every 10 seconds. Such an hourly rate demands extraordinary efficiency in handling a case.

As plaintiffs note, defendant Westwood had recently litigated the issue of whether a plaintiff's claim, brought as a result of statements made during an on-air radio broadcast, was based on an act in furtherance of the defendant's right of petition or free speech and thus, subject to dismissal under California's Anti-SLAPP statute, on which the Oregon statute is based. Ingels v. Westwood One Broadcasting Servs, Inc., 129 Cal.App. 4th 1050, 28 Cal Rptr.3d 933 (2005). Furthermore, Hinkle himself had recently litigated an Oregon Anti-SLAPP motion to strike in a case in Multnomah County Circuit Court, and other partners in his firm had also recently litigated similar issues in another Anti-SLAPP motion to strike in another case in that court. See Sept. 19, 2006 Findings & Rec. at pp. 10-11 (citing to those cases in connection with discussion of "public issue/issue of public interest"). Clearly, Westwood and Hinkle should have benefitted from the previous research done by Westwood and by Hinkle and his law firm, resulting in fewer hours needed for researching the claims in this case.

*9 Additionally, several of the issues may have appeared complex, but were only superficially so. For example, defendants note that there were "several questions relating to causation and damages with respect to the interference with economic relations claims asserted by the corporate plaintiff." Martino and Westwood Mem. at p. 8. But, such issues are more accurately depicted as garden variety tort claim questions, not requiring weeks of research. Damages questions are of little importance in resolving the motion.

Another example is the issue of whether the statements during the broadcast were fact or opinion or capable of a defamatory meaning. As Judge Hogan remarked in the *Pipes* case:

The First Amendment issue was simply whether a particular statement is capable of defamatory meaning, or whether it is properly construed as opinion, and therefore protected by the First Amendment. This issue often arises in defamation cases. The availability of a special motion to strike was an unusual legal issue, although the application of the special motion to strike involved fairly straight forward issues of statutory interpretation.

Pipes, 2004 WL 1403007, at *3. The same can be said in this case. These issues frequently arise in defamation cases and should not require the amount of time expended here.

Defendants also seek fees for 2.9 hours spent researching the citation of unpublished California appellate decisions and another 3.6 hours for drafting the portion of defendants' reply brief on this topic. Even disregarding the fact that this Court is unlikely to rely on an unpublished appellate decision from any jurisdiction and thus accepting that a brief look at this issue may have been warranted, spending almost three hours to research such straightforward procedural rules of minimal importance is unreasonable. The additional 3.6 hours spent drafting that portion of the

brief is unconscionable considering that it resulted in a single paragraph of seventeen lines of text. All told, that seventeen lines of text results in a claim for \$2,340. A single sentence suggesting that the Court not put any weight on the unpublished appellate decision from a non-controlling jurisdiction would suffice.

As noted above, Oregon's Anti-SLAPP statute provides that discovery is stayed upon the filing of a special motion to dismiss. O.R.S. 31.152(2). Martino and Westwood filed their motion on July 8, 2005. Yet, after that date, Hinkle spent more than eight hours drafting interrogatory and document requests. While Hinkle may have thought it prudent to prepare the discovery requests, especially given a Ninth Circuit case holding that the similar California statutory provision staying discovery did not apply in federal court, that does not mean it is reasonable to shift the expense for discovery requests that were prepared, but apparently never served, to the plaintiffs in this case.

Bosworth and his firm spent approximately 46.7 hours researching and briefing the Anti-SLAPP motion, including time spent reading plaintiffs' and co-defendants' memoranda, and time spent at oral argument and responding to plaintiffs' objections to the Findings & Recommendation.^{FN5} Clear Channel's initial motion was four lines of text and consisted solely of joining the motion, memorandum, and declarations filed by Martino and Westwood. Clear Channel's reply memorandum was five pages long. Its response to plaintiffs' objections to the Findings & Recommendation was five lines of text, consisting solely of joining what had already been filed by Martino and Westwood in response to plaintiff's objections. Thus, Clear Channel seeks over \$14,000 for what amounts to five pages of original briefing. Even considering the time needed to review the filings of the other parties and to attend oral argument, the time expended is unreasonable.

FN5. This does not include the additional 15.4 hours Bosworth spent on factual investigation or communicating with co-defense counsel, opposing counsel, and his client.

***10** Certainly defense counsel achieved an excellent result for their clients: early dismissal of the entire case. And, the amount in controversy was significant. However, as illustrated by the above-recited examples, I find that defense counsel, especially one who has expertise in First Amendment, libel, and privacy issues, and the other who filed two "me too" memoranda, seek reimbursement for a clearly unreasonable number of hours.

2. Reasonable Hourly Rate

Hinkle's 2005 billing rate was \$360 per hour. Bosworth's was \$310 per hour. Both attorneys submit declarations regarding their experience, expertise, and comparable rates in the relevant Portland legal community.

Plaintiffs concede that "the experience, reputation and ability of Mr. Hinkle and Mr. Bosworth are beyond challenge." Pltfs' Opp. at p. 4. But, plaintiffs note, while clients are free to employ a senior attorney to perform certain functions, without regard to cost, the court's job is to consider whether

the billing rate was reasonably necessary to perform those functions. In some cases, plaintiffs suggest, the same result may be achieved by having a more junior associate with a lower hourly billing rate, whom the time records show was familiar with the case, perform the legal research and prepare the drafts of the briefs under the direction of the more senior attorney.

Plaintiffs also note that defendants' requested hourly rates are based on those of corporate commercial litigators. Plaintiffs argue that while the attorneys involved in this case may indeed specialize in that area, this case was not corporate commercial litigation. Rather, this was ordinary tort litigation involving claims of defamation, false light invasion of privacy, and intentional interference with economic relations and advantage. The pivotal issue was whether the speech at issue was constitutionally protected.

As the parties note, this Court starts its analysis of the reasonable rate by looking to the Oregon State Bar Economic Survey ^{FN6}. Hinkle notes that the OSB Economic Survey shows that in 2002, a Portland lawyer with over 30 years experience with a billing rate of \$337 was in the 95th percentile. A Portland business/corporate litigator in the 95th percentile had a \$333 hourly rate. Hinkle further states that in 2002, his billing rate was \$305 per hour, putting him within the range of market rates as shown in the OSB Economic Survey.

FN6. Available at: www.osbar.org/surveys_research/econsurv02/econsurvey02.html.

Assuming, in 2002, that a Portland lawyer with more than 30 years experience had a 95th percentile billing rate of \$335 per hour, that rate for 2005, adjusted for inflation ^{FN7}, would be approximately \$364 per hour, about what Hinkle charges. Bosworth's 2005 rate of \$310 per hour is between the \$275 rate in 2002 for the 75th percentile of Portland lawyers with more than 21 but less than 30 years of experience, and the \$320 95th percentile rate for those lawyers. Adjusted for inflation, that range in 2005 would be approximately \$299 to \$348.

FN7. As seen in the Bureau of Labor Statistics website, the Consumer Price Index (Urban) for All Items shows an average inflation rate of 1.9% for 2003, 3.3% for 2004, and 3.4 percent for 2005. Available at: <ftp://ftp.bls.gov/pub/special.requests/cpi/cpi.ai.txt>.

***11** While the requested rates are within the market range seen in the OSB Economic Survey, that is not conclusive of their reasonableness, especially in the context of a fee-shifting award. First, I agree with plaintiffs that while these practitioners are regarded as exceptional corporate commercial litigators, this particular case was not of that nature. It was basic tort litigation with a constitutional issue often seen in the context of defamation claims. Thus, the more appropriate OSB Economic Survey reference is the rates for general civil litigation defense by Portland practitioners. In 2002, the average rate for this category was \$205, the median was \$195, the 75th percentile rate was \$250, and \$300 was the rate for the 95th percentile. Adjusted for inflation, the 2005 rates would be \$272 to \$327 for the 75th to 95th percentiles.

Second, I agree with plaintiffs about the use of a senior attorney in place of a less experienced, but

nonetheless competent junior counsel. This touches upon my primary problem with this fee petition. A highly seasoned specialist, by virtue of his or her experience, should handle the case more efficiently and with fewer hours needed for research and preparation of the motion than a less experienced, but competent junior lawyer. Thus, if the clients and the attorneys, Hinkle and Bosworth, want to have the senior lawyers work up the case themselves, I expect to see fewer hours billed than would be reasonably expended by a more junior attorney at a lower hourly rate. The problem here is that the requested amount is based on an exceptionally high hourly rate *and* an exceptionally high number of hours considering the tasks at hand. In my opinion, neither the requested rates, nor the requested hours are reasonable taken together.

3. Reasonable Fee for Initial Petition

As noted above, together defendants seek fees for approximately 295.5 hours spent on the case through the time the filing of their initial fee petitions in December 2005. In *Pipes*, the attorneys sought fees for 265.1 hours of time which Judge Hogan determined was unreasonable. The cases appear to be similar in that both involved fairly straightforward tort claims with an additional First Amendment issue. Both involved motions to strike made under Oregon's Anti-SLAPP statute. *Pipes* also included a Rule 12(b) motion to dismiss. Both cases also raised the applicability of the Anti-SLAPP statute in federal court and both cases included a service-related issue (in the instant case, plaintiffs challenged the timing of the motion to strike by Clear Channel because it was filed more than sixty days after service of the original Complaint). Finally, the briefing in both cases was extensive.

I recognize that Judge Hogan issued his opinion in June 2004, two years ago. I also recognize that this case involved some issues not involved in *Pipes* such as plaintiffs indicating their intent to move to strike Feroglia's declaration, and more importantly, a second round of briefing necessitated by the original Magistrate Judge case assignment. Thus, I conclude that a fee higher than the \$5,000 awarded by Judge Hogan is required here.

***12** Based on all of the O.R.S. 20.075 factors discussed above, and on my independent assessment of the reasonableness of the requested fees, I conclude that \$20,000 in fees is reasonable for the time spent up to and including the filing of the initial fee petitions by all defendants in December 2005. Since Bosworth's requested \$19,251 is approximately 18.6% of the total sought by all defendants, I award Bosworth 18.6% of the \$20,000, or \$3,720, and the remainder, or \$16,280, to Hinkle.

B. Supplemental Motion

As indicated above, following the December 13, 2005 Judgment, plaintiff Mt. Hood Polaris moved to amend the order and judgment and to amend the complaint. The motion to amend was brought pursuant to Rules 52(b) and 15(a). Defendants filed separate responses to the motion in early January, arguing, *inter alia*, that Rule 52(b) was inapplicable and that Mt. Hood could not rely on Rule 15(a) after entry of judgment. Mt. Hood filed a reply memorandum in support of its motion

and simultaneously filed an amended motion to amend pursuant to Rule 60(b).

In a February 8, 2006 Scheduling Order, Judge Brown noted that Mt. Hood had failed to seek leave of the court to amend the motion to amend and had failed to comply with Local Rule 7. 1(c), requiring the motion to be accompanied by a separately filed legal memorandum or brief. Judge Brown nonetheless allowed Mt. Hood to file the amended motion. She then established deadlines for the filing of a memorandum in support by plaintiffs and for defendants to file responses. She set an oral argument date in March 2006. Defendants, having already filed responses to the original motion to amend, were now obligated to file additional responses to the new arguments raised by Mt. Hood in the amended motion.

Defendants ultimately prevailed when, on April 12, 2006, Judge Brown denied Mt. Hood's motion to amend and its amended motion to amend. As Judge Brown explained in her Opinion, Mt. Hood sought to set aside the judgment only if its motion to amend the complaint was allowed. Apr. 12, 2006 Op. & Ord. at p. 6. Mt. Hood's proposed Second Amended Complaint contained a new claim for intentional interference with economic relations.

Although Mt. Hood had brought a similar claim in its Amended Complaint which was challenged in the Special Motions to Strike, the new proposed claim alleged that defendants inflicted economic harm on Mt. Hood for various improper purposes instead of relying on the previous allegations of improper means. As explained in the September 19, 2005 Findings & Recommendation, the improper means at issue in the Amended Complaint were the statements regarding plaintiffs' alleged lying. Sept. 19, 2005 Findings & Rec. at p. 24. I concluded that the claim must be stricken under the AntiSLAPP special motion to strike because the challenged statements were protected by the First Amendment. By relying on various improper purposes, Mt. Hood was clearly trying to assert a claim in the proposed Second Amended Complaint that would be outside the realm of claims subject to the Anti-SLAPP statute.

*13 Judge Brown concluded that the proposed new claim would be futile because “[t]his Court, ..., already has held the broadcast is conduct in furtherance of the constitutional right of free speech for which the Oregon Legislature had provided protection in Oregon Revised Statute § 31.150.” Apr. 12, 2006 Op. & Ord. at p. 9. Even though Mt. Hood relied on improper purposes, the claim was still based on the broadcast. She noted that if the Court allowed the motion to further amend the claim, defendants confirmed that they would again file a motion to strike it under the Anti-SLAPP statute. *Id.* Judge Brown concluded that the Court, “in line with its earlier reasoning, again would grant such a motion.” *Id.* Thus, she denied Mt. Hood's post-judgment motions. *Id.* at pp. 9-10.

Hinkle seeks \$28,984.50 for the time spent on the case beginning January 1, 2006, through the filing of the supplemental fee petition on April 14, 2006. In his declaration, he states that he seeks fees for 72.2 hours of his time, and 14 hours spent by associates in his office, for a total of 86.2 hours. Apr. 14, 2006 Hinkle Declr. at ¶ 3.

Bosworth seeks \$17,257.50 for the time spent on the case from January 3, 2006, through the April 18, 2006 filing of his supplemental fee petition. In his declaration, he states that he seeks fees for 35.7 hours of his time, and a total of 32.7 hours spent by three associates in his office, for a total of 68.4 hours. Apr. 18, 2006 Bosworth Declr. at ¶ 7.

Plaintiffs oppose the award of any time spent on the post-judgment litigation because O.R.S. 31.152 limits fees to those expended on a motion to strike under the Anti-SLAPP statute and the post-judgment motions in this case concerned a motion to amend to assert a new claim. I reject this argument because while plaintiffs' proposed new claim was presented in a motion to amend the judgment and to allow the filing of a new complaint, the pivotal issue addressed by Judge Brown in her April 12, 2006 Opinion was the futility of allowing the proposed amendment given that it would not survive a motion to strike it under the Anti-SLAPP statute. Thus, the fees generated by defendants on this issue would have been generated either in the context of the motion to amend or on a second motion to strike. Accordingly, I find it reasonable to award them.

Although the post-judgment time expended by defense counsel was necessitated by Mt. Hood's filing its motion to amend, and was then compounded by Mt. Hood's filing an amended motion to amend after defendants had already responded to the first motion to amend, defendants' hours are again, unreasonably high. For example, while Bosworth may have lowered expenses by using associates to perform some research and drafting, and this invariably requires some coordination between the partner and the associate, it is not reasonable to expect plaintiffs to pay for both the time an associate spends with Bosworth and the time that associate then spends conferring with even more junior associates, or the time the associates spend conferring with each other. *See, e.g.*, Apr. 18, 2006 Bosworth Declr. at pp. 3-4 (0.4 hours on January 3, 2006 spent by Kono meeting with Bosworth and 0.4 hours on January 3, 2006 spent by Kono meeting with Usui and Colton; 0.2 hours on January 4, 2006 spent by Colton meeting with Usui and 0.2 hours on January 4, 2006 spent by Usui meeting with Colton).

***14** Another example of excessive hours is the time spent by Hinkle on basic research related to the standards for motions to amend under Rules 59 and 60. By my calculation, Hinkle and his associate spent more than 15 hours on the research and drafting of these issues which should be basic to any experienced federal court litigator. *See, e.g.*, Apr. 14, 2006 Hinkle Declr. at pp. 5-6, 8 (4.5 hours by Hinkle on January 1, 2006 for research on standards for amending under Rules 52 and 59 and drafting portion of memorandum; 3.5 hours by associate on January 1, 2006 on "researching legal issues" and drafting memorandum; 5.3 hours by Hinkle on January 2, 2006 on relationship between Rule 52(b) and Rule 59 and standards for amending under Rule 59, plus drafting memorandum; 2.3 hours by Hinkle on January 26, 2006 on researching the standards for setting aside a judgment under Rule 60; some portion of 2.8 hours by Hinkle on February 18, 2006 on research regarding grounds for setting aside judgment).

Additionally, Hinkle and his staff spent at least 10, and likely closer to 15 ^{FN8}, hours on legal research regarding the improper purpose element of the intentional interference with economic relations claim. *See, e.g.*, Apr. 14, 2006 Hinkle Declr. at pp. 7-8 (3.4 hours by associate on January

30, 2006 spent on legal research regarding the improper purpose element of an intentional interference claim; 7.1 hours by the associate on January 31, 2006 spent on the same research and drafting a memorandum on this issue; some portion of 2.8 hours by Hinkle on February 18, 2006 spent on legal research regarding the improper purpose prong of an intentional interference claim; some portion of 9.5 hours by Hinkle on February 20, 2006 spent on improper purpose research). This is an unreasonably high number of hours for this task.

FN8. The declaration contains entries showing time was spent on more than one task or researching more than one issue. For example, on February 18, 2006, Hinkle spent 2.8 hours working on the response memorandum and performing legal research on two issues, one of which was the improper purpose issue. On February 20, 2006, he spent 9.5 hours on the response memorandum, including research on two legal issues, one of which was the improper purpose issue. The reference to fifteen hours is based on attributing one-third of the total time claimed for each of these days to the improper purpose research.

On balance, considering all of the O.R.S. 20.075 factors discussed in the previous section, and based on my independent assessment of the reasonableness of the hours worked and the hourly rates sought, I conclude that \$7,500 is a reasonable fee for the time spent by defendants litigating the post-judgment motions. The amount sought by Bosworth is approximately 37.3 percent of the total sought by all defendants. Thus, I award 37.3 percent of \$7,500, or \$2,797.50 to Bosworth, and the remainder, or \$4,702.50, to Hinkle.

CONCLUSION

Defendants' motions for attorney's fees (# 49, # 54), and supplemental motions for attorney's fees (# 77, # 80), should be granted in part and denied in part. Martino and Westwood should be awarded a total of \$20,982.50 in attorney's fees. Clear Channel should be awarded a total of \$6,517.50 in attorney's fees.

SCHEDULING ORDER

The above Findings and Recommendation will be referred to a United States District Judge for review. Objections, if any, are due June 30, 2006. If no objections are filed, review of the Findings and Recommendation will go under advisement on that date.

***15** If objections are filed, a response to the objections is due July 14, 2006, and the review of the Findings and Recommendation will go under advisement on that date.

IT IS SO ORDERED.