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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA SPORTFISHING
PROTECTION ALLIANCE, a non-
profit corporation,

Plaintiff,

v.

CHICO SCRAP METAL, INC., a
California corporation;
GEORGE W. SCOTT, SR.,
individually and as trustee
of GEORGE W. SCOTT, SR.
REVOCABLE INTER VIVOS TRUST
DATED SEPTEMBER 25, 1995,

Defendants.

No. 2:10-cv-01207-GEB-AC

**ORDER REGARDING PLAINTIFF'S
MOTION FOR INTERIM ATTORNEY FEES**

Plaintiff California Sportfishing Protection Alliance ("Plaintiff") seeks an interim award of \$1,270,064.97 in attorney fees and costs under 33 U.S.C. § 1365(d), contending it is the prevailing party following this Court's Order that granted in part and denied in part each party's summary judgment motion. Additionally, Plaintiff seeks attorney fees for its work on the instant motion. Plaintiff also moves to strike Defendants' errata to their Opposition brief, filed in opposition to the motion *sub judice*.

1 I. LEGAL STANDARD

2 Section 1365(d) states:

3 The court, in issuing any final order in any
4 action brought pursuant to this section, may
5 award costs of litigation (including
6 reasonable attorney and expert witness fees)
7 to any prevailing or substantially prevailing
8 party, whenever the court determines such
9 award is appropriate.

10 The Ninth Circuit has held: "A district court's
11 decision to award attorney fees under . . . the [federal Clean
12 Water Act (]CWA[)] must rest on two findings. First, [the court]
13 must find that the fee applicant is a 'prevailing or
14 substantially prevailing party.' Second, it must find that an
15 award of attorney fees is 'appropriate.' An award of attorney
16 fees may not be appropriate where 'special circumstances' [that
17 would render the award of attorney fees unjust] are found."
18 Resurrection Bay Conservation All. v. City of Seward, Alaska, 640
19 F.3d 1087, 1091 (9th Cir. 2011) (first alteration in original)
20 (footnote, citations, and internal quotation marks omitted).
21 Further, "the usual approach to evaluating the reasonableness of
22 an attorney fee award requires application of the lodestar method
23 and Kerr[¹] factors," the most critical of which "is the degree
24 of success obtained." Id. at 1095 (citations omitted).

25 Under the lodestar method, the district court
26 "multiplies the number of hours the prevailing party reasonably
27 expended on the litigation by a reasonable hourly rate" to
28 calculate the lodestar figure. Ballen v. City of Redmond, 466

1 Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975) (adopting factors to be considered in determining the reasonableness of attorney fees).

1 F.3d 736, 746 (9th Cir. 2006) (citation and internal quotation
2 marks omitted).

3 **II. MOTION FOR INTERIM ATTORNEY FEES**

4 Defendants agree that Plaintiff is a prevailing party.
5 (Mem. of P. & A. in Opp'n to Mot. ("Opp'n") 6:11-13, ECF No.
6 242.) Further, they do not argue that a special circumstance
7 exists. (Opp'n 6:4-13.)

8 **A. Relevant Community**

9 Plaintiff seeks rates "based on the prevailing San
10 Francisco Bay Area market rates for [Plaintiff]'s Bay Area
11 counsel, and the prevailing market rates in Quincy, California
12 for" Plaintiff's Quincy counsel, Robert Tuerck. (Mem. of P. & A.
13 ISO Pl.'s Mot. ("Mot.") 14:12-14, ECF No. 231.) Specifically,
14 Plaintiff seeks the following hourly rates for its counsel:
15 Andrew Packard: \$595; Erik Roper: \$350; Emily Brand: \$333; Laurie
16 Mikkelson: \$350; Megan Truxillo: \$333; John Prager: \$283; Jackson
17 & Tuerck: \$250; and Lozeau Drury LLP: \$700. (Ex. A, ECF No. 233-
18 1.)

19 Defendants do not challenge these rates.

20 The reasonable hourly rate is "calculated according to
21 the prevailing market rates in the relevant legal community,
22 [Blum v. Stenson, 465 U.S. 886, 895 (1984)], and the general rule
23 is that the rates of attorneys practicing in the forum district,
24 here the Eastern District of California-Sacramento, are used."
25 Gates v. Deukmejian, 987 F.2d 1392, 1405 (9th Cir. 1992)
26 (citation omitted). However, out-of-forum "rates . . . may be
27 employed if [Sacramento] counsel was unavailable, either because
28 they are unwilling or unable to perform because they lack the

1 degree of experience, expertise, or specialization required to
2 handle properly the case." Id. at 1405 (citations omitted).
3 "[P]laintiffs must . . . prove the unavailability of counsel
4 **within** the local forum in order to justify the use of outside
5 counsel." Barjon v. Dalton, 132 F.3d 496, 501 (9th Cir. 1997).
6 "Gates allows proof of either unwillingness **or** inability due to
7 lack of experience, expertise, or specialization." Id.

8 Plaintiff's Executive Director Bill Jennings declares:

9 Over the past fifteen years, I have tried to
10 contact attorneys in the Sacramento area to
11 see if they were interested in representing
12 [Plaintiff] CSPA on a contingent basis in
13 enforcing the Clean Water Act. After multiple
14 discussions, I was unable to retain attorneys
15 in Sacramento or the greater Sacramento area
16 that were willing to take this kind of case
17 on a contingent basis. I made similar
18 inquiries in the Stockton area and was
19 unsuccessful there as well. I then contacted
20 several firms in the San Francisco Bay Area
21 to see if they would take the case on a
22 contingent basis. Of the attorneys I
23 contacted, only Mr. Packard's firm, with
24 Lozeau Drury LLP and Jackson & Tuerck
25 agreeing to be co-counsel, were willing and
26 able to do so.

27 (Jennings Decl. ¶ 12, ECF No. 232.)

28 This conclusory statement does not support a finding
that Sacramento counsel was unavailable to represent Plaintiff in
this case. Therefore, the relevant community for purposes of
determining a reasonable hourly rate is Sacramento.

"[T]he burden is on the fee applicant to produce
satisfactory evidence—in addition to the attorney's own
affidavits—that the requested rates are in line with those
prevailing in the [relevant] community for similar services by
lawyers of reasonably comparable skill, experience and

1 reputation." Camacho v. Bridgeport Fin., Inc., 523 F.3d 973, 980
2 (9th Cir. 2008) (quoting Blum, 465 U.S. at 896 n.11). "Affidavits
3 of the plaintiffs' attorney and other attorneys regarding
4 prevailing fees in the community, and rate determinations in
5 other cases, particularly those setting a rate for the
6 plaintiffs' attorney, are satisfactory evidence of the prevailing
7 market rate." United Steelworkers of Am. v. Phelps Dodge Corp.,
8 896 F.2d 403, 407 (9th Cir. 1990).

9 The only evidence Plaintiff presented on Sacramento
10 attorney fee rates follows.

11 Environmental lawyer Frederic Evenson declares:

12 I believe Mr. Packard's firm's market rates
13 of \$595/hour for his work, and \$333-350/hour
14 for the work of his associates with four to
15 six years of experience and specialized
16 environmental training, are well within the
range of market rates charged by attorneys
with similar experience and skill in both the
San Francisco and the Sacramento areas.

17 (Evenson ¶ 12, ECF No. 239.) The fact Evenson uses the "words 'I
18 believe,' however, does not automatically render [his] testimony
19 inadmissible. Rather, the question is whether [his] statements
20 lack[] the requisite proof of personal knowledge." Edwards v.
21 Toys "R" Us, 527 F. Supp. 2d 1197, 1201 (C.D. Cal. 2007)
22 (citation and internal quotation marks omitted). Evenson,
23 however, does not assert he has personal knowledge of Sacramento
24 rates, and instead outlines his personal knowledge concerning San
25 Francisco rates and "across the state" rates. (E.g., Evenson
26 ¶ 9.) Therefore, Evenson's belief is not "satisfactory evidence
27 of the prevailing market rate." United Steelworkers of Am., 896
28 F.2d at 407; see also Jordan v. Multnomah Cty., 815 F.2d 1258,

1 1264 n.9 (9th Cir. 1987) (noting that affiant "did not indicate
2 that the rates sought were comparable to [affiant's] rates, and
3 that plaintiffs did not submit evidence to support [his] belief,"
4 where affiant stated in support of an hourly rate: "I believe
5 that these hourly rates are reasonable and consistent with those
6 being charged by attorneys of comparable skill and experience on
7 comparable matters in this community,")²

8 Environmental lawyer Donald B. Mooney declares: "It is
9 my experience that current market rates for attorneys in the
10 Sacramento area with 21 years of experience is \$450/hour, and
11 attorneys with 4-6 years of experience is in the range of \$245-
12 \$320/hour." (Mooney Decl. ¶ 13, ECF No. 238.) Mooney's
13 declaration does not show that his referenced "experience"
14 qualifies him to opine "about the prevailing rate in [Sacramento]
15 for similarly qualified lawyers working on a similar [Clean Water
16 Act] case." Schwarz v. Sec'y of Health & Human Servs., 73 F.3d
17 895, 908 (9th Cir. 1995).

18 Lozeau declares: "I am aware that the prevailing market
19 rate for associates with comparable experience as associates who
20 worked on this case range . . . from \$225 to \$475 in the
21 Sacramento area." (Lozeau Decl. ¶ 11.)

22 These declarants have not pointedly stated the
23 prevailing rate in this community for a comparable Clean Water

24 ² Similarly, Lozeau asserts in his declaration: "Based on my research and
25 my discussions with other attorneys, I have become familiar with the
26 commercial rates charged by attorneys of my experience and skill in
27 Sacramento, which I **believe** are currently in the range of \$400 to \$700."
28 (Lozeau Decl. ¶ 10, ECF No. 234 (emphasis added).) He also declares: "I also
believe Mr. Packard's firm's market rates of \$595/hour for his work, and \$283-
350/hour for his associates' work, are well within the range of market rates
charged by attorneys with similar experience and skill in both the San
Francisco and the Sacramento areas." (Lozeau Decl. ¶ 13 (emphasis added).)

1 Act litigator. Therefore, Plaintiff fails to carry its burden to
2 demonstrate that the requested rates are reasonable, and its
3 motion for attorney fees is denied.

4 **B. Expert Witness Fees**

5 Plaintiff "seek[s] reimbursement of its expert [witness
6 fees] in the amount of \$116,952.13." (Mot. 15:17-18.) It argues
7 its expert witness fees for certified geologist John Lane are
8 warranted since he "provide[d] expert testimony regarding the
9 connectivity of the Facility's discharges to 'waters of the
10 United States' within the meaning of the C[WA]." (Mot. 21:16-18.)
11 It also argues its expert witness fees for certified geologist
12 Steven Bond are warranted since his testimony was important "to
13 all claims on which Plaintiff [was granted] . . . summary
14 judgment and . . . [defeated] most of the arguments presented by
15 Defendants in the cross-motions for summary judgment." (Mot.
16 23:9-10.) Packard further declares these expert costs "were
17 reasonable and necessary to [Plaintiff]'s diligent prosecution of
18 this action." (Packard Decl. ¶¶ 61-62.)

19 Defendants do not oppose this portion of the motion.

20 Section 1365(d) permits an award of reasonable expert
21 witness fees "to any prevailing or substantially prevailing
22 party."

23 However, the reasonableness of the sought-after expert
24 witness fees cannot be confirmed, since "[P]laintiff ha[s] failed
25 to provide adequate documentation to assess the reasonableness of
26 the claimed amounts." Cabrales v. Cty. of Los Angeles, 864 F.2d
27 1454, 1466-67 (9th Cir. 1988) cert. granted, judgment vacated,
28 490 U.S. 1087 (1989) and opinion reinstated, 886 F.2d 235 (9th

1 Cir. 1989) (“We hold that the court’s denial of these fees on
2 these grounds was not an abuse of discretion.”). Exhibit I,
3 submitted in support of Plaintiff’s request for expert costs,
4 merely lists the experts’ names and total costs. (Ex. I, ECF No.
5 233-8.) Although Packard asserts that the expert costs are
6 reasonable and describes the topics on which the two experts
7 provided testimony, (Packard Decl. ¶¶ 60-63), Plaintiff “does not
8 explain in any real detail how the experts divided their time
9 between various tasks: there are no time entries or invoices from
10 the experts, for example.” Banas v. Volcano Corp., 47 F. Supp. 3d
11 957, 978-79 (N.D. Cal. 2014). Therefore, Plaintiff’s request for
12 expert witness fees is denied.

13 **C. Litigation Expenses (Taxation of Costs)**

14 Plaintiff seeks \$27,523.33 in “litigation expenses
15 normally billed to a client (such as filing fees, court
16 reporters, deposition transcript, copies, postage, courier,
17 travel).” (Packard Decl. ¶ 60.)

18 Local Rule 292 contemplates that a bill of costs is not
19 filed until final judgment is entered, and therefore, the request
20 for litigation expenses (costs) is premature and denied on this
21 basis.

22 **D. Fee Motion**

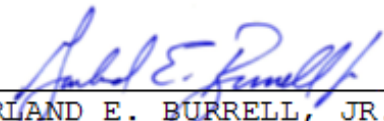
23 Plaintiff seeks an additional \$37,050.20 in fees for
24 time spent on this motion. (Mot. 15:19-20.) Both Packard and
25 Truxillo worked on the fee motion and billed twenty-two and four
26 hours, respectively. (Ex. A.) However, since Plaintiff has not
27 sustained its attorney fee rate request, this portion of the
28 motion is also denied.

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III. CONCLUSION

Plaintiff's motion for interim attorney fees is denied. Further, Plaintiff's motion to strike Defendant's errata to their Opposition brief is denied as moot in light of this decision.

Dated: January 7, 2016



GARLAND E. BURRELL, JR.
Senior United States District Judge