UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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GENERAL CHARLES "CHUCK" YEAGER, (RET.), and GENERAL CHUCK YEAGER FOUNDATION,

Plaintiffs,

v.

CONNIE BOWLIN, ED BOWLIN, DAVID MCFARLAND, AVIATION AUTOGRAPHS, a non-incorporated Georgia business entity, BOWLIN & ASSOCIATES, INC., a Georgia corporation, INTERNATIONAL ASSOCIATION OF EAGLES, INC., an Alabama corporation, SPALDING SERVICES, INC., and DOES 1 through 100, inclusive,

Defendants.
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NO. CIV. 2:08-102 WBS JFM

MEMORANDUM AND ORDER RE: MOTION FOR ATTORNEY'S FEES AND COSTS

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Having prevailed on their motion for summary judgment (See Docket No. 135), defendants Connie and Ed Bowlin, Aviation Autographs, and Bowlin and Associates, Inc. now move for an award

of attorney's fees and costs pursuant to California Civil Code section 3344(a) and section 35(a) of the Lanham Act, 15 U.S.C. 1117(a).

I. Factual and Procedural Background

Plaintiffs General Charles Yeager and the General Chuck Yeager Foundation filed suit against defendants on January 14, 2008, for violations of California Civil Code section 3344 (statutory right of publicity); the Lanham Act, 15 U.S.C. §§ 1051-1129; California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200-17210; and the California False Advertising Act, id. § 17500; as well as common law claims for breach of right to privacy, fraud, breach of contract, unjust enrichment, accounting, and equitable rescission. (Docket No. 1.) Defendants filed a motion to dismiss the original complaint, which was granted with leave to amend. (Docket No. 17). Plaintiffs then filed a First and Second Amended Complaint.

On November 16, 2009, defendants Connie and Ed Bowlin, Aviation Autographs, and Bowlin and Associates, Inc. moved for summary judgment. (Docket No. 103.) The court granted that motion in its entirety and entered judgment in favor of defendants. (Docket No. 135.) Defendants filed a motion to recover their attorney's fees and costs on February 2, 2010. (Docket No. 141.) In response to pervasive block billing in defendants' initial billing statement, on April 23, 2010, the court ordered defendants to submit an amended motion for attorney's fees that did not use block billing. (Docket No. 162.) Defendants submitted an amended motion for attorney's fees and amended billing statement that allocated time for each task

performed on May 3, 2010. (Docket No. 163.)

II. Discussion

Jurisdiction in this action is based on 28 U.S.C. § 1331 (federal question jurisdiction). "In an action where a district court is exercising its subject matter jurisdiction over a state law claim, so long as 'state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed.'" MRO Commc'ns, Inc. v. AT & T Corp., 197 F.3d 1276, 1281 (9th Cir. 1999) (citing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 259 n.31 (1975)). Thus, when a federal court has federal question jurisdiction and exercises supplemental jurisdiction over a state law claim, the court may award attorney's fees under the applicable statute. See MRO Commc'ns, 197 F.3d at 1281-83.

Defendants request attorney's fees and costs under both California Civil Code section 3344(a) and section 35(a) of the Lanham Act. California Civil Code section 3344(a) provides for a mandatory award of attorney's fees and costs to the prevailing party on a section 3344 statutory right of publicity claim. Cal. Civ. Code § 3344(a) ("The prevailing party in any action under this section shall also be entitled to attorney's fees and costs."); Bonner v. Fuji Photo Film, No. Civ. 06-4372 CRB, 2008 WL 410260, at *2 (N.D. Cal. Feb. 12, 2008) (citing Kirby v. Sega of Am., Inc., 144 Cal. App. 4th 47, 62 (2006)).

"[T]he fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably

expended multiplied by the reasonable hourly rate." PLCM Group v. Drexler, 22 Cal. 4th 1084, 1095 (2000). "The reasonable hourly rate is that prevailing in the community for similar work." Id. (citing Margolin v. Reg'l Planning Comm'n, 134 Cal. App. 3d 999, 1004 (1982)). The lodestar may then by adjusted upward or downward "by the court based on factors including . . . (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award." Ketchum v. Moses, 24 Cal. 4th 1122, 1132 (2001). The purpose of adjusting the lodestar is to fix the fee for the action in question at fair market value. Id.

A similar approach is applied under federal law. The court first calculates the lodestar by taking the number of hours reasonably expended by the litigation and multiplying it by a reasonable hourly rate. Fisher v. SJB-P.D. Inc., 214 F.3d 1115, 1119 (9th Cir. 2000) (citing Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)). The court may then adjust the lodestar based on an evaluation of the factors articulated in Kerr v. Screen Extras Guild, Inc., 536 F.2d 67 (9th Cir. 1975) that are not subsumed under the lodestar calculation.[1] Id.

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[1] The factors articulated by the Ninth Circuit in Kerr are: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill required 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

Federal law, unlike California law, does not allow for contingency multipliers. Compare City of Burlington v. Dague, 505 U.S. 557, 567 (1992) with Serano v. Priest, 20 Cal. 3d 25, 48-49 (1977). As a contingency multiplier is not being asked for in this case, the court's analysis of the reasonableness of defendants' attorneys' fee award under either law will largely be identical. Given defendants' emphasis on section 3344(a) and its mandatory nature, the court will begin its analysis of defendants' fee award under California law.

A. Lodestar Calculation

Defendants propose a lodestar figure of $296,673.50. This amount accounts for the hours principally expended by Todd M. Noonan, a partner of the law firm of Stevens, O'Connell & Jacobs LLP ("Stevens O'Connell"), although certain fees generated by other partners, associates, and paralegals are also included. (See Noonan Decl. (Docket No. 145) ¶¶ 7, 14-15; Am. Mot. Attorney's Fees (Docket No. 163) at 3.) This amount does not include approximately $33,745 worth of charges written off by Stevens O'Connell in their bills to defendants. (Id. ¶ 14.) The figure also includes an additional $1,200 for services provided by defendants' Georgia-based counsel, Donald Taliaferro and $12,440 in attorney's fees incurred in connection with the Bill of Costs and defendant's reply brief to plaintiffs' opposition to the motion. (Id. ¶ 58; Am. Mot. Attorney's Fees at 3.)

Plaintiffs object to defendants' request for attorneys'

"undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. Kerr, 526 F.2d at 70.

fees and costs on numerous grounds. Plaintiffs primarily contend that: (1) defendants' amended billing statements should be rejected because they do not have sufficient evidence to support them, (2) Stevens O'Connell's billing rates were unreasonable, (3) much of the work done by Noonan could have done by associates, paralegals, or secretaries at a cheaper cost, and (4) defendants should be denied compensation and have their lodestar amount reduced for billing related to attacks on the Yeagers' character.

1. Adequacy of Amended Billing Statements

Plaintiffs argue that defendants' amended billing statements do not meet defendants' burden of proof because the amended billing statements were not made contemporaneously and lack adequate foundation as to their validity. Although the Ninth Circuit has "expressed a 'preference' for contemporaneous records," it has "never held that they are absolutely necessary." Fischer v. SJB-P.D., Inc., 214 F.3d 1115, 1121 (9th Cir. 2000); see also United States v. $12,248 U.S. Currency, 957 F.2d 1513, 1521 (9th Cir. 1991); United States v. City & County of San Francisco, 748 F. Supp. 1416, 1420 (N.D. Cal. 1990) (noting that the use of reconstructed billing records "is an established practice in this circuit"). "Basing the attorneys' fee award in part on reconstructed records developed by reference to litigation files and other records is not an abuse of discretion." Davis v. City & County of Sacramento, 976 F.2d 1536, 1542 (9th Cir. 1992) (citing Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1473 (9th Cir. 1983)) rev'd in part on other grounds by Davis v. City & County of Sacramento,

984 F.2d 345 (9th Cir. 1993).

Defendants' amended billing statements, which list the amount of time expended on each identified task instead of block billing for all time for a given day, are sufficiently reliable.[2] Noonan, Stevens O'Connell associate Daniel J. Croxall, and paralegal Lucy Kellogg created the amended billing statements by reviewing the original billing statements and then using their personal recollections, customs and practices, and review of the documents and correspondence created on each day to reconstruct the amount of time spent on each task. (Am. Noonan Decl. (Docket No. 166) ¶¶ 3-6.; Croxall Decl. (Docket No. 164) ¶¶ 3, 6; Kellogg Decl. (Docket No. 165) ¶¶ 3, 5-6.) Unlike cases where a party must reconstruct its billing records from scratch, defendants' counsel had the assistance of contemporaneously created block billed records when creating the amended billing statements, thereby increasing the reliability of the reconstructed records. The declarations submitted by defendants' counsel indicate that the amended billing statements were created with reference to defendants' litigation file, the previous bills, and with

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[2] Plaintiffs object to Noonan, Croxall, and Kellogg's declarations, as well as the amended billing statements themselves. Noonan, Croxall, and Kellogg's declarations are all based on their personal knowledge, and describe the methodology used to create the amended billing statements. Noonan also states that he has personal knowledge that the statements are reliable. Noonan, Croxall, and Kellogg utilized documents which were either available to plaintiffs as part of defendants' legal file or privileged to construct the amended billing statements. These documents are properly submitted in support of defendants' fee request. See Fischer, 214 F.3d at 1121 (noting that fee requests based on reconstructed billing statements can be proper). Accordingly, plaintiffs' evidentiary objections on the grounds of lack of foundation, lack of personal knowledge, hearsay, lack of access to documents refreshing recollection, and best evidence are overruled.

information within counsel's personal knowledge. In light of the foregoing facts, the court finds that the amended billing statements are sufficiently reliable and adequate. See Davis, 976 F.2d at 1542; Fleming v. Coverstone, No. 08cv355 WQH (NLS), 2009 WL 764940, at *4 (S.D. Cal. Mar. 18, 2009).

2. Reasonable Rate

A reasonable rate is typically based upon the prevailing market rate in the community for "similar work performed by attorneys of comparable skill, experience, and reputation." Chalmers v. City of Los Angeles, 796 F.2d 1205, 1210 (9th Cir. 1986); see also Blum v. Stenson, 465 U.S. 886, 895-96 n.11 (1984) ("[T]he burden is on the fee applicant to produce satisfactory evidence . . . that the requested rates are in line with those prevailing in the community."); Drexler, 22 Cal. 4th at 1095. The relevant community is generally the forum in which the court sits. Barjon v. Dalton, 132 F.3d 496, 500 (9th Cir. 1997).

Noonan seeks an hourly rate of $400 per hour for his work and the work of fellow partner Brad Benbrook, $305 per hour for associate Dan Croxall's work, and $135 per hour and $155 per hour for the work of paralegals Lucy Kellogg and Greg Nelson, respectively. (Id.) In support of his requested fee rate, Noonan submits the declaration of Glenn W. Peterson, a partner at the firm of Millstone, Peterson & Watts LLP and practicing attorney in Sacramento since the late 1980s. (Peterson Decl. (Docket No. 142) ¶ 2.) Mr. Peterson's practice focuses on complex litigation with a "strong focus on intellectual property, including trademark/copyright infringement and business torts."

(Id. ¶ 3.) Mr. Peterson declares that "[f]or a complex right of publicity/Lanham Act case such as this in federal court . . . a rate of $400 is at the lower end of the market, if not [] below market rate" and that "many lawyers in Sacramento would bill $450 to $500 per hour or more for matters such as this." (Id. ¶ 4.)

Noonan also submits the declaration of Tory Griffin, a partner of the law firm of Downey Brand LLP in Sacramento whose practice includes intellectual property litigation and complex commercial litigation. (Griffin Decl. (Docket No. 143) ¶ 2.) Mr. Griffin declares that "[t]he hourly rates for partners in [his] firm have been established in light of the prevailing rates in the Sacramento area for attorneys with [Downey Brand LLP's] background and experience . . . and general range from $325 to 550 per hour for partner level lawyers." (Id. ¶ 3.) Mr. Griffin concludes that in his opinion, for a matter such as this that "was complex, involved a high profile plaintiff, and numerous state and federal claims . . . an hourly rate of $400 for a lawyer of Mr. Noonan's background and experience represents a reasonable rate." (Id. ¶ 4.)

Noonan lastly submits a declaration from Wesley C.J. Ehlers, a partner at Pillsbury Winthrop Shaw Pittman LLP, who has litigated antitrust, unfair competition, and intellectual property disputes in the Sacramento area. (Ehlers Decl. (Docket No. 144) ¶¶ 2-3.) Mr. Ehlers declares that "[f]or a complex right of publicity/Lanham Act case such as this in federal court . . . a rate of $400 is at the lower end of the market, if not below market rate." (Id. ¶ 5.) Mr. Ehlers further states that a $400 per hour rate "is below the customary rate that Pillsbury

would charge on an hourly basis for an attorney of Mr. Noonan's background and experience for a matter such as this" and that "many lawyers in Sacramento would bill $450 to $500 per hour or more" for this case. (Id.)

Plaintiffs argue that the rates proposed for Noonan, Croxall, and the paralegals are unreasonable because they are higher than the rates accepted as the prevailing hourly rate in Sacramento by courts in this district. Plaintiffs note that in many cases, "[j]udges in this district have consistently found $250 per hour to be a reasonable rate for an experienced attorney working in this community." Belliveau v. Thomson Fin., Inc., No. Civ. 2:05-1175 GEB DAD, 2007 WL 1660999, at *4 (E.D. Cal. June 6, 2007); see also Eiden v. Thrifty Payless Inc., 407 F. Supp. 2d 1165, 1171 (E.D. Cal. 2005) (Americans With Disabilities Act case); Cummings v. Connell, 177 F. Supp. 2d 1079, 1088-89 (E.D. Cal. 2001) (civil rights case), rev'd on other grounds, 316 F.3d 886 (9th Cir. 2003).

However, "in determining the prevailing market rate a district court abuses its discretion to the extent it relies on cases decided years before the attorneys actually rendered their services." Camacho v. Bridgeport Fin., Inc., 523 F.3d 973, 981 (9th Cir. 2008) (citing Bell v. Clackamas County, 341 F.3d 858, 869 (9th Cir. 2003) (holding it was an abuse of discretion to apply market rates more than two years before the work was performed)). "The district court's function is to award fees that reflect economic conditions in the district; it is not to 'hold the line' at a particular rate . . . ." Moreno v. City of Sacramento, 534 F.3d 1106, 1115 (9th Cir. 2008). Accordingly,

while the court can consider fees awarded by judges in this district, those fees are by no means dispositive. See id.

Moreover, the cases cited by plaintiffs for the proposition that $250 per hour is a reasonable rate for Noonan's work in this action are inapposite. Unlike those cases, which involved relatively simple civil rights or Americans with Disabilities Act claims, litigation of this action required specialized knowledge of the complexities of intellectual property law in a suit involving a high profile plaintiff. Defendants' counsel may accordingly be entitled to higher hourly compensation than attorneys who litigate cases that do not require such special skill or expertise.

The cases cited by plaintiffs also for the most part involved attorneys for prevailing plaintiffs who were entitled by statute to recover their fees from the opposing party, but never expected to collect them from their own clients. See, e.g., Eiden, 407 F. Supp. 2d at 1165; Cummings, 177 F. Supp. 2d at 1088-89. In those cases, the attorneys typically have a contingent fee contract in which the client is obligated to pay only if he or she prevails, and then, of course, it is the opposing party rather than the client who pays the fee. In those cases, a plaintiff's attorney cannot represent that the hourly rate proposed to the court is the actual fee that the client would pay. See White v. GMRI, Inc., No. Civ. 04-0620 WBS KJM, 2006 WL 947768, at *2-3 (E.D. Cal. Apr. 12, 2006).

In contrast, in a case such as this the hourly rate billed by the attorney is a rate which the client has agreed to pay, and would in fact pay if it did not prevail. It is also a

rate which the attorney regularly bills and collects from his other clients for similar work. In cases like this the attorney's representation of the going rate for his services is entitled to greater credibility. Accordingly, defendants' willingness to pay Noonan's $400 hourly rate is a strong indication that his rate was a reasonable market rate for this case. See Tire Kingdom, Inc. v. Morgan Tire & Auto, Inc., 253 F.3d 1332, 1337 (11th Cir. 2001).

Defendants have also presented substantial evidence in the form of declarations from experienced litigators in the Sacramento community indicating that partners with comparable levels of experience to Noonan generally charge between $325 and $500 per hour in the Sacramento area for intellectual property disputes and actions under the Lanham Act. (See Griffin Decl. ¶ 3; Peterson Decl. ¶ 4; Ehlers Decl. ¶ 5.) The declarations also aver that a case involving a high profile plaintiff, multiple state and federal claims, and the Lanham Act has a higher level of complexity than an average case in the community, which the court agrees is the case. (See Griffin Decl. ¶ 3; Peterson Decl. ¶ 4; Ehlers Decl. ¶ 5.)

Although the Peterson and Ehlers declarations do not use the exact phrase "prevailing rate" when describing the rates employed by partners with experience levels comparable to Noonan in Sacramento, both declarations indicate that a $400 per hour rate is at the lower end of the Sacramento market, if not below market for a case similar to this one. (Peterson Decl. ¶ 4; Ehlers Decl. ¶ 5.) Furthermore, the Griffin declaration states that Downey Brand LLP's rate of $325 to $500 per hour for a

partner's work is set based on the prevailing rates in Sacramento. Plaintiffs have presented no evidence to the contrary.

In the light of the findings of other courts in this district, the briefs, and the declarations submitted, the court finds that an hourly rate of $400 per hour is an appropriate rate for similar work performed by attorneys of similar experience and skill to Noonan and Benbrook in the Sacramento area.

However, defendants have not provided any evidence to the court to establish what a reasonable rate is for associate attorneys or paralegals in this community. "Judges in this district have repeatedly found that [a] reasonable rate[ ] in this district [is] . . . $150 for associates." Eiden, 407 F. Supp. 2d at 1171; see also Belliveau, 2007 WL 1660999, at *4. Additionally, the paralegal rate "favored in this district" is $75 per hour. Faerfers, 2008 WL 1970325, at *5 (quoting Robinson v. Chand, No. Civ. 2:05-1080 DFL DAD, 2007 WL 1300450, at *2 (E.D. Cal. May 2, 2007)). The court agrees with these conclusions and given that defendants have presented no evidence to the contrary, will limit recovery of associates' fees to a rate of $150 per hour and paralegals' fees to $75 per hour.

Plaintiffs also object to the rates charged for a number of hours billed by Noonan, arguing that many tasks billed at Noonan's partner rate should have been delegated to an associate, paralegal, or secretary. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's client also are not properly billed to one's adversary

pursuant to statutory authority." Hensley, 461 U.S. at 434. Accordingly, the court should "not approve of '[t]he wasteful use of highly skilled and highly priced talent for matters easily delegable to non-professionals or less experienced associates.'" MacDougal v. Catalyst Nightclub, 58 F. Supp. 2d 1101, 1105 (N.D. Cal. 1999) (citing Ursic v. Bethlehem Mines, 719 F.2d 670, 677 (3rd Cir. 1983)). However, when looking at appropriate billing rates for various tasks, the court,

> may not attempt to impose its own judgment regarding the best way to operate a law firm, nor to determine if different staffing decisions might have led to different fee requests. The difficulty and skill level of the work performed, and the result achieved--not whether it would have been cheaper to delegate the work to other attorneys--must drive the district court's decision.

Moreno, 523 F.3d at 1115.

In support of their claim of overbilling, plaintiffs submit a declaration from Gary A. Bresee, a partner of the law firm of Barger & Wollen LLP, who has been involved in litigation for twenty-one years, including litigation and consulting over attorney fee disputes. (See Bresee Decl. (Docket No. 157) ¶¶ 1-2.) Mr. Bresee contends that many tasks undertaken by Noonan would normally be undertaken by an associate and reviewed by a partner, and accordingly that Noonan's fees should be reduced to an associate rate for two-thirds of the 57.2 hours expended on this work. (Id. ¶¶ 16-20, 22.) Such work includes: personally researching venue and personal jurisdiction issues on the motion to dismiss; researching statute of limitations issues; drafting joint status reports, stipulations to extend time, a motion for sanctions, a stipulated protective order, and a motion to strike; drafting discovery documents such as document requests, requests

for admission, and interrogatories; and spending four hours at an off-site document production. (Id. ¶¶ 6-8).

The court is skeptical that the firm model imposed by Mr. Bresee would necessarily have saved defendants any money. Noonan wrote off a substantial number of the hours he performed on tasks for them. Noonan's expertise and independent work on the matter may very well have been more efficient than billing an associate to familiarize themselves with the facts, do the same work over a lengthier amount of time, and then have Noonan review their work. See Moreno, 534 F.3d at 1114-15 ("The district court may have been right that a larger firm would employ junior associates who bill at a lower rate than plaintiff's counsel, but a larger firm would also employ a partner-likely billing at a higher rate than plaintiff's counsel-to supervise them . . . lead counsel can doubtless complete the job more quickly, being better informed as to which documents are likely to be irrelevant, and which need to be examined closely. Modeling law firm economics drifts far afield of the Hensley calculus . . . ."). The court does not believe any of the aforementioned work performed by Noonan is below his skill level or necessitated the use of an associate to keep costs down, even if other firms would not have billed that way and accordingly will not change the billing rate for these tasks.

Plaintiffs further contend that Noonan billed several tasks that could be performed by a paralegal at partner rates. "[P]aralegal work should be billed at an appropriate rate, regardless of the status of the person actually undertaking the work." Robinson, 2007 WL 1300450, at *2. Several tasks

undertaken by Noonan should be billed at a paralegal rate, including his preparation of a discovery timetable (7/22/08), case scheduling with the courtroom deputy (8/21/08), document organization (2/6/09), and correspondence over deposition dates (8/21/09). See id. (including "preparing cover sheets, . . . e-filing documents, . . . scheduling matters, . . . preparing boilerplate documents, and organizing case files" as paralegal tasks). Accordingly, the court will reduce the 3.6 hours spent on these tasks to a $75 per hour rate.

Plaintiffs finally argue that the court should eliminate tasks billed by paralegals that are purely secretarial or clerical from its lodestar calculation. As this court has previously explained, secretarial tasks are generally not recoverable as attorney's fees because "the salaries and benefits paid to support staff are a part of the usual and ordinary expenses of an attorney in his practice, and are properly classified as overhead." Eiden, 407 F. Supp. 2d at 1171 (internal quotation marks omitted); see also Ketih v. Volpe, 644 F. Supp. 1312, 1316 (C.D. Cal. 1986). A number of tasks performed by defendants' paralegals appear to have been clerical or secretarial in nature, such as copying (5/22/08), Bates labeling (5/22/08), and scanning documents (8/5/09). Accordingly, the court will deduct 4.6 hours of paralegal work from its lodestar calculation.

3. Hours Reasonably Expended

Plaintiffs also object to some of the hours expended by defendants' counsel. Plaintiffs first object to defendants billing for time spent by Noonan consulting with fellow partner

Brad Benbrook. While excessive conferencing with other attorneys can be prone to abuse, the amount of conferencing in this case is quite small; only 8.3 hours were billed for conferences over case strategy between Benbrook and Noonan. (See Noonan Decl. ¶¶ 39-41.) Consultation between lawyers can be an invaluable resource, especially in a case staffed as leanly as this one, where Noonan did a substantial portion of the work without assistance of other attorneys to try to minimize costs. The court does not find the level of consultation between Benbrook and Noonan unreasonable, and accordingly will not eliminate Benbrook's hours from the lodestar.

Plaintiffs also object to defendants' request for $1,200 in fees for defendants' Georgia counsel, Donald Taliaferro and for defendants' additional request for $16,440 worth of work filing this fee motion and responding to plaintiffs' opposition. Defendants have not indicated what work Mr. Taliaferro performed for this case, how long he worked, or any billing documentation to that effect. Accordingly, defendants have not met their burden such that the court may grant them attorney's fees for Mr. Taliafero's work. However, plaintiffs have not supplied a valid reason for the court to deny defendants' request for attorney's fees incurred in filing the motion and responding to plaintiffs' opposition. Given the protracted nature of the litigation and the response required by plaintiffs' vigorous opposition to the original fee motion, the additional work performed by defendants' counsel is not unreasonable. Accordingly, the court will grant defendants their request for fees incurred in preparing their original motion and responding to plaintiffs' opposition

thereto.[3]

B. Adjusting the Lodestar Calculation

After calculating the lodestar, the court must decide whether to enhance or reduce the award in the light of particular factors, including the novelty and difficulty of the case, the skill displayed in presenting them, the extent the litigation precluded other employment by the attorneys, and the contingent nature of the fee award. Ketchum, 24 Cal. 4th at 1132. However, "[t]here is no hard-and-fast rule limiting the factors that may justify an exercise of judicial discretion to increase or decrease a lodestar calculation." Thayer v. Wells Fargo Bank, N.A., 92 Cal. App. 4th 819, 834 (2001). While defendants urge that no adjustments are necessary, plaintiffs contend that the lodestar calculation should be reduced because defendants' billings include work on claims that are not eligible for attorney's fees and irrelevant attacks on the Yeagers' character.

While some of the claims worked on by defendant are non-fee bearing claims, under California law a prevailing party may recover attorney's fees on a claim for which attorney's fees are not available if it occurs in a case where a statutory claim that allows for fees is present and the claims are so interrelated that a separate accounting for them is impossible. See Akins v. Enter. Rent-a-Car, 79 Cal. App. 4th 1127, 1133 (2000). This rule has explicitly been applied to section 3344(a) claims. See, e.g. Kriby, 144 Cal. App. 4th at 62 n.7; Love v.

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[3] While the court will award defendants these attorney's fees, it will reduce them in accordance with the hours supplied in the amended billing statements and appropriate prevailing rates identified in this Order.

Mail on Sunday, No. Civ. 05-2298 ABC(PJWX), 2007 WL 2709975, at *3 (C.D. Cal. Sept. 7, 2007). The issues in this action were so intertwined that apportionment between the claims would be nearly impossible. Plaintiffs' claims all related to the same set of facts--namely that defendants allegedly used Yeager's name and likeliness without his permission. Plaintiffs' claims for breach of the common law right to privacy, unfair business practices, and violations of section 3344, the Lanham Act, and the California False Advertising Act were all based upon the same alleged misconduct by the Bowlins.

Plaintiffs' subsequent common law claims for fraud, breach of contract, accounting, unjust enrichment, and equitable rescission were also all intertwined with defendants' defenses to plaintiffs' misappropriation of likeness based claims. One of the elements for a claim for violation of section 3344 is a lack of consent. Cal. Civ. Code § 3344. Plaintiffs' allegations under section 3344 were premised on plaintiffs' lack of consent to sell items with General Yeagers' name and likeness because of contract breaches and fraud on the part of defendants. Plaintiffs could not prove their case without proving that defendants either engaged in the fraudulent conduct or breached an agreement with plaintiffs. Plaintiffs' claims for accounting, unjust enrichment, and equitable rescission were similarly all based upon defendants' alleged misappropriation, breach of contract, and fraud. Finally, defendants are not requesting reimbursement for any attorney's fees relating to research on any counterclaims defendants may have had. Accordingly, the court will not reduce the lodestar amount because plaintiffs' claims

were so intertwined that apportionment between them by defendants is not required.

Plaintiffs also contend that the lodestar should be reduced because defendants' motion for summary judgment contained a number of allegedly irrelevant facts in an attempt to undermine the character of General Yeager and Victoria Yeager and prejudice the court. While some facts in defendants' motion for summary judgment were irrelevant, the suggestion that defendants were attempting to prejudice the court are unfounded. Such concerns may be valid if defendants' statements were made at trial in front of a jury; however, the court has both the obligation and experience to dismiss irrelevant statements and objectively decide the law at summary judgment. Research on the credibility of witnesses is not irrelevant for trial and accordingly was a relevant area of research for defendants. Defendants' research on other court actions involving General Yeager also proved relevant for defendants' statute of limitations defense, since it helped prove that plaintiffs were on notice of claims they had against defendants. (See Order re: Mot. Summary Judgment at 27.) The court does not believe that defendants have attempted to "use the court processes for an improper purpose" and therefore declines to reduce the lodestar amount on that ground.

After reviewing the briefs, depositions, and other evidence before the court, the court finds that given the complexity of the case and defendants' good-faith efforts to avoid and write off costs that the lodestar amount need not be increased or reduced.

C. Costs

Defendants also ask for a number of costs not previously included in their Bill of Costs. Out-of-pocket costs and expenses incurred by an attorney that would normally be charged to a fee-paying client are recoverable as attorney's fees. United Steelworkers of Am. v. Phelps Dodge Corp., 896 F.2d 403, 407 (9th Cir. 1990). Plaintiffs do not object to defendants' request for reimbursement of $1,586.58 for costs associated with counsel's travel to depositions. The court will accordingly award these costs. See Foothill-De Anza Cmty. College Dist. v. Emerich, 158 Cal. App. 4th 11, 30 (2007).

Plaintiffs do object, however, to defendants' request for $2,610.50 in Westlaw charges associated with legal research in the case. A number of courts have allowed electronic legal research to be charged as attorney's fees. See Trustees of Const. Indus. & Laborers Health & Welfare Trust v. Redland Ins. Co., 460 F.3d 1253, 1258-59 (9th Cir, 2006); Cal. Common Cause v. Duffy, 200 Cal. App. 3d 730, 753 (1987). The billing statements submitted to the court indicate the amount defendants' were charged for research at each billing date. Noonan's declaration also indicates that each client has an individualized billing number so that the firm can separate Westlaw costs among clients. (Noonan Decl. ¶ 59.) Accordingly, the court finds plaintiffs' concern that defendants' counsel may be receiving more money than they pay for the service unfounded and will award the Westlaw charges to defendants.

Defendants finally request that $2,740 in costs initially denied by the court as part of their bill of costs be awarded as attorney's fees. Costs rejected as taxable costs in a

bill of costs may be awarded as attorney's fees may be recovered as attorney's fees. See United Steelworkers of Am., 896 F.2d at 407. Plaintiffs have not objected to or provided any reason why the court should deny defendants' request. Accordingly, the court will award the costs previously denied by the court in defendants' bill of costs as attorney's fees.

III. Conclusion

Based on the foregoing discussion, defendants will be awarded the following:

A. Fees

Lodestar Calculation

Person	Rate	Hours	=
Noonan	$400	630.2	$252,080.00
Benbrook	$400	8.3	$3,320.00
Croxall	$150	32.0	$4,800.00
Kellogg/Nelson	$75	131.9	$9,892.50
			$270,092.50

Deductions:

A. Partner Doing Paralegal Work

-$1,170.00

B. Paralegals Doing Clerical Work

-$345.00

Total: $268,677.50

B. Costs

Item	Amount

Deposition Travel	$1,568.58
Westlaw fees	$2,610.50
Previously Denied Costs	$2,740.00

Total: $6,919.08

IT IS THEREFORE ORDERED that defendants' motion for attorney's fees and costs be, and the same hereby is, GRANTED in the amount of $275,596.58.

DATED: June 3, 2010

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE