



805 SW Broadway
Suite 1500
Portland, OR 97205
503.226.1191 Phone
503.226.0079 Fax

File Number: F6644-0006
503.226.8646 Direct
delkanich@buchalter.com

November 29, 2023

VIA E-MAIL (CAO@OSBAR.ORG)

Mr. Linn Davis
Assistant General Counsel and CAO Attorney
Oregon State Bar
16037 SW Upper Boones Ferry Road
P.O. Box 231935
Tigard, OR 97281-1935

Re: LDD 2301120
Michael Fuller (David Koenig)

Dear Mr. Davis:

I write now in response to David Koenig's October 19, 2023 additional submission in support of his inquiry against Michael Fuller.

In the underlying litigation, Mr. Fuller represented Jennifer and Evans Clinchy in defending against Mr. Koenig's frivolous lawsuit. Mr. Koenig's claims had no merit (as Judge Skye ultimately found), and his unfounded litigation was filed in bad faith to harass the defendants. Mr. Fuller successfully obtained a full dismissal of all of Mr. Koenig's claims and has now filed a fee petition, supported by an expert declaration. In this Bar matter, Mr. Koenig continues to make unfounded and false claims against Mr. Fuller, and Mr. Koenig has attempted to use his Bar complaint against Mr. Fuller as leverage in the civil matter against Mr. Fuller's clients.

Our prior September 27, 2023 letter generally responds to Mr. Koenig's allegations, but I respond here separately to address a few specific points:

First, Mr. Koenig alleges that Mr. Fuller engaged in dishonesty and bad faith litigation in drafting and filing the Special Motion to Strike on behalf of his clients, and Mr. Koenig relies on his Supplemental Response to the Motion to Strike, as well as his Declaration filed in support, to suggest that Mr. Fuller's recitation of facts was incorrect. This is not accurate at all: Mr. Koenig

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lost that motion, and the court agreed with the factual and legal argument presented by Mr. Fuller. There is no basis to suggest that Mr. Fuller engaged in bad conduct in filing or arguing the *successful* Motion to Strike.

Second, Mr. Koenig alleges that Mr. Fuller, on behalf of the defendants he represents, is seeking an excessive amount of attorneys' fees in the Statement of Jennifer and Evans Clinchy for Attorney Fees, Costs and Disbursements. In particular, Mr. Koenig complains that defendants have requested \$84,717.25 in fees, costs, and disbursements, when Mr. Koenig's own lawyer (who withdrew early) only charged him \$14,085.20 as part of an apparent hybrid contingency arrangement, and other defense counsel (representing just one defendant and for far less time than Mr. Fuller was required to litigate on behalf of the Clinchy's) petitioned for \$9,339.65. But the Clinchys' request is reasonable, and Mr. Koenig substantially misleads the Bar to suggest that the entire amount sought was for Mr. Fuller's attorney fees. The Clinchys have sought a total of \$84,717.25, which includes the following:

- \$48,559.50: ORS 31.152(3) allows reasonable fees and costs to a defendant who prevails on a special motion to strike. This amount reflected 89.10 hours at \$545.00/hour, and Mr. Fuller completely discounted the time by two other attorneys who assisted.
- \$24,279.75: Consists of a requested 1.5 enhancement/multiplier based on the applicable factors under ORS 20.075(1)(b), (f). *See Beck v. Metro. Prop. & Cas. Ins. Co.*, 2016 WL 4978411 (D. Or. Sep. 16, 2016) (citing *Griffin v. Tri-County Metro. Transp. Dist.*, 112 Or. App. 575, 585 (1992) (approving trial court award of 2.0 multiplier)).
- \$1,188.00: Costs allowed per ORCP 68.
- \$10,690.00: Consists of two prevailing party fees per ORS 20.190, which includes both the \$345 prevailing party fee in circuit court under ORS 20.190(2)(A)(a) as well as the enhanced prevailing party fee of \$5,000 under ORS 20.190(3)—\$5,345 for each defendant.

In support of the Statement of Jennifer and Evans Clinchy for Attorney fees, Costs and Disbursements, Mr. Fuller included a Declaration of Matthew S. Kirkpatrick. Mr. Kirkpatrick opined that Mr. Fuller's hourly rate and hours worked were both reasonable, and that the application of an attorney fee multiplier of 1.5 or higher was appropriate. (I have included both the Statement and the Declaration in Support for you to review). After concluding that Mr. Fuller's

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hourly rate was reasonable, and on the low end when compared to the Oregon State Bar's 2022 Economic Survey, he gave his opinion on the reasonableness of the time expended:

10. In my opinion, the hours expended by the Clinchys' counsel were reasonable for the tasks performed and were reasonably necessary to achieve the successful result in this case. The plaintiff made serious allegations and sought significant damages that required a thorough and robust defense. The allegation of six claims and incorporation of extensive documentary material into the complaint made this case difficult and time consuming to defend. The case and time records reflect that Fuller endeavored to require plaintiff to make his claims more definite and certain, then conducted focused discovery into plaintiff's extensive allegations. This discovery enabled defendants to establish that plaintiff's allegations were unfounded and subject to a special motion to strike. Fuller prepared such motions and the Court determined that plaintiff's allegations lacked support in law and in fact; and therefore dismissed his claims.

11. I am familiar with Mr. Fuller's legal work and know him to pursue the most efficient approach to litigation that will effectively advance his clients' legal interests. My review of this case convinces me that Fuller's work was both efficient and effective in this case in securing the dismissal of plaintiff's claims against his clients.

Mr. Kirkpatrick then opined on the reasonableness of a fee multiplier in a case like this:

14. In my opinion, the fee multiplier of 1.5 requested by the Clinchys or an even higher fee multiplier of up to 2.0 is appropriate in this case. Substantial fee multipliers are necessary in cases like this in order to discourage the use of the courts to harass innocent people like defendants with the threat of ruinous damages based on factually and legally unsupported claims.

Notably, Mr. Koenig did not file any response or objection to the Statement of Jennifer and Evans Clinchy for Attorney fees, Costs and Disbursements. Instead, after Mr. Fuller submitted a proposed supplemental judgment that complied with UTCR 5.100 for an award of fees, costs, and disbursements, Mr. Koenig filed an Objection to the Form of Judgment. He did not, however,

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explain how or why the proposed judgment failed to comply with UTCR 4.100 or was otherwise improper, and, instead, used the objection as a collateral attack on the court's prior order granting defendants' motion to strike. In his Objection, Mr. Koenig complained about what he perceived to be the court's lack of interest and/or tolerance for his oral argument on the motion to strike and referenced this Bar complaint—obviously to attempt to give weight to his argument despite it having no relevance at all to the form of a proposed judgment. Mr. Koenig did not challenge Mr. Fuller's hourly rate, the hours spent on the matter, or the request for a multiplier or the enhanced prevailing party fee.

Mr. Fuller engaged in no misconduct in seeking reasonable attorneys' fees, costs, and disbursements on behalf of his clients, to which they are legally entitled. Mr. Fuller appropriately retained an expert in support, and Mr. Koenig has not pointed to anything specific to demonstrate that the fees were not reasonable or were not otherwise legally authorized. This is the unfortunate consequence of filing frivolous litigation: As Mr. Kirkpatrick noted, the Legislature requires such awards of attorney fees to discourage similar frivolous litigation in the future.

Third, Mr. Koenig claims that Mr. Fuller somehow bullied Mr. Mohan (Mr. Koenig's prior lawyer) by suggesting they enter a stipulated protective order ("SPO"), and Mr. Koenig claims that Mr. Fuller made false accusations about Mr. Koenig's alleged witness tampering. Not so. Mr. Fuller took a routine step in litigation (stipulating to an SPO with opposing counsel), and then properly designed a document under the order. Mr. Fuller had no reason to question Mr. Mohan's authority to enter the SPO, and Mr. Fuller reasonably believed that Mr. Koenig had agreed to the terms of the SPO. For all the reasons provided in my prior September 27, 2023 letter, these allegations have absolutely no merit.¹

Fourth, Mr. Koenig claims that Mr. Fuller was generally "nasty" and engaged in "bullying". For the reasons above and in our prior letter, this is not accurate. Mr. Kirkpatrick also has confirmed that Mr. Fuller's conduct and hours spent on the case was reasonable. There is no question that Mr. Fuller is a tireless advocate for his clients—especially when confronted with frivolous litigation seeking to chill free speech, as was the case here. Mr. Fuller zealously represented his clients, getting the case dismissed in full. Mr. Koenig is understandably upset that

¹ Mr. Koenig also alleges that it was improper for Mr. Fuller to take issue with Mr. Koenig for filing a document in court with his declaration (not under seal) that had been designed under the SPO. Relatedly, Mr. Koenig claims that it was a misrepresentation for Mr. Fuller to assert that Mr. Koenig did not intend to comply with the SPO. This is not true at all. On August 16, 2023, Mr. Koenig wrote: "I never signed the Court's May 25, 2023 protective order and am under no legal obligation from it." There was no other reasonable inference to draw than that Mr. Koenig did not intend to comply with the SPO because he did not sign the order. Then, as Mr. Koenig confirms in his letter to the Bar, "the judge made sure that I understood that the protective order did apply to me moving forward."

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he lost, and that he was called out on his conduct, but that does not mean that Mr. Fuller did anything wrong.

There is no merit to Mr. Koenig's claims, and Mr. Fuller respectfully requests that the Bar dismiss this inquiry. Please let me know if you need any additional information.

Best regards,
BUCHALTER
A Professional Corporation



David J. Elkanich
Shareholder

DJE:sr
Enclosure

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IN THE CIRCUIT COURT FOR THE STATE OF OREGON
FOR MULTNOMAH COUNTY

DAVID KOENIG

Plaintiff

vs

EVANS CLINCHY
JENNIFER CLINCHY and
BRIANNA (LOLA) McKISSEN

Defendants

Case No. 23CV15424

**STATEMENT OF JENNIFER
AND EVANS CLINCHY FOR
ATTORNEY FEES, COSTS
AND DISBURSEMENTS**

STATEMENT SUMMARY

| Amount Type | Statutory Authority | Total |
|-----------------------|----------------------------|--------------------|
| Lodestar | ORS 31.152(3) | \$48,559.50 |
| Enhancement | ORS 20.075 | \$24,279.75 |
| Costs | ORCP 68 | \$1,188.00 |
| Prevailing Party Fees | ORS 20.190 | \$10,690.00 |
| Grand Total | | \$84,717.25 |