

1
2
3
4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
6

7 ERIC DMUCHOWSKY,

8 Plaintiff,

9 v.

10 SKY CHEFS, INC.,

11 Defendant.

Case No. 18-cv-01559-HSG (DMR)

**AMENDMENT TO REPORT AND
RECOMMENDATION**

Re: Dkt. No. 77

12 The court issues this amendment to its prior Report and Recommendation (Docket No. 77,
13 “R&R”) on Plaintiff Eric Dmuchowsky’s motion for attorneys’ fees (Docket No. 63, “Mot.”).

14 **I. BACKGROUND**

15 On March 12, 2018, Dmuchowsky brought this action under the Employee Retirement
16 Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001 et seq., against Defendant Sky Chefs,
17 Inc., alleging that Sky Chefs failed to timely provide employee benefit plan documents in violation
18 of ERISA. [Docket No. 1 (Compl.)] Dmuchowsky sought declaratory and monetary relief,
19 including statutory penalties, interest, and attorneys’ fees and costs. Id. at 4. Sky Chefs produced
20 the documents at issue between April 17, 2018 and July 13, 2018. [Docket No. 34-1 (A.R.) 12-
21 234.] On January 15, 2019, the parties reached a settlement agreement as to Dmuchowsky’s penalty
22 claim, but reserved the matter of attorneys’ fees and costs for adjudication. [Docket No. 58.] On
23 February 13, 2019, Dmuchowsky filed a motion for attorneys’ fees and costs. The Honorable
24 Haywood S. Gilliam referred the motion to the undersigned for a Report and Recommendation.
25 [Docket No. 66.]

26 On May 1, 2019, the undersigned issued a Report and Recommendation that recommended
27 granting Dmuchowsky’s motion in part and awarding \$105,795 in fees and \$1,619.22 in costs for a
28 total award of \$107,414.22. R&R at 1. This included fees for 20.5 hours of work performed by

1 attorney Monica Lienke at a rate of \$400 per hour for a total of \$8,200. *Id.* at 22. On May 10, 2019,
2 Dmuchowsky filed a notice of errata, stating that the court erroneously had inferred that Lienke
3 “joined Kantor & Kantor approximately three years ago,” when in fact she joined Kantor & Kantor
4 in August 2018. Docket No. 78 (“Errata”); see also R&R at 19. The error originated in the wording
5 of Lienke’s declaration. [Docket No. 63-3 (“Lienke Decl.”).] Lienke states that she passed the
6 California Bar Exam in 2014 and then worked for a different firm for two years. *Lienke Decl.* at ¶
7 5. The next paragraph begins, “[s]ince joining Kantor & Kantor...,” which the court inferred to
8 mean that Lienke had started working for Kantor & Kantor immediately after leaving her prior firm.
9 However, Lienke’s declaration omitted the non-obvious fact that after she left her prior firm in
10 January 2017, she did not join Kantor & Kantor until August 2018. *Errata* at 2. Neither the
11 declaration nor the *Errata* explain what Lienke did between January 2017 and August 2018.

12 On May 15, 2019, Sky Chefs responded to the *Errata* by filing an objection to the Report
13 and Recommendation, arguing among other things that the fee award of \$400 per hour for Lienke’s
14 time is inappropriate, given that she is in her third year of practice and has less than one year of
15 ERISA experience. [Docket No. 79 (“Obj.”) at 3.] The undersigned now addresses Sky Chefs’
16 arguments regarding Lienke’s billing rate in order to present a complete Report and
17 Recommendation for Judge Gilliam’s consideration.

18 **II. ANALYSIS**

19 An attorney’s “reasonable hourly rate” is calculated “according to the prevailing market rates
20 in the relevant community.” *Blum v. Stenson*, 465 U.S. 886, 895 (1984). “To inform and assist the
21 court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory
22 evidence—in addition to the attorney’s own affidavits—that the requested rates are in line with
23 those prevailing in the community for similar services by lawyers of reasonably comparable skill,
24 experience and reputation.” *Id.* at 896, n. 11. Affidavits of the plaintiff’s attorney and other
25 attorneys regarding prevailing fees in the community as well as rate determinations in other cases
26 can provide evidence of the prevailing market rate. *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d
27 942, 947 (citing *United Steelworkers of America v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th
28 Cir. 1990)). In the absence of opposing evidence, the proposed rates are presumed reasonable.

1 Phelps Dodge Corp., 896 F.2d at 407.

2 Lienke is a graduate of Stanford Law School and passed the California Bar Exam in
3 December 2014. Lienke Decl. ¶¶ 4-5. From January 2015 until January 2017, she was an associate
4 attorney at Springmeyer Law, “a boutique San Francisco law firm that provides corporate and
5 transaction legal services to employees and early-stage companies in the technology industry.” Id.
6 ¶ 5; Errata at 2. She joined Kantor & Kantor in August 2018. Errata at 2. In the Errata, Plaintiff
7 once again passes up the opportunity to exhibit candor and make a clear representation to the court
8 about Lienke’s legal experience. Instead, the Errata says that “[t]ogether with her prior time
9 practicing law (January 2015 to January 2017), Ms. Lienke is in her third-year [sic] of practice.”
10 The court infers that Lienke did not practice law for a year and a half between the time she left
11 Springmeyer and joined Kantor & Kantor, and she therefore has less than three years of experience
12 as a lawyer.

13 Sky Chefs requests that Lienke’s hourly rate be reduced to \$250 per hour and cites several
14 ERISA trust contribution cases in support of that rate.¹ Courts have generally awarded lower rates
15 in ERISA trust contribution cases, which are relatively straightforward and frequently result in
16 default judgment, thereby often resembling collection matters rather than contested disputes on the
17 merits. See, e.g., Cent. California IBEW/NECA Pension Tr. v. Ozzimo Elec., Inc., No. 13-cv-03800-
18 JSW (LB), 2015 WL 1883906, at *4 (N.D. Cal. Apr. 22, 2015) (awarding \$195 to \$235 per hour for
19 attorneys on the case); Operating Engineers’ Health & Welfare Tr. Fund for N. California v.
20 Breneman, Inc., No. 17-cv-05172-EDL, 2018 WL 5099250, at *8 (N.D. Cal. Aug. 15, 2018), report
21 and recommendation adopted, No. 17-cv-05172-WHA, 2018 WL 6822624 (N.D. Cal. Oct. 9, 2018)
22 (approving \$235 per hour for a shareholder attorney and \$230 per hour for associates); Boards of
23 Trustees of Sheet Metal Workers Pension Tr. of N. California v. Guidi, No. 17-cv-04936-JSW
24 (TSH), 2018 WL 6818658, at *12 (N.D. Cal. Nov. 29, 2018), report and recommendation

25
26 ¹ As the relevant district is the Northern District of California, the court does not consider the out-
27 of-district case cited by Sky Chefs. *Reyes v. Bakery & Confectionery Union & Indus. Int’l Pension*
28 *Fund*, 281 F. Supp. 3d 833, 853 (N.D. Cal. 2017) (“[B]oth this Court and other courts in this district
have considered the Northern District or the San Francisco Bay Area as the relevant market when
analyzing fees motions in ERISA cases.”); see *Obj. at 3-4* (citing *Broderick v. Prudential Ins. Co.*
of Am., No. 04-cv-0719-GAF (MANx), (C.D. Cal. Mar. 31, 2005)).

1 adopted, No. 17-cv-04936-JSW, 2018 WL 6822630 (N.D. Cal. Dec. 19, 2018) (finding that rates of
2 \$220 to \$235 per hour “are well within the range of reasonable fees in an action by an ERISA trust
3 to collect delinquent contributions”). The current matter was a litigated dispute that encompassed
4 full briefing and a hearing on the parties’ Rule 52 motions. It is therefore more appropriate to look
5 to cases that reflect rates for associate attorneys in ERISA cases that were decided on the merits.

6 Sky Chefs also cites older cases in this district with lower fee rates for associate attorneys in
7 ERISA cases. See *Caplan v. CAN Financial Corp.*, 573 F. Supp. 2d 1244, 1249 (N.D. Cal. 2008)
8 (awarding \$330 per hour for a fourth-year associate and \$350 per hour for a sixth-year associate);
9 *Oster v. Standard Ins. Co.*, 768 F. Supp. 2d 1026, 1035 (N.D. Cal. 2011) (awarding \$400 per hour
10 for two associates who had each been practicing law for ten years and had significant ERISA
11 experience). These orders were issued in 2008 and 2011, respectively, and are not indicative of
12 2018 billing rates.

13 Recent ERISA merits cases evidence higher fee rates for associate attorneys. In *Stewart v.*
14 *Applied Materials, Inc.*, No. 15-cv-2632-JST, 2017 WL 3670711, at *10 (N.D. Cal. Aug. 25, 2017),
15 the court awarded \$400 per hour to two associates with two and three years’ experience,
16 respectively.² Another 2017 case awarded \$450 per hour for a five-year associate. *Norris v.*
17 *Mazzola*, No. 15-cv-04962-JSC, 2017 WL 6493091, at *12 (N.D. Cal. Dec. 19, 2017). These cases
18 reflect 2017 rates, which arguably would be higher in 2018.

19 However, experience of counsel in a particular practice area, in addition to their total years
20 of experience, may impact their reasonable fee rate. *Dowdy v. Metro. Life Ins. Co.*, No. 15-cv-
21 03764-JST, 2019 WL 120730, at *5 (N.D. Cal. Jan. 7, 2019) (reducing a requested fee rate for
22 attorneys who were not experts in ERISA because they “were required to research basic ERISA
23 issues that would already have been familiar to a more experienced lawyer”). Given that Lienke
24 took a substantial break from the practice of law and had only four months of ERISA experience
25 when she argued the Rule 52 motion in this case, the court finds that a rate of \$375 per hour accounts
26

27 ² Since many orders omit the number of years associate attorneys have practiced, some of these rates
28 were ascertained from publicly available sources (such as declarations filed on the public docket
and searches on the California State Bar website) in addition to the orders cited here.

1 for 2018 upward rate adjustments as well as Lienke’s comparative inexperience in ERISA cases.
2 The court accordingly recommends awarding Lienke a rate of \$375 per hour.

3 Consistent with the undersigned’s prior recommendation to award Lienke 20.5 hours of
4 work, the total fees recommended for Lienke amount to \$7,687.50. Adding this amount to the
5 recommended fee award for attorney Brent Brehm in the amount of \$97,595 and the recommended
6 cost award of \$1,619.22, the court recommends awarding a total amount of \$106,901.72.

7 **III. CONCLUSION**

8 For the reasons set forth above, the undersigned amends the prior Report and
9 Recommendation only as to Lienke’s reasonable billing rate, and recommends awarding Lienke
10 \$375 per hour for 20.5 hours of work, resulting in an award for her time in the amount of \$7,687.50
11 and a total award of \$106,901.72.

12 Any party may file objections to this report and recommendation with the District Judge within
13 14 days of being served with a copy. See U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(a); N.D. Civ. L.R. 72-
14 2.

15
16 **IT IS SO ORDERED.**

17 Dated: June 26, 2019

