

1 Thomas R. Burke (CA State Bar No. 141930)
DAVIS WRIGHT TREMAINE LLP
2 505 Montgomery Street, Suite 800
San Francisco, California 94111
3 Telephone: (415) 276-6500
Facsimile: (415) 276-6599
4 Email: thomasburke@dwt.com

5 Matt Zimmerman (CA State Bar No. 212423)
ELECTRONIC FRONTIER FOUNDATION
6 454 Shotwell Street
San Francisco, CA 94110
7 Telephone: (415) 436-9333
8 Facsimile: (415) 436-9993
Email: mattz@eff.org

9
10 Attorneys for Defendants Council on American-Islamic
Relations, Inc., Council on American Islamic Relations
11 Action Network, Inc., and Council on American Islamic
Relations of Santa Clara, Inc.

DAVIS WRIGHT TREMAINE LLP

12
13 IN THE UNITED STATES DISTRICT COURT
14 THE NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 MICHAEL SAVAGE,
17 Plaintiff,

18 v.

19 COUNCIL ON AMERICAN-ISLAMIC
20 RELATIONS, INC., COUNCIL ON
AMERICAN ISLAMIC RELATIONS ACTION)
21 NETWORK, INC., COUNCIL ON AMERICAN)
ISLAMIC RELATIONS OF SANTA CLARA,)
22 INC., and DOES 3-100,)
23 Defendants.)

) Case No. CV07-06076 SI
)
) **DECLARATION OF MATTHEW**
) **ZIMMERMAN IN SUPPORT OF**
) **MOTION FOR AWARD OF**
) **ATTORNEYS' FEES AND COSTS**

) Date: October 3, 2008
) Time: 9:00 a.m.
) Honorable Susan Illston

24
25
26
27
28

DAVIS WRIGHT TREMAINE LLP

1 1. I am an attorney of record for the Defendants in this matter and a member in good
2 standing of the California State Bar, and am admitted to practice before this Court. I have personal
3 knowledge of the matters stated in this declaration. If called upon to do so, I am competent to
4 testify to all matters set forth herein.

5 2. I am a Senior Staff Attorney at the Electronic Frontier Foundation (“EFF”), which
6 is a nonprofit corporation organized and existing under the laws of The Commonwealth of
7 Massachusetts with its principal place of business in San Francisco, California. I have been a
8 Senior Staff Attorney at EFF since January of 2008 and was a Staff Attorney before that beginning
9 in 2004.

10 3. EFF generally represents clients without charge in precedent-setting litigation of
11 national importance involving novel and complex issues arising from the intersection of new
12 technology with privacy rights, free press and free expression rights, and other civil liberties.
13 Nevertheless, EFF attorneys have hourly rates for purposes of cases in which EFF is entitled to
14 attorneys’ fees.

15 4. My 2007 hourly rate, which is the hourly rate for purposes of this matter, is \$400
16 per hour.

17 5. My rates are well within the prevailing hourly rates in the San Francisco Bay Area
18 for lawyers of comparable education, expertise, and experience who handle matters of the type
19 involved in this litigation.

20 6. Courts have found EFF’s rates to be reasonable in several recent cases. In *Elec.*
21 *Frontier Foundation v. Office of the Director of National Intelligence*, No. 07-05278 SI, 2008
22 U.S. Dist. LEXIS 44050 (N.D. Cal. June 4, 2008), for example, this Court found EFF’s 2007
23 hourly rates to be reasonable. In *Apple v. Does* (Santa Clara Superior Ct., Case No. 1-04-CV-
24 032178), EFF was awarded attorneys’ fees in accordance with their lawyers’ 2006 and 2007 rates.
25 *Id.* In *In re Sony BMG CD Technologies Litigation* (S.D.N.Y. Case No 1:05-cv-09575-NRB),
26 EFF attorneys were paid fees at their hourly rates as part of the settlement of the action in June
27 2006. *Id.* at Dkt. No. 127. In addition, in *OPG v. Diebold*, 337 F. Supp. 2d 1195 (N.D. Cal.
28 2004), EFF attorneys were paid fees pursuant to a settlement after a summary judgment victory at

1 the organization's 2004 hourly rates.

2 7. In 2000, I received my Juris Doctor degree from Columbia University.

3 8. Prior to joining EFF, I worked for the law firm Morrison & Foerster LLP, where I
4 focused on technology and commercial litigation matters, and for the nonprofit advocacy
5 organization The First Amendment Project, where I specialized in privacy and free speech issues.
6 My practice at EFF focuses on civil liberties, free speech, and privacy law and also includes
7 ongoing work in intellectual property law as well as government transparency issues.

8 9. After a careful review of my time records on the case which were recorded
9 contemporaneously as the work was performed, I estimate the minimum number of hours I spent
10 on the answer, motion for judgment on the pleadings, reply in support of the motion for judgment
11 on the pleadings, motion for judicial notice, and the motion for fees as follows:

<u>Date</u>	<u>Task</u>	<u>Hours</u>
4-Jan-08	Call with T. Burke re: co-counsel arrangement and breakdown of representation.	0.2
7-Jan-08	Conference call with T. Burke and client re: [redacted]. Review Complaint.	1.6
8-Jan-08	Review Complaint, outline fair use argument.	1.7
9-Jan-08	Review Complaint, copyright fair use research.	2.3
15-Jan-08	Conference call with T. Burke and client re: [redacted].	1.2
16-Jan-08	E-mail correspondence and telephone call with T. Burke re: case strategy re: upcoming motion, co-counsel arrangement.	1.1
17-Jan-08	Research copyright fair use case law, build on copyright outline for upcoming motion for judgment on the pleadings.	5.4
18-Jan-08	Draft copyright section for motion for judgment on the pleadings.	4.9
19-Jan-08	Research copyright fair use case law, draft copyright section for motion for judgment on the pleadings.	4.3
20-Jan-08	Research copyright fair use case law, draft copyright section for motion for judgment on the pleadings.	5.2
21-Jan-08	Draft and edit copyright section for motion for judgment on the pleadings.	3.7
23-Jan-08	Draft and edit copyright section for motion for judgment on the pleadings.	7.8

DAVIS WRIGHT TREMAINE LLP

1	24-Jan-08	Call with T. Burke and J. Glasser re: copyright section for motion for judgment on the pleadings; correspondence with client and T. Burke about [redacted].	0.8
2			
3	25-Jan-08	Review and edit combined draft of motion for judgment on the pleadings; conference call with T. Burke, J. Glasser, client re: [redacted].	2.9
4			
5	26-Jan-08	Research copyright case law for motion for judgment on the pleadings.	1.7
6			
7	27-Jan-08	Review and edit motion for judgment on the pleadings, answer to complaint; call with T. Burke re: edits to motion for judgment on the pleadings.	6.5
8			
9	28-Jan-08	Review and edit motion for judgment on the pleadings, answer to complaint; call with T. Burke re: edits to motion for judgment on the pleadings.	4.0
10			
11	29-Jan-08	Review and edits to answer to complaint; call and correspondence with T. Burke re: same.	1.7
12			
13	1-Feb-08	Correspondence and call with T. Burke, J. Glasser, and client re: [redacted].	0.6
14			
15	4-Feb-08	Review correspondence from opposing counsel; correspondence with T. Burke, J. Glasser, and client re: [redacted].	0.8
16			
17	14-Feb-08	Review opposition to motion for judgment on the pleadings.	1.3
18			
19	15-Feb-08	Conference call with T. Burke, J. Glasser, and client re: [redacted].	1.5
20			
21	16-Feb-08	Review opposition; research copyright case law; draft reply brief.	4.8
22			
23	17-Feb-08	Draft reply brief.	2.1
24			
25	19-Feb-08	Draft and edit reply brief.	7.2
26			
27	20-Feb-08	Correspondence with T. Burke re: reply brief; edit reply brief.	4.4
28			
	21-Feb-08	Correspondence and call with T. Burke re: reply brief; edit reply brief; draft motion for judicial notice re: copyright registration and declaration in support of.	3.5
	22-Feb-08	Call with T. Burke and client re: [redacted].	0.8
	3-Mar-08	Call with T. Burke re: failure of refusal of opposing counsel to stipulate to the submission of copyrighted work.	0.2
	5-Mar-08	Prepare questions for T. Burke in preparation for motion for judgment on the pleadings oral argument; communication with T. Burke and client about [redacted].	1.0
	6-Mar-08	Correspondence with client re: [redacted].	0.4

DAVIS WRIGHT TREMAINE LLP

1	7-Mar-08	Assist T. Burke to prepare for oral argument; participate at oral argument at counsel's table; discuss [redacted] with client afterwards.	3.5
2			
3	10-Mar-08	Review opposing counsel administrative request to introduce new case; correspondence with T. Burke about same as well as ADR schedule and strategy.	0.7
4			
5	11-Mar-08	Review and edit letter to court regarding opposition to opposing counsel's administrative request.	0.3
6	12-Mar-08	Call with T. Burke re: CMC, initial disclosures.	0.2
7	15-Apr-08	Review transcript of motion for judgment on the pleadings hearing.	0.8
8	25-Jul-08	Review order granting motion for judgment on the pleadings.	1.0
9	29-Jul-08	Call with E. Stahl, K. Opsahl, J. Glasser and client re: [redacted].	0.6
10	12-Aug-08	Call with T. Burke re: fees motion, potential Savage amended complaint.	0.3
11			
12	14-Aug-08	Review opposing counsel's notice that an amended complaint will not be filed; correspondence with T. Burke re: same.	0.5
13	15-Aug-08	Review entry of final judgment; correspondence with T. Burke re: same.	0.2
14			
15	21-Aug-08	Research re: fees under the Copyright Act, outline motion for fees.	1.4
16	22-Aug-08	Research re: fees under the Copyright Act, outline motion for fees.	3.6
17	23-Aug-08	Research re: fees under the Copyright Act, draft motion for fees.	1.7
18	24-Aug-08	Draft motion for fees.	3.8
19	25-Aug-08	Draft and edit motion for fees.	10.4
20	26-Aug-08	Draft and edit motion for fees.	7.2
21	27-Aug-08	Draft and edit motion for fees; correspondence with J. Gratz re: declaration regarding reasonableness of fees; help draft declarations for EFF attorneys in support of fee motion.	11.4
22			
23	28-Aug-08	Edit motion for fees; correspondence with J. Gratz re: declaration regarding reasonableness of fees; help draft declarations for EFF attorneys in support of fee motion.	7.7
24	29-Aug-08	Finalize motion for fees along with accompanying declarations.	2.0
25		=====	====
26			Total 2007 hours: 142.9

27
28 10. In total, I spent no fewer than 142.9 hours on this litigation. At my hourly rates,

DAVIS WRIGHT TREMAINE LLP

1 my total fees are \$ 57,160.00.

2 11. Fred von Lohmann, Kurt Opsahl, Corynne McSherry, and I have spent a reasonable
3 number of hours to answer the complaint, secure a favorable order on the motion for judgment on
4 the pleadings, and request attorneys' fees. The total amount of attorneys' fees EFF seeks to
5 recover is \$ 62,507.50.

6 12. All of the hours expended by EFF lawyers in this matter were directed towards
7 responding to Count 1 (the copyright infringement claim) of Savage's complaint, except for the
8 hours spent assisting CAIR answering the complaint which was generally applicable to both
9 causes of action.

10 13. Attached hereto as Exhibit A is a Declaration of Fred von Lohmann, submitted in
11 support of CAIR's fee motion.

12 14. Attached hereto as Exhibit B is a Declaration of Kurt Opsahl, submitted in support
13 of CAIR's fee motion.

14 15. Attached hereto as Exhibit C is a Declaration of Corynne McSherry, submitted in
15 support of CAIR's fee motion.

16 16. On August 26, 2008, I spoke by phone with both Daniel Horowitz and Ian Boyd,
17 counsel for Savage, regarding the motion for fees. While the parties have not come to an
18 agreement regarding how much (if any) of a fee award Savage would be willing to stipulate to, but
19 future conversations may take place. No other disputes with respect to this motion – besides the
20 substance of this motion – are in dispute.

21 17. Attached hereto as Exhibit D is a true and correct copy of the Complaint in *Talk*
22 *Radio Inc. v. Thomas v. Leavitt et. al.*, No. 03C 3167 (N.D. Ill. filed May 13, 2003), a case brought
23 by Michael Savage's distributor against the operators of a web site for, among other things,
24 allegedly posting excerpts from Savage's show and encouraging readers to contact advertisers to
25 convince them to discontinue their support of his program.

DAVIS WRIGHT TREMAINE LLP

1 18. Attached hereto as Exhibit E is a true and correct copy of the Order of Dismissal
2 (filed December 12, 2003) in *Talk Radio Inc. v. Thomas v. Leavitt et. al.*, No. 03C 3167 (N.D. Ill.
3 filed May 13, 2003).

4 19. Attached hereto as Exhibit F is a true and correct copy of a screen capture of
5 <http://www.michaelsavage.com> taken on March 7, 2008.

6 20. Attached hereto as Exhibit G is a true and correct copy of a screen capture of
7 <http://www.michaelsavage.com> taken on April 8, 2008.

8 22. Attached hereto as Exhibit H is a true and correct copy of a screen capture of
9 <http://michaelsavage.wnd.com/?pageId=136>, taken on May 10, 2008.

10 23. Attached hereto as Exhibit I is a true and correct copy of a screen capture of
11 <http://michaelsavage.wnd.com/?pageId=138>, taken on August 28, 2008.

12 24. Attached hereto as Exhibit J is a true and correct copy of a screen capture of
13 <http://michaelsavage.wnd.com/?pageId=134>, taken on August 28, 2008.

14
15
16
17 I declare under penalty of perjury of the laws of the State of California that the foregoing is
18 true and correct to the best of my knowledge and belief. Executed August 29, 2008 in San
19 Francisco, California.

20
21
22 /s/ Matthew Zimmerman
Matthew Zimmerman