APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Filed: February 22, 2022]

No. 21-35074

D.C. No. 2:18-cv-01385-JCC

ABOLFAZL HOSSEINZADEH,	)
	)
Plaintiff,	)
	)
and	)
	)
MARY ANDERSON,	)
	)
Appellant,	)
	)
v.	)
	)
BELLEVUE PARK HOMEOWNERS ASSOCIATION,	)
	)
Defendant-Appellee,	)
	)
and	)
	)

ADRIAN TEAGUE, in both his individual capacity and representative capacity as director of Bellevue Park Homeowners Association; JENNIFER GONZALEZ, in both her individual capacity and representative capacity as director of Bellevue Park Homeowners Association,

Defendants.

No. 21-35111

D.C. No. 2:18-cv-01385-JCC

ABOLFAZL HOSSEINZADEH,

Plaintiff-Appellant,

v.

BELLEVUE PARK HOMEOWNERS ASSOCIATION; et al.,

Defendants-Appellees.

MEMORANDUM[*]

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted February 9, 2022
Seattle, Washington

Before: BYBEE, BEA, and CHRISTEN, Circuit Judges.

1. Appellant Abolfazl Hosseinzadeh ("Hosseinzadeh") appeals the district court's grant of summary judgment in favor of Appellees for claims of defamation, false light, and various racial and religious discrimination claims. Separately, Appellant Mary Anderson ("Anderson"), formerly counsel for Appellant Hosseinzadeh in the district court proceedings, appeals the district court's award of fees and costs against her. For the following reasons, we affirm the district court in full. The parties are familiar with the facts of the case, so we do not recite them here.

2. Hosseinzadeh asserts a defamation claim against Appellee Adrian Teague ("Teague") concerning an email Teague sent to members of the Bellevue Park Homeowner's Association ("BPHOA") relating to Hosseinzadeh's attempt to control a BPHOA-owned Wells Fargo account while Hosseinzadeh believed himself to be BPHOA Board President. Hosseinzadeh asserts a defamation claim against Appellee Jennifer Gonzales[1] ("Gonzales") concerning an email Gonzales sent to a U.S. Bank representative relating to Hosseinzadeh's attempt to control a BPHOA-owned U.S. Bank account while Hosseinzadeh believed himself to be BPHOA Board President. Both claims fail due to the common interest privilege, which is a defense to defamation. *Valdez-Zontek v. Eastmont Sch.*

[1] Appellee Gonzales's name is misspelled in the caption of this case. We use the spelling she states is correct.

Dist., 225 P.3d 339, 347 (Wash. App. 2010). The common interest privilege "arises when parties need to speak freely and openly about subjects of common organizational or pecuniary interest." *Moe v. Wise*, 989 P.2d 1148, 1154 (Wash. App. 1999). Appellee Teague, a Bellevue Park homeowner and BPHOA member, made the allegedly defamatory statement that Hosseinzadeh had "attempted to defraud US Bank by requesting that the associations' operational funds be transferred out," via an email sent only to the following individuals: members of the BPHOA; BPHOA's attorney; and BPHOA's property manager. Accordingly, this communication falls within the common interest privilege. Appellee Gonzales, a Bellevue Park homeowner and BPHOA member, made the allegedly defamatory statement that Hosseinzadeh had "spent the last 6 months or so trying to obtain access to the HOA funds, and was successful at this at Wells Fargo," via an email to a representative at U.S. Bank concerning a BPHOA account held at U.S. Bank. U.S. Bank has a pecuniary interest in the BPHOA account held under its control, as evidenced by, *inter alia*, the interpleader action U.S. Bank itself filed in the Superior Court of Washington for King County to determine which parties had authority to control the account. Accordingly, this communication falls within the common interest privilege. As Hosseinzadeh presents no evidence that either Teague or Gonzales abused the common interest privilege, summary judgment on these claims was proper.

3. Hosseinzadeh also asserts false light claims against both of Appellees Teague and Gonzales due to the aforementioned emails. "A false light claim arises

when [1] someone publicizes a matter that places another in a false light [2] the false light would be highly offensive to a reasonable person and [3] the actor knew of or recklessly disregarded the falsity of the publication and the false light in which the other would be placed." *Corey v. Pierce Cty.*, 225 P.3d 367, 373 (Wash. App. 2010) (cleaned up). Hosseinzadeh submitted no facts suggesting that either Appellee "knew of or recklessly disregarded the falsity of the publication" of either statement. Accordingly, summary judgment on these claims was proper.

4. Hosseinzadeh asserts discrimination claims against the BPHOA under the Fair Housing Act ("FHA"), 42 U.S.C. § 1982 Civil Rights Act ("CRA"), and the Washington Law Against Discrimination ("WLAD"), relating to two separate allegations of discrimination based on race, national origin, and religion. Hosseinzadeh is an Iranian immigrant, and he professes to be Muslim. These claims are all analyzed under the three-stage burden-shifting framework set forth in *McDonnell Douglas*. *Gamble v. City of Escondido*, 104 F.3d 300, 305 (9th Cir. 1997) (FHA claims); *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 551 (9th Cir. 1980) (CRA claims); *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cnty.*, 404 P.3d 464, 470 (Wash. 2017) (WLAD claims). First, Hosseinzadeh alleges that the BPHOA discriminated against him by failing to provide him with personal records he requested in the normal course of being a Bellevue Park homeowner. The BPHOA concedes that it withheld Hosseinzadeh's documents, although it presented a legitimate reason for doing so, which was that it was required to take precautions when

interacting with Hosseinzadeh, given the parties ongoing, litigious relationship with one another. Hosseinzadeh failed to submit any facts demonstrating that the BPHOA's reason was mere pretext for discrimination. Second, Hosseinzadeh alleges that the BPHOA discriminated against him by invalidating a March 2016 BPHOA Board of Directors election in which Hosseinzadeh was elected. As before, the BPHOA concedes that it did invalidate the March 2016 election, although it again presented a legitimate reason for doing so, which was that the March 2016 election lacked the necessary quorum under BPHOA bylaws. Hosseinzadeh failed to submit any facts demonstrating that the BPHOA's reason was mere pretext for discrimination.[2]

5. Hosseinzadeh asserts Washington Consumer Protection Act ("CPA") claims against the BPHOA arising out of two causes. First, Hosseinzadeh asserts that his WLAD causes of action are *per se* violations of the CPA. Wash. Rev. Code § 49.60.030(3). However, as Hosseinzadeh's WLAD claims fail, so to do any CPA claims based on those claims. Second, Hosseinzadeh asserts that the actions of the BPHOA in placing a lien on Hosseinzadeh's unit (then owned by Hosseinzadeh's sister) and ultimately obtaining a foreclosure decree against his sister constitutes a violation of the CPA. However, these actions were approved by the Superior Court of the State of Washington for King County and

[2] Moreover, Hosseinzadeh was allowed to be properly elected to the Board the following month.

affirmed by the Washington State Court of Appeals,[3] and Hosseinzadeh points to no evidence or caselaw suggesting that Washington State recognizes such judicially sanctioned actions as violations of the CPA. Accordingly, summary judgment on these claims was proper.

6. Appellant Anderson, formerly counsel for Appellant Hosseinzadeh in the district court proceedings, appeals the district court's award of fees and costs against her for failing to meaningful engage with BPHOA in coming to agreement on Federal Rule of Civil Procedure 30(b)(6) topics. We review under an abuse of discretion standard. *Sali v. Corona Reg'l Med. Ctr.*, 884 F.3d 1218, 1221 (9th Cir. 2018). Anderson met-and-conferred with counsel one time in a meeting that failed to achieve any progress in narrowing Anderson's 60 proposed 30(b)(6) topics. Afterwards, Anderson failed to engage with BPHOA on three separate occasions, multiple times telling it nothing more than to "read my letters." A single meet-and-confer does not automatically discharge a party's discovery obligations under Federal Rule of Civil Procedure 37. Moreover, the district court correctly found that several of Anderson's 30(b)(6) topics were flawed. Additionally, none of the three exceptions to Federal Rule of Civil Procedure 37(a)(5)(A)'s mandatory fee payment rule applyin this case. Altogether, the district court did not commit error in awarding fees against Anderson.

AFFIRMED.

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[3] *Bellevue Park Homeowners Association v. Hosseinzadeh*, 8 Wash. App. 2d 1001, 2019 WL 1245634 (Mar. 18, 2019).

APPENDIX B

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C18-1385-JCC

[Filed: January 8, 2021]

ABOLFAZL HOSSEINZADEH,	)
	)
Plaintiff,	)
	)
v.	)
	)
BELLEVUE PARK HOMEOWNERS ASSOCIATION, *et al.*,	)
	)
Defendants.	)
	)

ORDER

This matter comes before the Court on Defendant Adrian Teague's motion for summary judgement (Dkt. No. 157). Having considered the parties' briefing[1] and the relevant record, and finding oral argument

[1] The Court has not considered the portion of Plaintiff's briefing exceeding the page limits prescribed by Local Civil Rule 7(e)(3).

unnecessary, the Court hereby GRANTS Defendant Teague's motion for the reasons explained herein.

I. BACKGROUND

The parties have a long and contentious history regarding management of Bellevue Park and its related Homeowners Association ("BPHOA"). The Court has described the most recent allegations in previous orders and will summarize only allegations relevant to the instant motion here. (*See generally* Dkt. Nos. 34, 143, 144, 150.) Plaintiff brings defamation and false light claims against Defendant Teague based on an e-mail Defendant Teague sent to BPHOA members, BPHOA's law firm, and BPHOA's property manager, which said the following:

> During one of the invalid board meetings, a member was nominated president and has attempted to defraud US Bank by requesting that the association[']s operational funds be transferred out. While I am not an attorney, these attempts to move the association[']s money [are] tantamount to criminal activity and they have not been honored by the bank.

(Dkt. No. 158-2 at 58; *see also* Dkt. No. 1 at 8, 10–12.) Defendant Teague moves for summary judgment on the defamation and false light claims. (Dkt. No. 157.)

II. DISCUSSION

A. Legal Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to

any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those that may affect the outcome of the case, and a dispute about a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986). In deciding whether there is a genuine dispute of material fact, the court must view the facts and justifiable inferences to be drawn from them in the light most favorable to the nonmoving party. *Id.* at 255. In general, "[t]he moving party bears the initial burden of establishing the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party properly supports its motion, the nonmoving party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). Ultimately, summary judgment is appropriate against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

B. Plaintiff's Defamation Claim

A plaintiff must prove four elements to make out a claim for defamation: (1) falsity, (2) an unprivileged communication, (3) fault, and (4) damages. *Mark v. Seattle Times*, 635 P.2d 1081, 1088 (1981). When a defendant in a defamation action moves for summary judgment, the plaintiff has the burden of establishing a prima facie case on all four elements. *LaMon v.*

Butler, 770 P.2d 1027, 1029 (1989). The prima facie case must consist of specific, material facts, rather than conclusory statements, that would allow a jury to find that each element of defamation exists. *Id.* (citing *Herron v. Tribune Pub'g Co.*, 736 P.2d 249, 258 (1987)). Summary judgment plays a "particularly important role" in defamation cases:

> Serious problems regarding the exercise of free speech and free press guaranteed by the First Amendment are raised if unwarranted lawsuits are allowed to proceed to trial. The chilling effect of the pendency of such litigation can itself be sufficient to curtail the exercise of these freedoms.

Mark, 635 P.2d at 1088 (internal quotations omitted).

As described below, Defendant Teague presents unrebutted facts establishing that his communication was, in fact, privileged, while Plaintiff presents insufficient facts to demonstrate otherwise. Therefore, the Court need not consider the remaining elements in granting summary judgment to Defendant Teague on this claim.

1. Common Interest Privilege

A defendant may assert a privilege to defend against liability for a defamatory statement. *Valdez-Zontek v. Eastmont Sch. Dist.*, 225 P.3d 339, 347 (Wash. App. 2010) (citing *Bender v. City of Seattle*, 664 P.2d 492, 504 (Wash. 1983)). The "common interest" privilege arises when "the declarant and the recipient[s] have a common interest in the subject matter of the communication." *Moe v. Wise*, 989 P.2d

1148, 1154 (Wash. App. 1999) (citing *Ward v. Painters' Local Union No. 300*, 252 P.2d 253, 257 (Wash. 1953)). "This privilege generally applies to organizations, partnerships, and associations and 'arises when parties need to speak freely and openly about subjects of common organizational or pecuniary interest.'" *Valdez-Zontek*, 225 P.3d at 347 (quoting *Moe*, 989 P.2d at 1155). "When the facts are not in dispute as to the circumstances of the alleged defamatory communication, the determination whether a privilege applies is a matter of law for the court to decide." *Id.*

Plaintiff concedes that the common interest privilege applies to the e-mail at issue, (*see* Dkt. No. 162 at 23), and the Court agrees. All recipients were either members of BPHOA, its attorney, or its property manager. (Dkt. Nos. 1 at 3, 36 at 2.) They have a common and pecuniary interest in the Board's operations and, correspondingly, the subject of the e-mail. *See Valdez-Zontek*, 225 P.3d at 347. At issue, though, is whether the e-mail represented an abuse of that privilege.

2. Abuse of Privilege

A defendant can abuse a privilege if he "kn[e]w the matter to be false or act[ed] in reckless disregard as to its truth or falsity," i.e., acted with actual malice, or "knowingly publishe[d] the matter to a person to whom its publication [wa]s not otherwise privileged." *Moe*, 989 P.2d at 1157. As to the issue of actual malice, the inquiry is "subjective and focuses on the declarant's belief in or attitude toward the truth of the statement at issue." *Id.* (quoting *Story v. Shelter Bay Co.*, 760 P.2d 368, 373 (Wash. App. 1988)). A plaintiff must establish

abuse of a privilege by clear and convincing evidence. *Id.* (citing *Bender*, 664 P.2d. at 505). At summary judgment, the Court must consider whether there is evidence for a rational juror to support a finding of actual malice by clear and convincing evidence. *Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110, 1134–35 (9th Cir.2003).

Defendant Teague presents significant evidence, namely his own testimony, along with contemporaneous communications, supporting a genuine belief in the claims he made in the e-mail. (*See* Dkt. Nos. 158 at 4–9; 158-1 at 61, 63, 65–68, 70, 77–78, 80, 82; 158-2 at 6, 16–17, 19, 22–23, 31, 40, 49–51, 53–54, 56, 61, 70.) Plaintiff presents no evidence, other than conjecture, regarding Teague's intent or belief in making his statement. This is insufficient to withstand summary judgment.

Plaintiff also alleges that Defendant Teague may have published his message to persons who are no longer members of BPHOA.[2] But Plaintiff does not provide any evidence in support of this allegation and the evidence presented by Defendant Teague, namely the e-mail itself, which contains a list of recipients, and testimony from both Teague and the alleged non-homeowner who received the message, contradicts it. (*See* Dkt. Nos. 158-2 at 58, 159-1 at 13, 163-2 at 67–68.)

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[2] Plaintiff claims that Defendant Teague "does not know exactly all the individuals to whom he sent the email" but, at a minimum, included "Terri Rutherford, who was no longer a homeowner." (Dkt. No. 162 at 14.)

Accordingly, the Court FINDS that Plaintiff presents insufficient evidence to survive a motion for summary judgment on his defamation claim against Defendant Teague.

C. Plaintiff's False Light Claim

Defamation and false light claims are distinct: a false light claim compensates for mental suffering, while a defamation claim compensates for reputational harm. *Life Designs Ranch, Inc. v. Sommer*, 364 P.3d 129, 139 (Wash. App. 2015) (citing *Eastwood v. Cascade Broad. Co.*, 722 P.2d 1295, 1297 (Wash. 1986)). "[A] plaintiff must present a prima facie case of false light to overcome a motion for summary judgment." *Seaquist v. Caldier*, 438 P.3d 606, 616 (Wash. App. 2019). A false light claim arises when (1) someone publicizes a matter that places the plaintiff in a false light, (2) "the false light would be highly offensive to a reasonable person," and (3) "the actor knew of or recklessly disregarded the falsity of the publication and the false light in which the other would be placed." *Corey v. Pierce Cnty.*, 225 P.3d 367, 373 (Wash. App. 2010) (citing *Eastwood*, 722 P.2d at 1297). The final element is dispositive in this instance. As described above, Defendant Teague presents significant evidence of his good-faith belief in the claims he alleged. *See supra* Part II.B.2. Plaintiff presents conjecture and speculation. *Id.* This is insufficient to survive a motion for summary judgment.

Accordingly, the Court FINDS that Plaintiff presents insufficient evidence to survive a motion for summary judgment on his false light claim against Defendant Teague.

III. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant Teague's motion for summary judgment (Dkt. No. 157).

DATED this 8th day of January 2021.

/s/ John C. Coughenour
John C. Coughenour
UNITED STATES DISTRICT JUDGE

APPENDIX C

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C18-1385-JCC

[Filed: January 12, 2021]

ABOLFAZL HOSSEINZADEH,	)
	)
Plaintiff,	)
	)
v.	)
	)
BELLEVUE PARK HOMEOWNERS ASSOCIATION, *et al.*,	)
	)
Defendants.	)

ORDER

This matter comes before the Court on Defendants Bellevue Park Homeowners Association ("BPHOA") and Jennifer Gonzales' motion for summary judgement (Dkt. No. 184). Having considered the parties' briefing[1]

[1] The Court has not considered the portion of Plaintiff's response brief exceeding 24 pages. *See* W.D. Wash. Local Civ. R. 7(e)(3).

and the relevant record, and finding oral argument unnecessary, the Court hereby GRANTS the motion for the reasons explained herein.[2] In addition, the Court GRANTS BPHOA's request (Dkt. No. 210 at 12) to strike Plaintiff's brief (Dkt. No. 204) responding to Defendant Gonzales' joinder notice (Dkt. No. 189) and DENIES Plaintiff's motion (Dkt. No. 212) for leave to file a surresponse.[3]

I. BACKGROUND

Plaintiff has a longstanding dispute with members of Bellevue Park Homeowner's Association, as well as BPHOA itself. The Court has described Plaintiff's allegations in previous orders and will summarize only those relevant to the instant motion. (*See generally* Dkt. Nos. 34, 143, 144, 150.) Plaintiff, who was born in Iran and is Muslim, alleged that BPHOA, both directly and through its representatives, discriminated against Plaintiff because of his national origin and religion and

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[2] Plaintiff, in responding to BPHOA's summary judgment motion, asks the Court to defer consideration of BPHOA's motion pursuant to Federal Rule of Civil Procedure 56(d) until after the Rule 30(b)(6) deposition of BPHOA's representative. (Dkt. No. 207 at 15.) But Plaintiff has not submitted the requisite affidavit identifying what specific facts further discovery would reveal and explaining why those facts preclude summary judgment. *Tatum v. City and Cnty. of San Francisco*, 441 F.3d 1090, 1100 (9th Cir. 2006). Accordingly, the Court declines to defer consideration of BPHOA's summary judgment motion.

[3] Plaintiff already exceeded the page limits afforded by Local Rule 7 in responding to BPHOA's motion to dismiss and has not demonstrated why the evidence and arguments included in this brief could not have been made within his response brief.

made legally-actionable false statements about Plaintiff. (*See generally* Dkt. No. 1.) The Court dismissed some of Plaintiff's claims in previous orders. (*See* Dkt. Nos. 34, 220.) BPHOA and Ms. Gonzales move for summary judgment on Plaintiff's remaining claims. (Dkt. Nos. 184, 189.) Specifically, BPHOA seeks dismissal of Plaintiff's defamation and false light claims, along with Plaintiff's claims resulting from BPHOA's alleged violations of the Fair Housing Act ("FHA"), the Civil Rights Act, Washington's Law Against Discrimination ("WLAD"), and Washington's Consumer Protection Act ("WCPA"). (*See* Dkt. Nos. 184.) Ms. Gonzales also seeks dismissal of the defamation and false light claims against her. (Dkt. Nos. 1, 189.)

II. DISCUSSION

A. Legal Standard

In general, the Court will "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material if it "might affect the outcome of the suit under the governing law," and a dispute of fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[A] party seeking summary judgment . . . bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317,

323 (1986). Once the moving party meets its burden, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The nonmoving party must "show[] that the materials cited do not establish the absence . . . of a genuine dispute" or "cit[e] to particular parts of . . . the record" that show there is a genuine dispute. Fed. R. Civ. P. 56(c)(1). When analyzing whether there is a genuine dispute of material fact, the "court must view the evidence 'in the light most favorable to the opposing party.'" *Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)).

B. Defamation & False Light Claims

The following statement by Ms. Gonzales to a U.S. Bank Vice President serves as the basis for Plaintiff's remaining defamation and false light claims:[4]

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[4] Plaintiff also alleges in deposition testimony that Ms. Gonzales made a second defamatory statement. (Dkt. No. 46 at 122, 125–126.) But this allegation is not contained in Plaintiff's complaint. (*See generally* Dkt. No. 1 at 8–9.) To satisfy the notice pleading requirements of Federal Rule of Civil Procedure 8(a)(2), there must be some reference to the statement in the complaint. *See Asay v. Hallmark Cards, Inc.*, 594 F.2d 692, 699 (8th Cir. 1979) (requiring a plaintiff to plead a defamatory statement with specificity to allow a defendant to "evaluate the possibility of a privilege."); *see also Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1080 (9th Cir. 2008) ("where . . . the complaint does not include the necessary factual allegations to state a claim, raising such claim in a summary judgment motion is insufficient to present the claim to the district court."). Because the complaint

Karen,

I did not hear back from you today, so I wanted to follow-up via email. As I mentioned, a homeowner (actually, he is not even a homeowner-he is a representative for a homeowner) has spent the last 6 months or so trying to obtain access to the HOA funds, and was successful at this at Wells Fargo . . . Our accounts at US Bank are frozen and our other account gone. We have no idea *why* the account is frozen. We have past due bills and no way to pay them. We have no way to collect HOA dues. This is a continuing nightmare for many people. What documentation is need [sic] to restore our account and keep Ab[5] and his cohorts from taking our funds? I can have our HOA attorney contact you and provide you with any documentation you require. I must say, though, this is a very urgent matter for us. We have already lost a lot of money and the longer we don't pay bills, the more fees we incur. We are ready and willing to provide whatever documentation needed so that we can fix this ASAP. I appreciate your help and urgency in this matter.

~Jeni Gonzales

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lacks such a reference, the Court will not consider the alleged statement here.

[5] Plaintiff is commonly referred to as "Ab." (*See, e.g.*, Dkt. No. 185-2 at 4, 5; 185-4 at 5, 8.)

(Dkt. No. 46 at 115 (emphasis in original).) Ms. Gonzales made the statement via e-mail while serving as a BPHOA Director.

1. Defamation

A plaintiff must prove four elements to make out a claim for defamation: (1) falsity, (2) an unprivileged communication, (3) fault, and (4) damages. *Mark v. Seattle Times*, 635 P.2d 1081, 1088 (1981). When a defendant in a defamation action moves for summary judgment, the plaintiff has the burden of establishing a prima facie case on all four elements. *LaMon v. Butler*, 770 P.2d 1027, 1029 (1989). This must consist of specific, material facts rather than conclusory statements that would allow a jury to find that each element of defamation exists. *Id.* (citing *Herron v. Tribune Pub'g Co.*, 736 P.2d 249, 258 (1987)). Summary judgment plays a "particularly important role" in defamation cases:

> Serious problems regarding the exercise of free speech and free press guaranteed by the First Amendment are raised if unwarranted lawsuits are allowed to proceed to trial. The chilling effect of the pendency of such litigation can itself be sufficient to curtail the exercise of these freedoms.

Mark, 635 P.2d at 1088 (internal quotations omitted).

Ms. Gonzales' statement was intended to inform U.S. Bank, one of BPHOA's financial institutions, that Plaintiff was no longer a BPHOA board member and, therefore, was not authorized to conduct business on BPHOA's behalf. (Dkt. No. 184 at 11.) Ms. Gonzales did

so after learning that Wells Fargo, another institution where BPHOA banked, had cashed out a certificate of deposit holding more than $100,000 in BPHOA funds based upon Plaintiff's instructions while he allegedly served as a BPHOA representative. (Dkt. No. 185-5 at 2–3.)

Ms. Gonzales' communication was subject to a common-interest privilege and, absent an abuse of that privilege, is not a basis for a defamation claim. *Valdez-Zontek v. Eastmont Sch. Dist.*, 225 P.3d 339, 347 (Wash. App. 2010) (citing *Bender v. City of Seattle*, 664 P.2d 492, 504 (Wash. 1983)). The "common interest" privilege arises when "the declarant and the recipient[s] have a common interest in the subject matter of the communication." *Moe v. Wise*, 989 P.2d 1148, 1154 (Wash. App. 1999) (citing *Ward v. Painters' Local Union No. 300*, 252 P.2d 253, 257 (Wash. 1953)). This includes communications between members of different organizations engaging in a "routine business transaction," so long as they have a "common pecuniary interest." *Id.* (citing *Williams v. Blount*, 741 P.2d 595, 596 (Wyo. 1987)).

An otherwise privileged communication can be stripped of its privilege if a defendant "kn[e]w the matter to be false or act[ed] in reckless disregard as to its truth or falsity," i.e., acted with actual malice. *Moe*, 989 P.2d at 1157. But a plaintiff must establish this by clear and convincing evidence. *Id.* (citing *Bender*, 664 P.2d. at 505). Therefore, to defeat summary judgment, Plaintiff must present sufficient facts to allow a rational juror to make a finding of actual malice.

Suzuki Motor Corp. v. Consumers Union of U.S., Inc., 330 F.3d 1110, 1134–35 (9th Cir.2003).

Plaintiff presents no facts, or even argument, demonstrating actual malice by Ms. Gonzales in his summary judgment briefing. (Dkt. No. 207 at 25–26.) Instead, he buries his argument in his brief in response to Ms. Gonzales' joinder notice. (Dkt. No. 204 at 17–21.) This appears to be an attempt to avoid the page limits provided in the Local Rules and, on this basis, the Court struck Plaintiff's response to the joinder notice.[6] *See* W.D. Wash Local Civ. R. 7(e)(3).

Even if the Court were to consider Plaintiff's argument in his stricken brief, it is unavailing. First, Plaintiff did not present sufficient facts to demonstrate a genuine dispute worthy of a juror's consideration as to whether Ms. Gonzales demonstrated actual malice—a very high bar. (*See generally id.* at 17–21.) Next, Plaintiff argued that there is no privilege because "US Bank did not have a common interest in the BPHOA account as did Gonzales." (Dkt. No. 204 at 16–17.) This incorrect. BPHOA, U.S. Bank, and Ms. Gonzales, as BPHOA's representative, all had interests in safeguarding the financial assets that BPHOA held at U.S. Bank. Accordingly, the Court GRANTS Defendants' motion for summary judgment on Plaintiff's defamation claim.

2. False Light

Like a defamation claim, a "plaintiff must present a prima facie case of false light to overcome a motion

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[6] *See supra* note 3.

for summary judgment." *Seaquist v. Caldier*, 438 P.3d 606, 616 (Wash. App. 2019). A false light claim arises when (1) someone publicizes a matter that places the plaintiff in a false light, (2) "the false light would be highly offensive to a reasonable person," and (3) "the actor knew of or recklessly disregarded the falsity of the publication and the false light in which the other would be placed." *Corey v. Pierce Cnty.*, 225 P.3d 367, 373 (Wash. App. 2010) (citing *Eastwood*, 722 P.2d at 1297). The final element is dispositive in this instance. As described above, *see supra* Part II.B.1., Plaintiff presents inadequate facts or evidence to suggest that Ms. Gonzales knew of or recklessly disregarded the falsity of her statement, both in Plaintiff's response to Defendants' motion for summary judgment and in Plaintiff's stricken brief in response to Ms. Gonzales' joinder notice. Accordingly, the Court GRANTS Defendants' motion for summary judgment of Plaintiff's false light claim.

C. Discrimination Claims

1. Fair Housing Act

The FHA prohibits discrimination "against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(b). Moreover, it is unlawful to "coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of" rights afforded by the FHA. 42 U.S.C. § 3617. FHA claims must be brought "not later than 2 years after the occurrence or the termination of an alleged discriminatory housing

practice." 42 U.S.C. § 3613(a)(1)(A). Although claims that a defendant engaged in a continuous course of discriminatory conduct may allow a plaintiff to recover for damages that precede the limitations period, "[a] continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation." *See Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981) (citing *Collins v. United Airlines, Inc.*, 514 F.2d 594, 596 (9th Cir. 1975)). Plaintiff alleges that, based upon his religion and national origin, BPHOA intentionally discriminated against him, harassed and intimidated him and his family, and treated him in a discriminatory manner, directly and through its representatives. (*See* Dkt. No. 1 at 12–14.)

The Court analyzes FHA disparate treatment claims under the three-stage framework set forth in the *McDonnell Douglas/Burdine* test. *Gamble v. City of Escondido*, 104 F.3d 300, 305 (9th Cir. 1997). The *McDonnell Douglas* framework first requires a prima facie showing that: "(1) plaintiff is a member of a protected class; (2) plaintiff applied for [a benefit or treatment] and was qualified to receive it; (3) the [benefit or treatment] was denied despite being qualified; and (4) defendant approved [the benefit or treatment] for a similarly situated party during a period relatively near the time plaintiff was denied [the benefit or treatment]." *Id.* After a plaintiff proves a prima facie case, the burden shifts to the defendant to articulate a "legitimate, nondiscriminatory reason for its action." *Id.* Finally, if the defendant has carried its burden, the plaintiff must then prove, by a preponderance of the evidence, that the reason asserted by the defendant is "mere pretext." *Id.*

In his complaint, Plaintiff alleges that the following acts represent disparate treatment: BPHOA's foreclosure of his property; BPHOA's initial refusal to permit him to serve as a member of its Board of Directors in March 2016, which was later reversed; the homeowners' removal of him from the Board in January 2017; and BPHOA's failure to provide him personal records. (Dkt. No. 1 at 6, 12.)[7] The Court previously dismissed Plaintiff's FHA claims based on the foreclosure proceeding as time-barred and need not revisit that ruling. (Dkt. No. 34 at 12.) Similarly, FHA claims relating to Plaintiff's failed March 2016 election to the Board of Directors are also time-barred. (*See* Dkt. No. 186-21 at 2.) As to Plaintiff's January 2017 removal from the Board, this was an action by the Bellevue Park *homeowners* rather than BPHOA. (*See* Dkt. No. 186 at 8–10.) Thus, it cannot form the basis of an FHA claim against BPHOA.

Finally, regarding the personal records, Plaintiff provides evidence suggesting that BPHOA treated him differently than "[o]ther members [who] could see their [personal unit] records just by asking" whereas Plaintiff was told "that he had to give 60 days' advance notice" and "eventually had to hire an attorney to see the records." (Dkt. No. 207 at 13; *see* Dkt. No. 208-25 at

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[7] In subsequent briefing, Plaintiff also alleged that BPHOA's formation of a litigation committee, its failure to indemnify him for his attorney fees related to his Board service, and its refusal to repair property damage to his unit represented disparate treatment. (Dkt. No. 207 at 11–14, 19–22.) Because those allegations were not contained in Plaintiff's operative complaint, the Court need not address them here. *See* Fed. R. Civ. P. 8(a)(2); *supra* note 4.

2–5[8].) This is sufficient to establish a prima facie case. However, while BPHOA's response to Plaintiff's request was not consistent with the governing documents, (*see* Dkt. No. 52-1 at 60, 114), it is not necessarily indicative of disparate treatment *due to national origin or religion*. And here, BPHOA articulated a legitimate, nondiscriminatory reason: the parties' litigation and dispute history required BPHOA to take special care before releasing records to Plaintiff. (Dkt. No. 210 at 11.) Therefore, to survive summary judgment, Plaintiff must put forth *some* evidence to show that these reasons are "mere pretext" and that the true reason for the BPHOA's delay in producing his personal records was a discriminatory motive. Plaintiff fails to meet this burden. While Plaintiff makes allegations and offers evidence of animus based upon his religion or national origin by certain Bellevue Park *homeowners*, he fails to present evidence of animus *by BPHOA*. Instead, what he presents suggests a dysfunctional and litigious relationship between himself and BPHOA.

Accordingly, the Court GRANTS Defendants' motion for summary judgment on Plaintiff's FHA claim.

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[8] BPHOA objects to Plaintiff's reliance on this document as unauthenticated hearsay. (Dkt. No. 210 at 2.) The Court need not address this objection, as it is undisputed that BPHOA's property manager did, in fact, limit Plaintiff's access to the records at issue. (*See generally* Dkt. No. 210 at 10–11.)

2. Civil Rights Act

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982. However, the "Civil Rights Act, like the FHA, was not intended as a springboard to bring neighbor disputes into a federal forum." *Lawrence v. Courtyards at Deerwood Ass'n, Inc.*, 318 F. Supp. 2d 1133, 1150 (S.D. Fla. 2004) (citing *Stackhouse v. DeSitter*, 620 F. Supp. 208, 209, 211 (N.D. Ill.1985)).

To prove racial discrimination under Section 1982, Plaintiff must show that BPHOA acted with an intent to discriminate on the basis of his religion or national origin. *Shaare Tefile Congregation v. Cobb*, 481 U.S. 615, 617 (1987). The statute of limitations for bringing a Section 1982 claim is three years, as determined by reference to the statute of limitations under WLAD. *See Mitchell v. Sung*, 816 F.Supp. 597, 600 (N.D.Cal.1993) ("because section 1982 does not have a statute of limitations, courts apply the applicable state statute of limitations"); Wash. Rev. Code § 4.16.080(2).

In order to prevail on his Section 1982 claim, Plaintiff must establish (1) membership in a protected class; (2) discriminatory intent; and (3) interference with the rights or benefits connected with the ownership of property. *Daniels v. Dillards, Inc.*, 373 F.3d 885, 887 (8th Cir. 2004). It is undisputed that Plaintiff is a member of a protected class. However, to survive a motion for summary judgment, Plaintiff must put forth at least some evidence that BPHOA or its representatives *intentionally* deprived him of his

property rights because of discriminatory animus. *See, e.g.*, *Lawrence*, 318 F.Supp.2d at 1144; *Whisby-Myers v. Kiekenapp*, 293 F. Supp. 2d 845, 850 (N.D. Ill. 2003); *Awkard v. Rammelsberg*, 2019 WL 3308385, slip op. at 3 (D.S.C. 2019). Events occurring within the relevant statute of limitations[9] that are adequately pled by Plaintiff include statements by various homeowners both before and after their service on BPHOA's Board, BPHOA's initial refusal to permit Plaintiff to serve as a member of its Board in March 2016, the homeowner's later removal of Plaintiff from the Board in January 2017; and BPHOA's failure to provide Plaintiff immediate access to his personal records. Actions taken by the homeowners, rather than BPHOA, cannot serve as a basis for a claim against BPHOA. Nor can actions taken by BPHOA Directors predating and postdating their service to BPHOA. Plaintiff's remaining allegations—his failed March 2016 election to BPHOA's Board of Directors and BPHOA's failure to provide certain records—do not represent acts of *intentional* discrimination.

Accordingly, the Court GRANTS Defendants' motion for summary judgment on Plaintiff's Section 1982 claim.

3. Washington Law Against Discrimination

WLAD prohibits discrimination in "any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage,

[9] The Court declines Plaintiff's request to equitably toll the statute of limitations for a Section 1982 claim based on BPHOA's foreclosure action. (*See* Dkt. No. 207 at 25.)

or amusement." Wash. Rev. Code § 49.60.030(1)(b). Additionally, it is unlawful to discriminate based on national origin in the course of real estate transactions. Wash. Rev. Code § 49.60.030(1)(c). The statute of limitations for a WLAD claim is three years. *Antonius v. King County*, 103 P.3d 729, 732 (Wash. 2004).

The following allegedly discriminatory actions by BPHOA occurred within the statute of limitations period:[10] the initial refusal to permit Plaintiff to serve as a member of its Board of Directors in March 2016, which was reversed in April 2016,[11] and the denial of access to his personal records. (Dkt. No. 207 at 23.) Both of which represent alleged acts of disparate treatment, which the Court will again consider under the *McDonnell Douglas* burden-shifting framework. *See Ellorin v. Applied Finishing, Inc.*, 996 F. Supp. 2d 1070, 1092 (W.D. Wash. 2014). As to BPHOA's initial refusal to permit Plaintiff to serve as a member of its Board: Plaintiff has established a prima facie case that he was initially denied membership to the Board. (*See* Dkt. No. 208-8 at 10–11.) However, BPHOA provides a

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[10] As with Plaintiff's Section 1982 claim, *see supra* note 9, the Court declines Plaintiff's request to equitably toll the statute of limitations for a WLAD claim based on BPHOA's foreclosure action. (*See* Dkt. No. 207 at 25.)

[11] Plaintiff also argues that BPHOA's failure to indemnify him for his attorney fees related to his Board service and its refusal to repair property damage to his unit represented WLAD-actionable discriminatory acts. (Dkt. No. 207 at 23.) Because those allegations were not contained in Plaintiff's operative complaint, the Court need not address them here. *See* Fed. R. Civ. P. 8(a)(2); *supra* note 4.

nondiscriminatory reason for its action—a lack of a quorum at the meeting where Plaintiff was elected. Plaintiff fails to present sufficient evidence, in light of his appointment to the Board *the next month*, that the lack of a quorum was merely a pretext. The Court already applied the burden-shifting framework in finding for BPHOA on Plaintiff's Section 1982 claim regarding the limitations that BPHOA imposed on Plaintiff's access to his personal records: *See supra* Part II.C.2. That same analysis applies here. Plaintiff's remaining allegations describe acts that either did not occur within the limitations period or were not undertaken by persons during the time they served as BPHOA representatives. (*See* Dkt. No. 207 at 23.)

Accordingly, the Court GRANTS Defendants' motion for summary judgment on Plaintiff's WLAD claim.

D. Washington Consumer Protection Act Claim

To prove a CPA claim, a plaintiff must establish the following elements: "(1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; [and] (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 533 (Wash. 1986). "A per se unfair trade practice exists when a statute that has been declared by the legislature to constitute an unfair or deceptive act in trade or commerce has been violated." *Merriman v. Am. Guarantee & Liab. Ins. Co.*, 396 P.3d 351, 367 (Wash. Ct. App. 2017). Violation of the WLAD in the course of trade or commerce, as defined in the CPA, is

a *per se* CPA violation. Wash. Rev. Code § 49.60.030(3). The CPA defines "trade or commerce" as "the sale of assets or services, and any commerce directly or indirectly affecting the people of the State of Washington." Wash. Rev. Code § 19.86.010(2). Finally, a CPA claim is subject to a four-year statute of limitations. *O'Neill v. Farmers Ins. Co.*, 125 P.3d 134, 140 (Wash. Ct. App. 2004). The cause of action "accrues and the statute of limitations begins to run when a party has the right to apply to a court for relief." *Shepard v. Holmes*, 345 P.3d 786, 790 (Wash. 2014) (internal quotations omitted).

Alleged examples of disparate treatment that the Court previously considered in finding for BPHOA on Plaintiff's WLAD claim will not be readdressed here. *See supra* Part II.C.3. Plaintiff's remaining allegation relates to the foreclosure proceeding, which Plaintiff asserts resulted in over $100,000 in attorney fees and costs. (Dkt. No. 207 at 23.) In November 2014, BPHOA placed a lien on Plaintiff's unit for unpaid special assessments and thereafter obtained a foreclosure decree. (Dkt. Nos. 186-12 at 2–4, 186-17 at 2–5.) Plaintiff argues that the foreclosure was not only discriminatory, but that it violated the CPA. (Dkt. No. 207 at 23–24.) The Court strains to understand the argument. The liens and foreclosure were permissible under BPHOA's governing documents and ultimately approved by the King County Superior Court. (*See* Dkt. Nos. 52-1 at 16, 62–63; 186-17 at 2–5.) Therefore, they cannot form the basis of a CPA claim.

Accordingly, the Court GRANTS Defendants' motion for summary judgment on Plaintiff's CPA claim.

III. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants BPHOA and Gonzales', motion for summary judgment (Dkt. No. 184), DENIES Plaintiff's Rule 56(d) request (Dkt. No. 207 at 15), GRANTS BPHOA's request to strike Plaintiff's brief responding to Defendant Gonzales' joinder notice (Dkt. No. 210 at 12) and DENIES Plaintiff's motion for leave to file a surresponse (Dkt. No. 212). Plaintiff's remaining claims are dismissed with prejudice.

DATED this 12th day of January 2021.

/s/ John C. Coughenour
John C. Coughenour
UNITED STATES DISTRICT JUDGE

APPENDIX D

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C18-1385-JCC

[Filed: December 30, 2020]

ABOLFAZL HOSSEINZADEH,	)
	)
Plaintiff,	)
	)
v.	)
	)
BELLEVUE PARK HOMEOWNERS ASSOCIATION, *et al.*,	)
	)
Defendants.	)
	)

ORDER

This matter comes before the Court on Defendant Bellevue Park Homeowner's Association's (the "Association") petition for attorney fees and costs (Dkt. No. 174). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS in part and DENIES in part the petition for the reasons described herein.

I. BACKGROUND

In its August 20, 2020 order (Dkt. No. 167), the Court ordered "Plaintiff's counsel to pay the Association's reasonable expenses incurred in bringing its motion for a protective order." (*Id.* at 9; *see* Dkt. No. 69.) In doing so, the Court directed the Association to "provide the Court with an estimate of its reasonable expenses." (*Id.*) In response, the Association filed a petition for fees and an accompanying declaration setting forth its time and expenses incurred in obtaining the protective order. (*See* Dkt. Nos. 174, 175.)

II. DISCUSSION

A. Legal Standard

1. Recoverable Fees

If the Court grants a motion for a protective order, the Court ordinarily "must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Fed. R. Civ. P. 37(a)(5)(A); *see, e.g.*, *Hoglund v. Sher-Ber, Inc.*, 2008 WL 5427793, slip op. at 2 (W.D. Wash. 2008) (awarding Rule 37(a)(5)(A) fees based on work spent "preparing the motion to compel, the supporting declaration, and the proposed order"). The Court may also award a party reasonable attorney fees incurred in preparing a fee application. *See Anderson v. Dir., Office of Workers Comp. Programs*, 91 F.3d 1332, 1325 (9th Cir. 1996).

2. Calculation of Reasonable Fees

The Court employs a two-step process to calculate a reasonable fee award. *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1119 (9th Cir. 2000). First, the Court calculates the lodestar figure, which represents the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Second, the Court determines whether to increase or reduce that figure based on several factors that are not subsumed in the lodestar calculation. *See Kelly v. Wengler*, 822 F.3d 1085, 1099 (9th Cir. 2016); *see also Kerr v. Screen Guild Extras, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975).[1]

A reasonable hourly rate is the prevailing market rate in the community for similar services by a lawyer of reasonably comparable skill, experience and reputation. *Roberts v. City of Honolulu*, 938 F.3d 1020, 1024 (9th Cir. 2019). "The number of hours to be

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[1] The factors set forth in *Kerr* to evaluate the reasonableness of requested fees are:

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

526 F.2d at 70.

compensated is calculated by considering whether, in light of the circumstances, the time could reasonably have been billed to a private client." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008). The Court must exclude from the lodestar amount hours that are not reasonably expended because they are "excessive, redundant, or otherwise unnecessary." *Hensley*, 461 U.S. at 434. There is a "strong presumption" that the lodestar figure is a reasonable fee award. *Dague*, 505 U.S. at 562.

B. The Association's Attorney Fees

The Association is represented in this matter by Andrew Kintsler and Debra Akhbari. (Dkt. No. 175.) In seeking attorney fees pursuant to the Court's previous order, they submitted a declaration detailing time spent on the following tasks: meeting and conferring with Plaintiff's counsel on the scope of Plaintiff's proposed Rule 30(b)(6) topics, preparing a motion for a protective order and reply brief regarding those topics, and preparing a fee petition in response to the Court's protective order. (Dkt. Nos. 175 at 4–5, 175-1 at 2–3.) They also included time spent by a paralegal who assisted in preparing supporting declarations and exhibits. (*Id.*)

Plaintiff's counsel brings three challenges to the fee petition: first, the time spent prior to filing the motion for a protective order, i.e., communicating with Plaintiff's counsel regarding the scope of Rule 30(b)(6) topics, should be excluded; second, clerical time associated with the protective order motion should be excluded; and third, counsels' time spent drafting the

protective order motion and the associated reply was allegedly excessive and duplicative.

First, the Court agrees that the time spent by the Association's counsel prior to filing the motion should not be included in the fee award. The award previously ordered by the Court was limited to the fees associated with actually "making the motion" for a protective order. Fed. R. Civ. P. 37(a)(5)(A); *see Cockburn v. SWS Indus., Inc.*, 2012 WL 1144965, slip op. at 5 n.2 (W.D. Wash. 2012). Therefore, the Court will exclude the 12.6 hours spent by the Association's counsel on activities predating the motion. (*See* Dkt. No. 175-1 at 2.)

Second, while time spent by a paralegal assisting with declarations and exhibits *may* be awarded, that is only true if the time was not clerical in nature. *Wilbur v. City of Mt. Vernon*, 2014 WL 11961980, slip op. at (W.D. Wash. 2014). "[C]lients would reasonably expect that [clerical] tasks would be incorporated into the hourly rate charged by counsel." *Id.* The declaration provided does not explain what the paralegal actually spent time on. Therefore, the Court will exclude the 1.0 hour of paralegal time.

Third, regarding time spent on the motion: Mr. Kintsler spent 7.2 hours and Ms. Akhbari spent 10.1 hours. (Dkt. No. 175-1 at 3.) This involved preparing the motion, a proposed order, a reply brief, and supporting declarations. (*See* Dkt. Nos. 69, 69-1, 82, 83.) The amount of time spent was reasonable, as were

the rates charged,[2] which are in line with those of similarly-situated attorneys. *See, e.g.*, *TVI, Inc. v. Harmony Enterprises, Inc.*, 2019 WL 5213247, slip op. at 2 (W.D. Wash. 2019); *Soderstrom v. Skagit Valley Food Co-op*, 2019 WL 4276643, slip op. at 1 (W.D. Wash. 2019).

Accordingly, the Court FINDS the Lodestar figure for making the motion to be $6,165.00. This represents 17.3 hours in total spent by the Association's counsel on their motion and related filings and 2.5 hours spent by Ms. Kintsler in drafting the fee petition and related filings. The *Kerr* factors do not warrant an increase or a further reduction in the lodestar figure. *See Kelly*, 822 F.3d at 1099; *Kerr*, 526 F.2d at 70. The Court further FINDS that this lodestar figure represents a reasonable award of the Association's attorney fees in making its motion for a protective order and subsequent fee application under Federal Rule of Civil Procedure 37(a)(5)(A).

III. CONCLUSION

For the foregoing reasons, the Association's petition for attorney fees and costs (Dkt. No. 174) is GRANTED in part and DENIED in part. Plaintiff's counsel is ORDERED to pay the Association's attorney fees in the amount of $6,165.00 pursuant to Rule 37(a)(5)(A).

DATED this 30th day of December 2020.

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[2] Mr. Kinstler, the firm's managing partner, charged $375 per hour on this matter and Ms. Akhbari, a senior associate, charged $275 per hour. (Dkt. No. 175-1.)

/s/ John C. Coughenour
John C. Coughenour
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 21-35111

D.C. No. 2:18-cv-01385-JCC
Western District of Washington, Seattle

[Filed: May 13, 2022]

ABOLFAZL HOSSEINZADEH,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
BELLEVUE PARK HOMEOWNERS ASSOCIATION; et al.,	)
	)
Defendants-Appellees.	)
	)

ORDER

Before: BYBEE, BEA, and CHRISTEN, Circuit Judges.

The panel unanimously votes to deny the petition for panel rehearing. Judges Bybee and Bea recommend denying the petition for rehearing en banc. Judge Christen votes to deny the petition for rehearing en banc. The full court has been advised of the petition for

rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc, filed March 8, 2022 [Dkt. No. 45] is DENIED.