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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Brandon Lassley,)	
)	
Plaintiff,)	2:14-cv-1677 JWS
)	
vs.)	ORDER AND OPINION
)	
Secura Supreme Ins. Co.,)	[Re: Motion at docket 40]
)	
Defendant.)	
)	

I. MOTION PRESENTED

At docket 39 the court issued the protective order sought by plaintiff Brandon Lassley (“Lassley”) at docket 26, denied the motion to compel filed by defendant Secura Supreme Insurance Company (“Secura”) at docket 29, and ordered Secura to pay Lassley’s reasonable attorney’s fees under Rules 26(c)(3) and 37(a)(5). Lassley’s application for attorney’s fees is at docket 40, supported by the affidavit of Lassley’s counsel, Christopher S. Welker (“Welker”), at docket 40-1. Welker filed a supplemental affidavit at docket 42 that names the attorneys that were listed only by their initials in his previous affidavit, provides their biographies, and includes a copy of Lassley’s

1 contingent fee contract.¹ Secura’s opposition is at docket 43. The court did not seek a
2 reply from Lassley. Oral argument was not requested and would not assist the court.

3
4 **II. BACKGROUND**

5 The background to this case is set out in the court’s order at docket 39 and need
6 not be repeated here. Suffice it to say for present purposes that Lassley is seeking
7 \$15,450 in attorney’s fees for 61.6 total hours of work: 40.2 hours from senior associate
8 Justin Holm (“Holm”) at \$250 per hour (\$10,050); 11.2 hours from partner Welker at
9 \$300 per hour (\$3,360); and a combined 10.2 hours of junior associate time at \$200 per
10 hour (\$2,040)—5.6 hours from Tim Ray (“Ray”) and 4.6 hours from Richard Carpenter
11 (“Carpenter”).² These four attorneys’ 61.6 hours of work culminated in a nine-page
12 protective order motion³ and thirteen-page combined reply in support of that motion and
13 opposition to Secura’s motion to compel.⁴

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15 **III. STANDARD OF REVIEW**

16 Rule 37(a)(5) applies to the award of expenses related to successful protective
17 order motions⁵ and to unsuccessful motions to compel.⁶ It provides that the court must
18 award the prevailing party its “reasonable expenses,” including attorney’s fees, in
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¹Doc. 42-1.

23 ²Doc. 40-1 at 4-13.

24 ³Doc. 26.

25 ⁴Doc. 33.

26 ⁵Fed. R. Civ. P. 26(c)(3); Fed. R. Civ. P. 37(a)(5)(A).

27 ⁶Fed. R. Civ. P. 37(a)(5)(B).

1 making the protective order motion or opposing the motion to compel.⁷ When assessing
2 the reasonableness of a request for attorney’s fees, the court applies a two-part
3 “lodestar” approach.⁸ The court must first determine the “lodestar” figure by multiplying
4 the number of hours reasonably expended by a reasonable hourly rate.⁹ Second, the
5 court “may adjust the ‘presumptively reasonable’ lodestar figure based upon the factors
6 set forth in *Kerr v. Screen Extras Guild, Inc.*,¹⁰ that have not been subsumed in the
7 lodestar calculation.”¹¹ The fee applicant has the burden of submitting evidence to
8 support the hours and rates claimed.¹²

11 IV. DISCUSSION

12 **A. Lodestar Calculation**

13 **1. Hours reasonably expended**

14 “By and large, the [district] court should defer to the winning lawyer’s professional
15 judgment as to how much time he [or she] was required to spend on the case.”¹³ Yet,
16 the district court may “reduce the amount of requested fees to reflect a party’s limited
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18 ⁷Fed. R. Civ. P. 37(a)(5)(B).

19 ⁸See *Stokes v. Microsemi Corp.*, No. CV02-1689-PHX, 2003 WL 22114276, at *2 (D.
20 Ariz. Sept. 10, 2003) (applying the lodestar methodology to Rule 37 sanctions); *Dong Ah Tire &
21 Rubber Co., Ltd. v. Glasforms, Inc.*, No. C06-03359JF(RS), 2009 WL 3617786, at *1 (N.D. Cal.
22 Oct. 29, 2009) (“When, as here, attorneys’ fees are being awarded pursuant to the discovery
sanctions provisions of Federal Rule of Civil Procedure 37, courts generally use the ‘lodestar’
approach to calculate the proper fee amounts.”).

23 ⁹*Intel Corp. v. Terabyte Int’l, Inc.*, 6 F.3d 614, 622 (9th Cir. 1993).

24 ¹⁰526 F.2d 67, 70 (9th Cir. 1975)

25 ¹¹*Intel Corp.*, 6 F.3d at 622.

26 ¹²*Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 945-46 (9th Cir. 2007).

27 ¹³*Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008).

1 degree of success, to account for block billing, or to deduct those hours the court deems
2 excessive.”¹⁴ Secura argues that 61.6 hours is excessive given that the motions did not
3 involve dispositive questions, difficult questions of law, or complicated facts.¹⁵ It
4 specifically challenges the following time entries:
5

6 **a.) Preliminary work**

7 Lassley filed the protective order motion on May 6. Secura objects to time
8 entries in March and April for “preliminary work” that it argues is not related to the
9 motion. The court disagrees; the time Secura identifies was spent “making”¹⁶ the
10 protective order motion:
11

- 12 • Holm and Welker each spent 0.2 hours on March 11 conferring with
13 opposing counsel regarding the disputed document requests.
- 14 • On March 11 Holm spent 0.6 hours working with Welker on “HIPAA
15 authorization and protective order strategy,” and Welker spent 0.3 hours
16 analyzing “objections to defendant’s requests for drug rehabilitation
17 records.”
- 18 • Welker spent 0.6 hours on March 16 conferring with opposing counsel
19 regarding the document requests.
20

23 ¹⁴*Ryan v. Editions Ltd. W., Inc.*, 786 F.3d 754, 763 (9th Cir. 2015) (citations omitted).

24 ¹⁵Doc. 43 at 3-4.

25 ¹⁶Fed. R. Civ. P. 37(a)(5)(A) (“If the motion is granted . . . the court must . . . require the
26 party . . . whose conduct necessitated the motion . . . , the party or attorney advising that
27 conduct, or both to pay the movant’s reasonable expenses incurred *in making the motion*,
including attorney’s fees.”) (emphasis added).

- 1 • On March 16 Holm spent 0.4 hours working with Welker on “motion for
2 protective order strategy,” and Welker spent 0.5 hours researching
3 objections to Secura’s records request.

- 4 • On April 16 Holm spent 0.3 hours working with Welker on “response
5 strategy and protective order.”
6

7 **b.) Legal research**

8 Lassley’s lawyers spent 12 hours conducting legal research for the protective
9 order motion, broken down as follows:

- 10 • Holm (6.5 hours): 1.4 hours researching the standard for protecting drug-
11 treatment records; 2.8 hours researching “patient-physician privilege in
12 Arizona”; 1.4 hours researching the standard for “waiver of medical-
13 records privilege”; and 0.9 hours researching the availability of attorney’s
14 fees.
15
- 16 • Ray (5.3 hours): 1.1 hours researching the District of Arizona and Ninth
17 Circuit standard for requesting a protective order; 1.2 hours researching
18 Rule 26(c); 1.2 hours researching “ability to ask for protective order
19 concerning drug treatment and medical records that will embarrass a
20 party”; 0.2 hours researching Wright & Miller on “federal discovery rules”;
21 0.6 hours researching related caselaw; and 1 hour researching Moore’s
22 Federal Practice guide.
23
- 24 • Welker spent 0.2 hours researching caselaw regarding protective orders
25 related to “rehab records.”
26

27 Lassley’s lawyers spent 4.6 hours conducting research for the reply brief:

- 1 • Welker (1.7 hours): 1.1 hours conducting “research and analysis in
- 2 support of reply,” and 0.6 hours conducting “research and analysis
- 3 regarding reply.”
- 4
- 5 • Carpenter (1.5 hours): 0.4 hours researching the waiver doctrine, and 1.1
- 6 hours researching “discoverability of information sought solely for
- 7 impeachment or character evidence.”
- 8
- 9 • Holm spent 1.1 hours researching the “basis for privilege and
- 10 interpretation of same by federal courts.”
- 11
- 12 • Ray spent 0.3 hours researching the local rules regarding page limits.

13 Secura objects that all of this research “should have taken an associate no more
14 than four or five hours” to complete.¹⁷ The court agrees with Secura that 16.6 total
15 hours of legal research is excessive, but disagrees that anything more than five hours is
16 excessive. The court will reduce the time Holm and Ray spent researching the original
17 protective order motion to 3.5 hours each, down from 6.5 and 5.3 hours respectively,
18 which reflects a reasonable amount of time and accounts for the fact that their research
19 was somewhat redundant.¹⁸ This reduces the senior associate time by 3 hours and the
20 junior associate time by 1.8 hours.

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25 ¹⁷Doc. 43 at 5.

26 ¹⁸*Cf. Norman v. Hous. Auth. of City of Montgomery*, 836 F.2d 1292, 1301 (11th Cir.
27 1988) (“In making adjustments to hours claimed, the district court is charged with deducting for
28 redundant hours.”).

1 **c.) Lassley’s request for an extension of time**

2 On June 10 Lassley filed a one-page stipulated motion for an extension of the
3 deadline for filing his combined reply and opposition.¹⁹ Lassley’s lawyers spent 1.6
4 hours on this motion:

- 5 • On May 28 Welker spent 0.2 hours conferring with opposing counsel
6 about the motion;
- 7 • On June 9 Holm spent 0.7 hours drafting the stipulation and 0.2 hours
8 transmitting it to opposing counsel; Welker spent 0.2 hours revising the
9 stipulation and 0.2 hours conferring with opposing counsel about it; and
- 10 • On June 11 Welker spent 0.1 hours “evaluating” the court’s order granting
11 the parties’ stipulation.
12 the parties’ stipulation.
13 the parties’ stipulation.

14 Secura argues that Lassley should not be able to recover any of this time
15 because it was spent “solely for his attorneys’ convenience” and the motion was “readily
16 agreed to by defense counsel.”²⁰ But, because this motion was reasonable,²¹ the court
17 disagrees with Secura’s contention that Lassley should recover nothing. The court finds
18 that 1.6 hours is excessive, however. The time Holm spent drafting this one-page
19 stipulated motion will be reduced from 0.7 hours to 0.2 hours, and the time Welker spent
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23 ¹⁹Doc. 31.

24 ²⁰Doc. 43 at 6.

25 ²¹See *Holmes v. Astrue*, No. CIV.A. 3:08-1829, 2010 WL 3220085, at *2 (D. S.C. Aug.
26 12, 2010) (“[C]ourts have engaged in a case-by-case analysis of attorney fee requests for time
27 spent filing and reviewing motions for extension of time, looking closely at the circumstances of
28 each request.”).

1 evaluating the court's order granting the motion will be removed. This reduces the
2 senior associate time by 0.5 hours and the partner time by 0.1 hours.

3
4 **d.) Oral argument**

5 Lassley seeks fees for the 0.3 hours of time that Welker spent preparing for an
6 oral argument that was never scheduled. This task was not reasonably necessary; the
7 court will reduce the partner time by 0.3 hours.

8
9 **e.) Double billing**

10 Secura accuses Welker and Holm of double billing for the 0.6 hours that each
11 spent "evaluating" and "analyzing" Secura's reply brief on July 1. "There is nothing
12 inherently unreasonable about a client having multiple attorneys, and they may all be
13 compensated if they are not unreasonably doing the same work and are being
14 compensated for the distinct contribution of each lawyer."²² The court finds that it was
15 not unreasonable for the partner and senior associate working on this case to each
16 review Secura's reply brief.

17
18 **f.) Time spent drafting and revising**

19 Holm and Welker spent a total of 31.9 hours drafting and revising the two at-
20 issue filings, with Holm spending 28.2 hours and Welker spending 3.7. Holm spent 13.2
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27 ²²*Cf. Norman*, 836 F.2d at 1302.

1 hours drafting and revising the initial motion;²³ Welker spent 1.7 hours revising it.²⁴
2 Holm spent 15 hours on the combined reply and opposition brief;²⁵ Welker spent 2
3 hours working on it.²⁶ Secura argues that 31.9 hours is excessive and, at most, the
4 work required 17.5 hours of associate time and five hours of partner time.²⁷ But,
5 because the court cannot say that these hours are inherently excessive, there will be no
6 reduction in time.
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8 **2. Reasonable hourly rates**

9 “Fee applicants have the burden of producing evidence that their requested fees
10 are ‘in line with those prevailing in the community for similar services by lawyers of
11 reasonably comparable skill, experience and reputation.’”²⁸ As Lassley observes, the
12 Ninth Circuit has held that “[a]ffidavits of the plaintiffs’ attorney[s] and other attorneys
13 regarding prevailing fees in the community . . . are satisfactory evidence of the
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17 ²³On April 23 he spent 0.7 hours reading Lassley’s deposition transcript, 3.2 hours
18 drafting the protective order, and 1.4 hours checking citations and quotations. On April 24 he
19 spent 1.6 hours revising the motion and 0.9 hours drafting changes to citations and quotations.
20 On May 4 he spent 0.3 hours drafting an addition to the protective order motion. On May 5 he
21 spent 1.6 hours revising the protective order motion and 0.3 hours drafting the attorney’s fees
22 section. On May 6 he spent 2.6 hours revising motion and 0.6 hours compiling exhibits.

23 ²⁴On May 5 he spent 0.6 hours and on May 6 he spent 1.1 hours revising the motion.

24 ²⁵On June 17 he spent 1.9 hours analyzing Secura’s motion and opposition, 0.7 hours
25 working on a reply strategy with Welker, and 0.8 hours drafting the reply. On June 18 he spent
26 8.8 hours drafting the reply. On June 19 he spent 1.9 hours revising the reply, 0.7 hours
27 checking footnotes and citations, and 0.2 hours finalizing the reply.

28 ²⁶0.5 hours on June 17 and 1.5 hours on June 19.

²⁷Doc. 43 at 6.

²⁸*Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1110 (9th Cir. 2014) (quoting
Camacho v. Bridgeport Fin., Inc., 523 F.3d 973, 980 (9th Cir. 2008)).

1 prevailing market rate.”²⁹ Welker’s affidavit states that the requested hourly
2 rates—\$300 for a partner, \$250 for a senior associate, and \$200 for junior
3 associates—are fair and reasonable based on “his knowledge and experience in this
4 area of the law.”³⁰ The court finds that this evidence is sufficient to shift the burden to
5 Secura to rebut Welker’s affidavit with evidence challenging these rates.³¹
6

7 Secura argues that Lassley’s lawyers’ hourly rates are unreasonable because his
8 lawyers are primarily insurance defense attorneys, and such attorneys “do not bill at the
9 rate of \$300 per hour, or even \$200 per hour.”³² Secura’s counsel states that he “can
10 avow” to these facts, but he does not submit an affidavit or any other evidence to
11 support this avowal. More importantly, Secura fails to offer alternative hourly rates that
12 it believes would be more reasonable, or explain why insurance-defense-counsel rates
13 even apply here where Lassley’s attorneys are not acting as insurance defense lawyers
14 but as plaintiff-side personal injury lawyers. The court finds that Secura has not met its
15 burden of rebuttal, and although Lassley’s lawyers’ hourly rates are on the high end of
16 the spectrum,³³ they are in line with prevailing market rates.
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20 ²⁹*Id.* (quoting *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th
Cir. 1990)).

21 ³⁰Doc. 40-1 at 2.

22 ³¹*Chaudhry*, 751 F.3d at 1110-11 (“Once a fee applicant presents [evidence of the
23 prevailing market rate], the opposing party ‘has a burden of rebuttal that requires submission of
24 evidence . . . challenging the accuracy and reasonableness of the . . . facts asserted by the
prevailing party in its submitted affidavits.’”) (quoting *Camacho*, 523 F.3d at 980).

25 ³²Doc. 43 at 5.

26 ³³*See, e.g., Agster v. Maricopa Cty.*, 486 F. Supp. 2d 1005, 1014-15 (D. Ariz. 2007)
27 (determining that, as of about 8.5 years ago, the prevailing hourly rates in the community were
between \$300 and \$400 for “senior trial lawyers handling large, complex litigation;” \$180 for
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1 **B. Kerr Factor Adjustments**

2 Although “the lodestar figure is ‘presumptively reasonable,’ the court may adjust
3 it upward or downward by an appropriate positive or negative multiplier”³⁴ according to
4 the factors articulated by the Ninth Circuit in *Kerr v. Screen Extras Guild, Inc.*³⁵ The
5 original twelve so-called *Kerr* factors are:
6

- 7 (1) the time and labor required; (2) the novelty and difficulty of the
8 questions; (3) the skill requisite to perform the legal services properly;
9 (4) the preclusion of other employment due to acceptance of the case;
10 (5) the customary fee; (6) the contingent or fixed nature of the fee; (7) the
11 limitations imposed by the client or the case; (8) the amount involved and
12 the results obtained; (9) the experience, reputation, and ability of the
13 attorneys; (10) the undesirability of the case; (11) the nature of the
14 professional relationship with the client; and (12) awards in similar cases.³⁶

15 “At least one factor is no longer valid—whether the fee was fixed or contingent.”³⁷ And
16 many of the remaining factors are “subsumed within the initial calculation of hours
17 reasonably expended at a reasonable rate”³⁸ and “only warrant a departure from the
18 lodestar figure in ‘rare and exceptional cases.’”³⁹

19 _____
20 senior associates and junior partners; and \$160 for all other associates).

21 ³⁴*In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 941-42 (9th Cir. 2011)
(quoting *Cunningham v. Cnty. of Los Angeles*, 879 F.2d 481, 488 (9th Cir.1988)).

22 ³⁵526 F.2d 67, 69-70 (9th Cir.1975).

23 ³⁶*Id.* at 70.

24 ³⁷*Bluetooth*, 654 F.3d at 942 n.7 (citing *Davis v. City and Cnty. of S.F.*, 976 F.2d 1536,
25 1546 (9th Cir. 1992)).

26 ³⁸*Id.* (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 n.9 (1983)).

27 ³⁹*Id.* (quoting *Fischer v. SJB-P.D., Inc.*, 214 F.3d 1115, 1119 n.4 (9th Cir. 2000)).

1 The first three *Kerr* factors—time and labor required; novelty and difficulty of the
2 issues; and skill necessary—are subsumed in the court’s lodestar calculation and
3 warrant no adjustment. Factors five, eight, nine, ten, and eleven—customary fee;
4 amount involved and results obtained; experience reputation and ability; undesirability of
5 the case; and nature of the professional relationship—warrant no adjustment. Factor
6 four (preclusion of other employment) and factor seven (limitations imposed by the
7 client or the case) are not relevant to the circumstances here. Finally, factor twelve,
8 awards in similar cases, is a consideration more appropriate to fee awards based on
9 prevailing in the litigation as a whole. In sum, the *Kerr* factors do not warrant an
10 adjustment.
11
12

13 **V. CONCLUSION**

14 Based on the preceding discussion, the motion at docket 40 is GRANTED.
15 Secura is HEREBY ORDERED to pay Lassley \$14,095.

16 DATED this 25th day of November 2015.
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19 /s/ JOHN W. SEDWICK
20 SENIOR UNITED STATES DISTRICT JUDGE
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