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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

LIMO HOSTING, et al.,	)	
	)	
Plaintiffs,	)	No. C 08-2474 BZ
	)	
v.	)	<b>ORDER PARTLY GRANTING</b>
	)	<b>DEFENDANT'S MOTION FOR</b>
MIKHAIL FIKS, et al.,	)	<b>ATTORNEYS' FEES</b>
	)	
Defendants.	)	
_____	)	

Following a jury verdict against Limo Hosting, Inc. and Oleg Gridnev (plaintiffs) on all their claims and in favor of defendant and counterclaimant Mikhail Fiks (defendant) in the amount of \$41,000 against plaintiffs for cybersquatting and Bane Act violations, defendant filed this motion seeking attorneys' fees of \$125,548.42.

Defendant first seeks fees for defending the copyright claim. In the Ninth Circuit, "an award of attorney's fees to a prevailing defendant that furthers the underlying purposes of the Copyright Act is reposed in the sound discretion of district courts." Entertainment Research Group, Inc. v. Genesis Creative Group, Inc., 122 F.3d 1211, 1229 (9th Cir.

1 1997) cert. denied, 523 U.S. 1021 (1998), quoting Fantasy,  
2 Inc. v. Fogerty, 94 F.3d 553, 555 (9th Cir. 1996). The  
3 factors to be considered in awarding attorneys' fees to a  
4 prevailing party in a copyright action include "(1) the degree  
5 of success obtained; (2) frivolousness; (3) motivation; (4)  
6 the objective unreasonableness of the losing party's factual  
7 and legal arguments; and (5) the need, in particular  
8 circumstances, to advance considerations of compensation and  
9 deference." Id. at 1229.

10 The jury found that plaintiffs did not have a valid  
11 copyright. Defendant was very successful in this regard and  
12 this factor favors the award of fees.

13 I do not find that plaintiffs' action for copyright  
14 infringement was frivolous. The jury's verdict turned more on  
15 plaintiffs' failure to present competent evidence than it did  
16 on any finding that the claim was baseless, meritless, or  
17 instituted for a vexatious purpose. This factor weighs  
18 against awarding fees.

19 I find that plaintiffs had a mixed motive in this case.  
20 On the one hand, Gridnev testified that he filed this action  
21 because he felt that defendant had wrongfully copied his sales  
22 pitch and website. On the other hand, Gridnev repeatedly  
23 threatened defendant over the phone, which indicates that  
24 plaintiffs' motivation was to harass. I find that this factor  
25 does not favor either party.

26 This copyright claim was not objectively unreasonable.  
27 At trial, Gridnev testified that he had copyrighted his sales  
28 pitch and that he subsequently saw the same sales pitch word-

1 for-word on defendant's website. Though Gridnev ultimately  
2 did not convince the jury that he owned a valid copyright,  
3 this speaks more to a failure to introduce evidence than to  
4 the claim being objectively unreasonable. This favor weighs  
5 against awarding fees.

6 Finally, I do not find that an award is necessary to  
7 further deter plaintiffs. There is no evidence that  
8 plaintiffs have engaged in similar lawsuits. Plaintiffs lost  
9 on all of their claims and now have a judgment against them  
10 for violating the Bane Act. That judgment, in addition to an  
11 award of attorneys' fees under the Bane Act, will adequately  
12 deter plaintiffs and compensate defendant. This factor weighs  
13 against an award of fees. In sum, the factors do not weigh in  
14 favor of an award under the Copyright Act. In addition, as  
15 discussed below, Fiks failed to break out the time he spent in  
16 defending the copyright claim.

17 Fiks also seeks fees for succeeding on his Bane Act  
18 counterclaims. Under Section 52.1(h) of the California Civil  
19 Code, a prevailing party in a Bane Act case may be awarded  
20 attorneys' fees, at the discretion of the trial court. Moran  
21 v. Oso Valley Greenbelt Ass'n, 117 Cal.App.4th 1029, 1034  
22 (2004). I find that defendant is entitled to attorneys' fees  
23 for prosecuting his Bane Act claims. The jury found that  
24 plaintiffs' actions were sufficiently egregious so as to  
25 warrant punitive damages. Plaintiffs in their opposition do  
26 not contend that defendant is not entitled to attorneys' fees  
27 for the Bane Act claim. Instead, they contend that the fee  
28 request is unsubstantiated and unreasonable. This argument

1 has some merit.

2 Under federal and state law, a party seeking fees "bears  
3 the burden of establishing entitlement to an award and  
4 documenting the appropriate hours expended and hourly rates."  
5 Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). A litigant  
6 who did not succeed on all claims should produce records  
7 sufficient to provide the court with "'a proper basis for  
8 determining how much time was spent on particular claims'".  
9 *Id.* at 437, fn. 12. The Court may properly reduce  
10 compensation on account of any failure to maintain appropriate  
11 time records. *Id.* at 438, fn. 13; accord, ComputerXpress,  
12 Inc. v. Jackson, 93 Cal.App.4th 993, 1020 (2001).

13 Here, the Court's ability to rule on his motion is  
14 obstructed by Fiks' failure to allocate the fees he seeks  
15 between his defense of the copyright claim; his defense of  
16 plaintiffs' other claims for which defendant has no fee claim,  
17 or is not asserting one; his prosecution of the Bane Act  
18 counterclaim; his prosecution of the cybersquatting  
19 counterclaim for which he claims no fees and his prosecution  
20 of the defamation counterclaim which he lost.

21 I have exercised my discretion under Hensley and its  
22 progeny in the following manner: First I have eliminated all  
23 hours claimed before December 11, 2008, the first date that  
24 the counterclaims are mentioned in the billing records, on the  
25 grounds that that time was devoted to defending the complaint.  
26 I have carefully reviewed each of the time entries after  
27 December 11, 2008 and discounted all fees requested. For  
28 entries where time could be attributed both to defending

1 plaintiffs' claims and prosecuting the counterclaims, I  
2 awarded defendant one-third of the requested fees, after  
3 deducting one half (or three-sixths) of the claimed time as  
4 attributable to defending the complaint, and an additional  
5 one-sixth as attributable to prosecuting the cybersquatting  
6 claim, for which no fees were sought, and the defamation  
7 claim, which Fiks lost. In my judgment, having presided over  
8 this case for over a year, and having presided over the trial,  
9 little time in addition to what was spent on the Bane Act  
10 claim was spent on the prosecution of the defamation claim and  
11 less time was spent on the cybersquatting claim than on the  
12 Bane Act Claim. Following the same methodology, I awarded  
13 Fiks two-thirds of all time which could be attributed only to  
14 prosecuting the counterclaims. Where I could not tell from  
15 the time records for which claims the work was performed,  
16 entries such as drafting discovery, I awarded nothing, since  
17 defendant has the burden of producing adequate records. In  
18 addition, I chose not to award any fees for time spent in  
19 preparing defendant's motion to compel filed April 21, 2009,  
20 since it was filed in violation of my prior Scheduling Order.  
21 See Docket No. 72.

22 A reasonable fee is "the number of hours reasonably  
23 expended on the litigation multiplied by a reasonable hourly  
24 rate." Hensley, 461 U.S. at 432; Serrano v. Priest, 20 Cal.3d  
25 25, 48 (1977). The reasonableness of an hourly rate is  
26 determined by examining the rates "prevailing in the community  
27 for similar work." See Margolin v. Regional Planning Com.,  
28 134 Cal.App.3d 999, 1004-05 (1982). Inexplicably, defendant

1 has not presented any evidence of prevailing rates in the  
2 community. However, "when the trial court is informed of the  
3 extent and nature of the services rendered, it may rely on its  
4 own experience and knowledge in determining their reasonable  
5 value." See In re Marriage of Cueva, 86 Cal.App.3d 290, 300  
6 (1978). Based on my experience with fees in this district,  
7 including fees I have awarded, and my experience in presiding  
8 over this case, I find that the already discounted rates  
9 claimed by Fiks are reasonable.

10 The balance of plaintiffs' opposition argues that various  
11 portions of the claimed fees are not recoverable. Defendant  
12 may not recover for clerical and secretarial work that "should  
13 be covered in hourly rates as normal overhead." Keith v.  
14 Volpe, 644 F.Supp. 1312, 1316 (C.D.Cal. 1986). However,  
15 "reasonable attorneys' fees may include paralegal services."  
16 Leuzinger v. County of Lake, 2009 WL 839056, \*8 (N.D.Cal.  
17 2009). To the extent it appears from the billing records that  
18 timekeepers Sumeena Birdi, Adam Schneider and Julie Lockwood  
19 performed what I would consider secretarial work, such as  
20 routing and mailing documents, I eliminated such hours.  
21 However, some of Birdi and Lockwood's time, such as drafting  
22 and editing documents and conducting online research in  
23 support of the counterclaim, is recoverable as paralegal work.

24 Using this methodology I award defendant fees as follows:

25	Karl Kronenberger	\$ 5,236.00
26	Jeff Rosenfeld	\$ 13,435.00
27	Margarita Calpotura	\$ 7,890.00
28	Sumeena Birdi	\$ 929.00

1 Julie Lockwood \$ 2,239.00

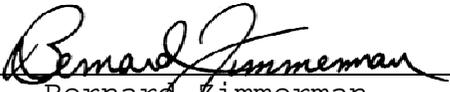
2 TOTAL: \$ 29,729.00

3 From this total, I deducted \$1,882.92 in fees I had  
4 awarded defendants as a sanction in my Final Pretrial Order,  
5 and which was also claimed as part of this motion.

6 I also award defendant one-third of the claimed  
7 computer-based legal research charges incurred after December  
8 11, 2008, for a total of \$886.00. See Trustees of Const.  
9 Industry and Laborers Health and Welfare Trust v. Redland Ins.  
10 Co., 460 F.3d 1253, 1258-59 (9th Cir. 2006) (noting the  
11 "growing circuit consensus" that computer-based legal research  
12 fees may be recovered as attorneys' fees).

13 I find no need for argument and **VACATE** the hearing  
14 scheduled for **January 6, 2010**. For the foregoing reasons, **IT**  
15 **IS HEREBY ORDERED** that defendant's Motion for Attorneys Fees  
16 is **GRANTED IN PART** in the amount of \$28,732.08.

17 Dated: January 4, 2010

18   
19 Bernard Zimmerman  
United States Magistrate Judge

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