

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF THE TRIAL COURT

HAMPDEN, SS

PALMER DISTRICT COURT  
DOCKET NO: 1143 CV 0293

BRIAN JOHNSON  
Plaintiff

vs.

PETER FREI  
Defendant

DEFENDANT'S MOTION FOR ATTORNEY  
FEES AND FOR LEAVE TO FILE LATE

Pursuant to the provisions of G.L. c. 12 §§ 11H & 11I, the defendant respectfully moves for an order of this court requiring the Plaintiff, to pay the defendant's reasonable attorney fees, expenses and litigation costs. Defendant further requests leave to file this request one date late. As stated in the affidavit below, counsel's office sustained a computer crash which delayed finalization of this filing. In support hereof, the Defendant submits the attached Affidavit of Counsel relative to the defendant's reasonable fees and expense.

G.L. c. 12 § 11I explicitly provides for recovery of reasonable attorney fees for any aggrieved person who prevails in an action under the Massachusetts Civil Rights Act (MCRA). In general see, 45 MPS 9.20. A party "prevails" under the MCRA if success is achieved "on a substantial question of law arising out of a common nucleus of facts that give rise to a cause of action under the statute, or on a related companion claim. *Batchelder v. Allied Stores Corp*, 393 Mass. 819, 822 (1985). The same statute provides for an award of "costs" of litigation.

This provision has been construed quite liberally. *Deary v. City of Gloucester*, 789 F. Supp. 61 (D.Mass. 1992), affirmed 9 F.3d 191 (1<sup>st</sup> circuit 1993). Costs include expert witness fees (n.b. \$2,500 in this case), deposition costs, sheriff fees, photography expenses, investigation costs, court costs, parking fees and telephone bills. *Id.* @ 68.

The initial standard for determination of an attorney's fee is the fair market rates for time reasonably spent based on the average hourly rates in the attorney's community for similar work by attorneys having the same number of years of experience, *Torres v. Attorney General*, 391 Mass 1 (1984). Adjustments are thereafter made to reflect appropriate considerations recognized by the SJC. *Society of Jesus v. Boston Landmarks Com.*, 411 Mass 754 (1992)(time and labor; novelty and difficulty; skill required; preclusive affect on attorney's ability to perform other work; attorney's customary fee; whether fee is contingent or fixed; time limitation forced by the litigation; amount involved in the case and results achieved; attorney's experience, reputation and ability; undesirability of being associated with the case, nature and length of the professional relationship between attorney and client; and awards in similar cases).

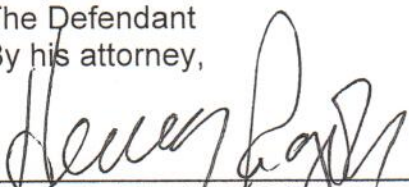
An award of attorney fees should not be reduced to reflect the value of the jury award. *Connolly v. Harrelson*, 33 F. Supp. 2d 92, 96 (D.Mass 1999), affirmed 201 F.3d 426 (1<sup>st</sup> Circuit 1999)(fact that photojournalist recovered only \$1 on claims against celebrity for assault and battery, intentional tort and MCRA violation did not warrant reduction under MCRA); *Davignon v. Clemmey*, 176 F. Supp. 2d 77 (D. Mass. 2001)., amended on reconsideration, vacated in part, appeal dismissed in part 322 F.3d 1,



rehearing and suggestion for rehearing en banc denied. See also, *Norris v. Murphy*, 287 F. Supp. 2d 111 (D. Mass. 2003)(\$1 award qualifies for attorney fees; \$265 hourly rate held reasonable).

WHEREFORE, the defendant respectfully moves this court to order the Plaintiff to pay the defendant's reasonable attorney fee and litigation costs incurred both in the defense of plaintiff's claim and in the prosecution of the defendant's counter claims.

Respectfully Submitted,  
The Defendant  
By his attorney,

  
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March 12, 2013

#### **AFFIDAVIT OF COUNSEL RE: LATE FILING**

Over the weekend preceding this filing, my office suffered a computer malfunction which prevented all data processing, including finalization of this motion and the printing of the billing summary. It was repaired this morning. I do not believe the delay causes prejudice to the parties or court and respectfully request leave to file one day late.

  
Henry L. Rigali, Esq.

#### **Certificate of Service**

I certify a copy of the foregoing document was served upon the Plaintiff by delivery in hand to his attorney, namely, upon Tani E. Saperstein, c/o Saperstein & Saperstein, P.C., 1350 Main Street, 12<sup>th</sup> Floor, Springfield, MA 01103, this 12<sup>th</sup> day of March, 2013.

  
Henry L. Rigali, Esq.