

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CALIFORNIA SERVICE EMPLOYEES HEALTH &
WELFARE TRUST FUND, MIKE GARCIA,
Trustee, CHARLES GILCHRIST, Trustee,
RAYMOND C. NANN, Trustee, LARRY T.
SMITH, Trustee,

No. C-06-3078 CW

ORDER GRANTING IN
PART PLAINTIFFS'
MOTION FOR RECOVERY
OF ATTORNEYS' FEES

Plaintiffs,

v.

ADVANCE BUILDING MAINTENANCE and
FORREST NOLIN,

Defendants.

_____/

Plaintiffs California Service Employees Health & Welfare Trust Fund (Trust) and its Trustees move to recover attorneys' fees, audit fees and costs incurred in prosecuting this action. Defendant Advance Building Maintenance (Advance) opposes Plaintiffs' motion. The matter was taken under submission on the papers. After considering all of the papers filed by the parties, the Court grants Plaintiffs' motion, but awards them less than the total amount of fees sought.

BACKGROUND

As discussed in the Court's earlier orders, the Trust is a non-profit, neutral third-party established to administer health

1 and welfare benefits to members of various unions pursuant to
2 collective bargaining agreements with employers including Advance.
3 Nolin is the CEO and sole shareholder of Advance. This dispute
4 arises out of successive collective bargaining agreements (CBAs),
5 also called Maintenance Contractors Agreements (MCAs), between
6 Advance and members of Local 1877 (previously Local 399) of the
7 Service Employees International Union (SEIU). Under the
8 agreements, Advance was required to make contributions to the Trust
9 for health and welfare benefits for covered employees.

10 On May 8, 2006, Plaintiffs filed this complaint against
11 Advance, alleging various unpaid benefits, late benefits and
12 related claims for interest and liquidated damages due for the time
13 period January, 1999 through December, 2002 and on two accounts for
14 the time period August, 2003 through December, 2003. On November
15 1, 2007, the Court granted in part Plaintiffs' motion for summary
16 judgment, finding that the only remaining question on the merits of
17 Plaintiffs' claims is whether Advance is entitled to credit for a
18 \$1,825.48 overpayment. The Court also granted Plaintiffs' request
19 for injunctive relief and entered a preliminary injunction
20 preventing Advance from paying any dividends, bonuses or
21 extraordinary salary to its officers or directors until after
22 \$647,382.02 owed to Plaintiffs is paid in full. Finally, the Court
23 granted Plaintiffs leave to file an amended complaint alleging four
24 additional causes of action, adding Forrest I. Nolin as a Defendant
25 and adding the Trust derivatively on behalf of Advance as a
26 Plaintiff. On December 26, 2007, the Court denied Nolin's motion
27 to dismiss the amended complaint. On January 8, 2008 the Court

1 granted Plaintiffs leave to file a seconded amended complaint
2 alleging delinquent payments for the time period January, 2003
3 through July, 2007.

4 On January 9, 2008, Advance filed an action for voluntary
5 wind-up and dissolution, and an application for an order appointing
6 a receiver. These filings were made in the Superior Court of
7 California for the County of Los Angeles (Western District) (Case
8 no. SS 016358).

9 On June 26, 2008, Plaintiffs accepted Advance's offer of
10 judgment pursuant to Rule 68 of the Federal Rules of Civil
11 Procedure in the sum of \$955,760.56 "increased by the addition of
12 an amount -- to be determined by the Court on noticed motion -- for
13 all of plaintiffs' fees and costs from August 11, 2007, through the
14 present that are recoverable by law in this action." Plaintiffs
15 now move to recover those fees and costs.

16 DISCUSSION

17 I. Plaintiffs' Request for Attorneys' Fees

18 ERISA provides that "the court in its discretion may allow a
19 reasonable attorney's fee and costs of action to either party." 29
20 U.S.C. § 1132(g)(1). "This section should be read broadly to mean
21 that a plan participant or beneficiary, if he prevails in his suit
22 under § 1132 to enforce his rights under his plan, should
23 ordinarily recover an attorney's fee unless special circumstances
24 would render such an award unjust." Smith v. CMTA-IAM Pension
25 Trust, 746 F.2d 587, 589 (9th Cir. 1984) (internal quotation marks
26 omitted). This is in line with ERISA's broad remedial purpose "to
27 protect employee rights and to secure effective access to federal

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1 courts." Id.

2 In determining whether special circumstances exist warranting
3 the denial of attorneys' fees, a court may consider: (1) the degree
4 of the opposing party's culpability or bad faith; (2) the ability
5 of the opposing party to satisfy an award of fees; (3) whether an
6 award of fees against the opposing party would deter others from
7 acting in similar circumstances; (4) whether the party requesting
8 fees sought to benefit all participants and beneficiaries of an
9 ERISA plan or to resolve a significant legal question regarding
10 ERISA; and (5) the relative merits of the parties' positions.
11 Hummell v. S.E. Rykoff & Co., 634 F.2d 446, 453 (9th Cir. 1980).
12 No one of these Hummell factors is decisive, and some may not be
13 pertinent in a given case. Carpenters S. Cal. Admin. Corp. v.
14 Russell, 726 F.2d 1410, 1416 (9th Cir. 1984). Rather, they reflect
15 a balancing, and not all must weigh in favor of a fee award.
16 McElwaine v. U.S. West, Inc., 176 F.3d 1167, 1173 (9th Cir. 1999).

17 A consideration of the Hummell factors in this case reveals no
18 special circumstances to warrant denying Plaintiffs' motion. While
19 the Court has not found that Advance acted in bad faith, bad faith
20 is not required for an award of attorneys' fees. Smith, 746 F.2d
21 at 590. And from a legal perspective, Advance is "culpable" in
22 that it was found to owe Plaintiffs a legal duty that it was not
23 fulfilling. It is not clear whether Advance will have the ability
24 to pay the fees sought. On the other hand, even though this
25 lawsuit seeks primarily to benefit Plaintiffs, an award of
26 attorneys' fees could serve to deter other plan administrators from
27 failing to pay contracted amounts. This could indirectly benefit

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1 other individuals.

2 As for the relative merits of the parties' positions,
3 Plaintiffs succeeded on their claim for benefits payments.
4 Plaintiffs were granted summary judgment for \$647,382.08. Further,
5 on June 26, 2008, Advance allowed entry of judgment in favor of
6 Plaintiffs against Advance. Accordingly, the fifth Hummell factor
7 also supports awarding Plaintiffs attorneys' fees.

8 III. Amount of Recoverable Fees

9 Reasonable attorneys' fees are determined by first calculating
10 the "lodestar." Jordan v. Multnomah County, 815 F.2d 1258, 1262
11 (9th Cir. 1987). "The 'lodestar' is calculated by multiplying the
12 number of hours the prevailing party reasonably expended on the
13 litigation by a reasonable hourly rate." Morales v. City of San
14 Rafael, 96 F.3d 359, 363 (9th Cir. 1996). There is a strong
15 presumption that the lodestar figure represents a reasonable fee.
16 Jordan, 815 F.2d at 1262. However, the court may adjust the award
17 from the lodestar figure upon consideration of additional factors
18 that may bear upon reasonableness. Kerr v. Screen Guild Extras,
19 Inc., 526 F.2d 67, 70 (9th Cir. 1975).

20 Determining a reasonable hourly rate is a critical inquiry.
21 Jordan, 815 F.2d at 1262 (citing Blum v. Stenson, 465 U.S. 886, 895
22 n.11 (1984)). In establishing the reasonable hourly rate, the
23 court may take into account: (1) the novelty and complexity of the
24 issues; (2) the special skill and experience of counsel; (3) the
25 quality of representation; and (4) the results obtained. See
26 Cabrales v. County of Los Angeles, 864 F.2d 1454, 1464 (9th Cir.
27 1988). These factors are subsumed in the initial lodestar

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1 calculation, and should not serve as independent bases for
2 adjusting fee awards. Morales, 96 F.3d at 363-64. The reasonable
3 rate inquiry should also be informed by reference to the prevailing
4 market rates in the forum district. Gates v. Deukmejian, 987 F.2d
5 1392, 1405 (9th Cir. 1992).

6 The Supreme Court has recognized that, while it is appropriate
7 for the district court to exercise its discretion in determining an
8 award of attorneys' fees, it remains important for the court to
9 provide "a concise but clear explanation of its reasons for the fee
10 award." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983); Hall v.
11 Bolger, 768 F.2d 1148, 1151 (9th Cir. 1985) (in computing an award,
12 the district court should provide a "detailed account of how it
13 arrives at appropriate figures for 'the number of hours reasonably
14 expended' and 'a reasonable hourly rate'" (quoting Blum, 465 U.S.
15 at 898).

16 A. Hourly Rate

17 1. Reasonableness

18 The billing rates charged by Plaintiffs' counsel in this
19 action are paralegal at \$105 per hour, associate attorney at \$180
20 per hour, and partner at \$200 per hour. However, in this motion,
21 Plaintiffs seek an hourly rate of \$275 per hour for all attorney
22 hours worked and \$105 per hour for paralegal hours worked.
23 Plaintiffs contend that \$275 per hour reflects the market rate for
24 the type of work performed in this case.

25 "Billing rates should be established by reference to the fees
26 that private attorneys of an ability and reputation comparable to
27 that of prevailing counsel charge their paying clients for legal
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1 work of similar complexity." Welch v. Metropolitan Life Ins. Co.,
2 480 F.3d 942, 946 (9th Cir. 2007) (internal quotation omitted). In
3 other ERISA cases, courts have found rates much higher than \$275
4 per hour to be reasonable for experienced ERISA attorneys. See
5 Farhat v. Hartford Life and Accident Ins. Co., 2006 WL 2521571, at
6 *7 (N.D. Cal.) (finding the rate of \$435 reasonable for a law firm
7 partner with significant ERISA experience and noting that "[t]he
8 declarations and relevant case law establish a range for
9 experienced partners from approximately \$400/hour to \$495/hour");
10 May v. Metropolitan Life Ins., 2005 WL 839291, at *3 (N.D. Cal.)
11 (noting evidence that the prevailing rate for partner-level ERISA
12 attorneys in the Bay Area is between \$425 and \$450 per hour);
13 Fenberg v. Cowden, 2006 WL 83053, at *3-*4 (N.D. Cal.) (approving a
14 rate of \$400 per hour for an ERISA attorney who lived outside the
15 Bay Area and had "significantly less" than twenty years of ERISA
16 litigation experience).

17 Mr. Miller's declaration outlines the Plaintiffs' attorneys'
18 professional background. According to the declaration, Mr. Miller,
19 a partner in his firm, has specialized in employee benefit law for
20 over twenty-five years. Miller Decl. ¶ 10. Mr. Miller has worked
21 on over fifty ERISA actions during his career. Id. Ms. McCulloch,
22 an associate at the firm, has ten years of litigation experience,
23 mostly in the areas of complex class action securities fraud
24 litigation and tax compliance litigation. Id. at ¶ 11. She has
25 specialized in employee benefit law since 2006. Id. Given Mr.
26 Miller's and Ms. McCulloch's level of experience, the \$275 hourly
27 rates is within the prevailing rate range. Therefore, the Court

1 finds the rates to be reasonable.

2 2. Law of the Case and Judicial Estoppel

3 Advance argues that Plaintiffs are judicially estopped from
4 arguing that they should receive the market rate. Advance notes
5 that in an earlier request for attorneys' fees that was granted as
6 part of the Court's November 1, 2007 summary judgment order,
7 Plaintiffs did not request the market hourly rate for their work.
8 Advance asks the Court to apply the law of the case doctrine or the
9 judicial estoppel doctrine to prevent Plaintiffs from seeking
10 market rates for their work.

11 "Under the law of the case doctrine, a court is generally
12 precluded from reconsidering an issue that has already been decided
13 by the same court, or a higher court in the identical case."
14 United States v. Alexander, 106 F.3d 874, 876 (9th Cir.1997)
15 (internal quotations omitted). In the Court's November 1, 2007
16 summary judgment order, the Court concluded that Plaintiffs'
17 request for attorneys' fees as part of their summary judgment
18 motion was reasonable. There, Plaintiffs' charged \$195 per hour
19 for a partner's work, \$180 per hour for an associate's work, and
20 \$95 per hour for a paralegal's work. Miller Dec. in Support of
21 Plaintiffs' Motion for Summary Judgment ¶ 2. In its previous
22 order, the Court did not address whether higher market rates for
23 the same work would also be reasonable. Thus, the issue presented
24 at this time was not already decided by the Court in its earlier
25 November 1, 2007 order. Therefore, the law of the case doctrine
26 does not prevent Plaintiffs from seeking the market rate for their
27 work.

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1 Judicial estoppel "precludes a party from gaining an advantage
2 by taking one position, and then seeking a second advantage by
3 taking an incompatible position." Rissetto v. Plumbers and
4 Steamfitters Local 343, 94 F.3d 597, 600 (9th Cir. 1996). In
5 Russel v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990), the Ninth
6 Circuit explained that:

7 The policies underlying preclusion of inconsistent
8 positions are general considerations of the orderly
9 administration of justice and regard for the dignity of
10 judicial proceedings. . . . Judicial estoppel is
11 intended to protect against a litigant playing fast and
loose with the courts. . . . Because it is intended to
protect the dignity of the judicial process, it is an
equitable doctrine invoked by a court at its
discretion.

12 Requesting a slightly higher billing rate at a later point in
13 litigation is not an "incompatible position." Moreover,
14 Advance has not shown how Plaintiffs are seeking a "second
15 advantage" by arguing for a higher billing rate.

16 B. Number of Hours

17 As a general proposition, Advance asserts that Plaintiffs' fee
18 award should be reduced by fifty percent because at least fifty
19 percent of the hours appearing on Plaintiffs' attorneys' fees
20 statements are excessive, redundant, and otherwise unnecessary. To
21 support its argument, Advance notes that it spent about half as
22 much time on this case as Plaintiffs did. However, as Plaintiffs
23 point out, reasonableness is the standard by which the Court
24 determines attorneys' fees, not how much time opposing counsel
25 spent on the case. See Hensley v. Eckerhart, 461 U.S. 424, 433
26 (1983). Therefore, the Court concludes that a fifty percent fee
27 reduction is not warranted.

1 they would be able to recover money in this ERISA action.
2 Therefore, Plaintiffs are entitled to \$57,397 in attorneys' fees
3 incurred in the state court receivership proceeding.

4 2. Attorneys' Fees for Claims Against Forest Nolin

5 Advance asserts that Plaintiffs are not entitled to an award
6 of attorneys' fees arising from their prosecution of their claims
7 against Forrest Nolin because (1) the Rule 68 offer of judgment was
8 made by Advance, not Nolin, and (2) 29 U.S.C. § 1132(g), which
9 provides for an award of attorneys' fees in ERISA cases, does not
10 support an award of fees for claims against Nolin in that
11 (a) Nolin is not an "employer," (b) no "judgment in favor of the
12 plan" was awarded against Nolin, and (c) Advance should not be
13 responsible for fees that Nolin should pay. Plaintiffs do not
14 dispute any of these points. Instead, Plaintiffs counter that all
15 attorneys' fees requested were incurred pursuing claims against
16 Advance.

17 Advance need not pay for legal fees for Plaintiffs' work
18 pertaining solely to Nolin's claims. Therefore, the Court denies
19 Plaintiffs' attorneys' fees request for all time spent in
20 connection with Nolin's motion to dismiss or transfer, \$7,959.75.
21 The remaining charges disputed by Advance all involved "a common
22 core of facts" and were "based on related legal theories," to those
23 asserted by Nolin. Hensley v. Eckerhart, 461 U.S. 424, 435 (1983).

24 Therefore, it is not possible to divide the remaining charges as
25 requested by Advance.

26 C. Audit Fees

27 The ERISA statutory scheme also provides for the award of
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1 "such other legal or equitable relief as the court deems
2 appropriate." 29 U.S.C. § 1132(g)(2)(E). The Ninth Circuit has
3 held that the recovery of accounting fees is appropriate "[b]ecause
4 an award of audit costs to the prevailing party is consistent with
5 the policy of encouraging full and fair contributions." Operating
6 Eng. Pen. Trust, et al. v. A-C Co., 859 F.2d 1336, 1343 (9th Cir.
7 1988). Therefore, the Court awards Plaintiffs \$73,360,
8 representing their accounting fees. See Thiermann Decl. ¶ 4.

9 D. Costs and Expenses

10 The Court also determines that Plaintiffs' other costs
11 totaling \$14,211 since August 11, 2007 are appropriate under 29
12 U.S.C. § 1132(g)(2). See Miller Decl. ¶ 7 and Exhibit D.

13 CONCLUSION

14 For the foregoing reasons, Plaintiffs' motion for attorneys'
15 fees, audit fees and costs (Docket No. 314) is GRANTED IN PART.
16 Advance is ordered to pay Plaintiffs' attorneys' fees in the amount
17 of \$306,456.25,¹ audit fees in the amount of \$73,360, and costs in
18 the amount of \$14,211.

19 IT IS SO ORDERED.

20 10/2/08

21 Dated: _____



22 CLAUDIA WILKEN
23 United States District Judge

24 _____
25 ¹ \$306,456.25 reflects the total amount of attorneys' fees
26 Plaintiffs requested, \$314,425, minus the amount of attorneys' fees
27 incurred pertaining solely to Nolin's motion to dismiss or
28 transfer, \$7,959.75 (\$7,959.75 = (\$275 partner hourly wage x 28.2
partner hours) + \$204.75 paralegal fees).