

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

MILILANI GROUP, INC.,  
  
Plaintiff,  
  
v.  
  
O'REILLY AUTOMOTIVE, INC.,  
and CSK AUTO, INC.  
  
Defendants.

No. 2:12-cv-00891 JAM-CKD

**ORDER GRANTING O'REILLY'S MOTION  
FOR ATTORNEY'S FEES**

This matter is before the Court on O'Reilly Automotive, Inc.'s ("O'Reilly") Motion for Attorney's Fees (Doc. #39). Plaintiff Mililani Group, Inc. ("Plaintiff") opposes the motion (Doc. #43) and O'Reilly replied (Doc. #49).<sup>1</sup> For the following reasons, O'Reilly's motion is GRANTED, however, the Court has reduced the total amount of the attorneys fees award.

///  
///  
  
\_\_\_\_\_

<sup>1</sup> This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for August 21, 2013.

1 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

2 This action was originally filed on April 6, 2012, against  
3 O'Reilly and CSK Auto, Inc.'s ("CSK") (collectively  
4 "Defendants"), alleging two causes action, the first for breach  
5 of contract and the second for waste. Defendants moved to  
6 dismiss all claims against O'Reilly and the waste claim; the  
7 Court granted that motion with leave to amend (Doc. #16). After  
8 Plaintiff filed a Second Amended Complaint ("SAC") (Doc. #17),  
9 Defendants once more moved to dismiss all claims against  
10 O'Reilly and the waste claim. On April 3, 2013, the Court  
11 granted Defendants' motion to dismiss with prejudice (Doc. #29).  
12 On June 17, 2013, judgment was entered in favor of O'Reilly  
13 (Doc. ##37, 38).

14 O'Reilly now seeks attorney's fees pursuant to the  
15 prevailing party fee provision found in the written lease  
16 agreement ("Lease") that CSK entered into with Plaintiff for  
17 warehouse and office space in Dixon, California (Doc. #39).  
18 Specifically, O'Reilly seeks \$57,600.50 in attorney's fees,  
19 which includes \$44,282.50 incurred for 15 months of litigation,  
20 \$8,413.00 incurred to bring its motion for attorney's fees, and  
21 \$4,905.00 incurred to research and draft its reply to  
22 Plaintiff's opposition. Reply at 2 n.1.

23  
24 II. OPINION

25 A. Legal Standard

26 Under the American rule, the prevailing litigant ordinarily  
27 is not entitled to collect reasonable attorney's fees from the  
28 losing party. Travelers Casualty & Surety Co. of Am. v. Pacific

1 Gas & Electric Co., 549 U.S. 443, 448 (2007). A statute or  
2 enforceable contract allocating attorney's fees, however, can  
3 overcome this rule. Id. State law governs the enforceability  
4 of attorney's fees in contract provisions. Security Mortgage  
5 Co. v. Powers, 278 U.S. 149, 153 (1928).

6 California law specifically authorizes contractual  
7 agreements for attorney fee awards. Cal. Code Civ. Proc.  
8 § 1021.1. California Civil Code Section 1717 governs the  
9 recovery of attorney's fees pursuant to an underlying contract.  
10 The statute "authorizes reasonable attorney's fees '[i]n any  
11 action on a contract, where the contract specifically provides  
12 that attorney's fees and costs, which are incurred to enforce  
13 the contract, shall be awarded either to one of the parties or  
14 to the prevailing party.'" Barrientos v. 1801-1825 Morton LLC,  
15 583 F.3d 1197, 1216 (9th Cir. 2009) (quoting Cal. Civ. Code §  
16 1717(a)).

17 B. Discussion

18 1. Prevailing Party Fee Provision

19 O'Reilly requests attorney's fees pursuant to California  
20 Civil Code Section 1717 ("Section 1717") because the Lease under  
21 which Plaintiff sued contains a prevailing party attorney's fee  
22 provision. The Lease provides as follows:

23 If either party hereto be made or shall become a party to  
24 any litigation commenced by or against the other involving  
25 the enforcement of any of the rights or remedies of such  
26 party, or arising on account of the default of the other  
27 party in its performance of any of the other party's  
28 obligations hereunder, then the prevailing party in such  
litigation shall receive from the other party all costs  
incurred by such party in such litigation, plus reasonable  
attorney's fees to be fixed by the Court, and together with  
interest thereon at the rate of twelve percent (12%) per  
annum from the date of judgment until paid.

1 Lease, Ex. B to the Declaration of Janlynn R. Fleener ("Fleener  
2 Decl."), Doc. 39-1, at ¶ 23.

3 Plaintiff neither opposes that O'Reilly is entitled to fees  
4 pursuant to the Lease nor disputes that O'Reilly was the  
5 prevailing party on the alter ego claim. See Opp. at 3.  
6 Plaintiff argues that part of the fees claimed here must be  
7 disallowed because they were incurred defending CSK on the waste  
8 claim.

9 Allocation is generally required when the same lawyer  
10 represents one party who is entitled to recover fees and another  
11 party who is not; however, allocation among jointly represented  
12 parties "is not required when the liability of the parties is so  
13 factually interrelated that it would have been impossible to  
14 separate the activities . . . into compensable and  
15 noncompensable time units" Cruz v. Ayromloo, 155 Cal.App.4th  
16 1270, 1277 (2007) (internal quotations and citations omitted).

17 Here, the same counsel represents CSK and O'Reilly, the  
18 waste claim was against both O'Reilly and CSK, and neither party  
19 distinguished between O'Reilly's and CSK's conduct. Defendants'  
20 counsel therefore had to do the same legal research and analysis  
21 for the waste claim for both O'Reilly and CSK in preparing their  
22 case. In addition, in both orders granting Defendants' motions  
23 to dismiss, the Court addressed whether Plaintiff adequately  
24 alleged the elements of the claim without distinguishing between  
25 O'Reilly and CSK because the liability of the parties was  
26 factually interrelated (Doc. ##16, 29). Accordingly, the Court  
27 finds that Defendants' counsel was not obligated to allocate  
28 attorney's fees between CSK and O'Reilly as to the waste claim.

1                   2.    Waste Claim

2                   Plaintiff next argues that O'Reilly is not entitled to any  
3 fees related to the waste claim. O'Reilly contends that fees  
4 should be awarded because the waste claim is inextricably  
5 intertwined with the other claims, it arose out of the contract,  
6 and the attorney's fee provision is broad enough to encompass  
7 the fees.

8                   Section 1717 covers only contract actions where the theory  
9 of the case is breach of contract and the contract sued upon  
10 provides for an award of attorney fees incurred to enforce that  
11 contract. Xuereb v. Marcus & Millichap, Inc., 3 Cal.App.4th  
12 1338, 1341 (1992). However, California Code of Civil Procedure  
13 Section 1021 also allows parties to agree that the prevailing  
14 party in litigation may recover attorney's fees, whether the  
15 litigation sounds in contract or in tort. Miske v. Bisno, 204  
16 Cal.App.4th 1249, 1259 (2012) (citing Xuereb, 3 Cal.App.4th at  
17 1341). Thus, in Miske, the Court held that "where the language  
18 of the agreement broadly applies to 'any dispute' under it, the  
19 attorney's fee clause encompasses any conflict concerning the  
20 effect of the agreement, including a tort claim." Id.; see also  
21 Gil v. Mansano, 121 Cal.App.4th 739, 744 (2004) ("Broad language  
22 in a contractual attorney fee provision may support a broader  
23 interpretation.")(summarizing cases).

24                   "Waste" is considered a tort. 78 Am. Jur. 2d Waste § 1.  
25 Therefore, to recover fees related to the waste claim, the fee  
26 provision in this case must be broad enough to encompass  
27 litigation that sounds in tort. The provision here provides, in  
28 relevant part, that attorney's fees are recoverable when either

1 party becomes "a party to *any litigation* commenced by or against  
2 the other involving the enforcement of *any of the rights or*  
3 *remedies* of such party, or arising on account of the default of  
4 the other party . . . ." Lease at ¶ 23 (emphasis added). "Any  
5 litigation" and "any of the rights or remedies" is equivalent to  
6 the phrase "any dispute," which the court in Miske determined to  
7 be broad language. See Miske, 204 Cal.App.4th at 1259.  
8 Therefore, the language of the attorney's fee provision is broad  
9 enough to cover a tort claim.

10 Accordingly, the Court finds that the attorney's fee  
11 provision covers the waste claim. In addition, the Court need  
12 not address O'Reilly's arguments that the waste claim is  
13 intertwined with the contract claim and that waste claim arises  
14 out of the contract.

15 3. Reasonable Attorney's Fees

16 Plaintiff argues that O'Reilly's attorney's fees are  
17 unreasonable. Plaintiff concedes that O'Reilly's counsel's  
18 rates "may be within the ballpark for the Sacramento region."  
19 Opp. at 4. However, Plaintiff argues that the time expended on  
20 this matter was inflated by the use of multiple attorneys.  
21 O'Reilly argues that it neither overstaffed this case nor over-  
22 billed.

23 Plaintiff refers to two specific examples: First, the  
24 November 29, 2012, invoice, which "sets forth the fees for the  
25 initial motion to strike shows that between September 19, 2012  
26 and September 25, 2012 three separate attorneys spent more than  
27 thirty-three [] billable hours preparing the initial motion to  
28 strike." Opp. at 5. A summer associate also provided

1 assistance. Second, the April 3, 2013, invoice, which has  
2 "identical charges by different attorneys for the same work."  
3 Id.

4 Having more than one attorney working on a task, on its  
5 own, does not show that the hours billed were excessive.  
6 Morales v. Whole Foods Mkt., Inc., C 12-01072 CRB, 2013 WL  
7 3967639, at \*4 (N.D. Cal. July 31, 2013). "[C]ommon sense  
8 dictates that a single task can be broken down over several  
9 discrete time periods and that a number of people might  
10 contribute to one end product." Id. (citation omitted).  
11 Moreover, "the court may permissibly look to the hourly rates  
12 charged by comparable attorneys for similar work, but may not  
13 attempt to impose its own judgment regarding the best way to  
14 operate a law firm, nor to determine if different staffing  
15 decisions might have led to different fee requests." Moreno v.  
16 City of Sacramento, 534 F.3d 1106, 1115 (9th Cir. 2008).  
17 Nevertheless, where a lawyer does unnecessarily duplicative  
18 work, a court may legitimately cut the hours. Id. at 1113.

19 Here, Plaintiff refers to the number of attorneys assigned  
20 to a task. However, without more, the Court may not consider  
21 staffing decisions. In addition, O'Reilly's counsel has  
22 excluded work done by summer associates on research and  
23 analysis. See Fleener Dec. ¶ 12. Plaintiff also argues that  
24 the 33 hours billed for the motion to dismiss is an inordinate  
25 amount of time for the motion. The Court recognizes that  
26 O'Reilly's counsel has attempted to recover only reasonable  
27 attorney's fees by cutting fees before submitting their invoices  
28 to the Court. However, as mentioned above, the Court has an

1 obligation to exclude unnecessary hours. Reviewing the November  
2 29, 2012, invoice, the Court finds that the research and  
3 analysis in support of the motion to dismiss was unnecessarily  
4 duplicative (i.e. two associates conducting similar legal  
5 research). Therefore, the Court deducts \$2,583 from the total  
6 invoice. Similarly, in the May 23, 2013, invoice, the Court  
7 finds that the research, revising, and editing of the reply  
8 brief by two relatively experienced attorneys included hours  
9 performing duplicative tasks that were not necessary to advance  
10 the litigation particularly because the reply brief was only  
11 five pages long and contained similar arguments as in the motion  
12 (Doc. #23). As a result, the Court deducts \$1,276 from the  
13 total invoice.

14 Accordingly, having considered the record as a whole and  
15 the relevant fee award factors, the Court finds that the  
16 reasonable fee award in this case is \$52,741.50.

17 4. O'Reilly's Fees

18 Plaintiff also argues that O'Reilly is not entitled to fees  
19 because CSK is paying for O'Reilly's fees. However, as O'Reilly  
20 argues, Plaintiff has not provided any evidence in support of  
21 this claim or legal support for its conclusion. Accordingly,  
22 the Court finds that a reduction on this ground is not  
23 appropriate.

24 C. Order to Show Cause

25 On August 12, 2013, the Court ordered Plaintiff's counsel  
26 to file a declaration explaining why Plaintiff's opposition was  
27 filed late and why sanctions should not be imposed. Stipulation  
28 and Order, Doc. #5, at 2. Plaintiff's counsel filed a response



1 on August 15, 2013. Response to the Order to Show Cause, Doc.  
2 #48. Good cause having been shown, the Court will not impose  
3 sanctions for filing a late opposition.  
4

5 III. ORDER

6 For the reasons set forth above, the Court GRANTS  
7 O'Reilly's Motion for Attorney's Fees. The Court awards  
8 O'Reilly \$52,741.50.

9 IT IS SO ORDERED.

10 Dated: September 10, 2013

11   
12 \_\_\_\_\_  
13 JOHN A. MENDEZ,  
14 UNITED STATES DISTRICT JUDGE  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28