

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ERICKSON PRODUCTIONS INC, et al.,
Plaintiffs,
v.
KRAIG R. KAST,
Defendant.

Case No. [5:13-cv-05472-HRL](#)

FURTHER ORDER GRANTING IN PART AND DENYING IN PART ERICKSON'S REQUEST FOR FEES AND COSTS

Re: Dkt. No. 177

Erickson¹ previously moved for an award of attorney's fees and costs under the Copyright Act, 17 U.S.C. § 505. Specifically, they asked for \$215,087.50 in fees and \$3,730.63 in costs for a total award of \$218,818.13. In a prior order on that motion, the court concluded that Erickson was entitled to an award. (Dkt. 174). However, the court was unable to properly assess the reasonableness of the requested fees because Erickson did not adequately support counsel's hourly rate. Accordingly, the motion was denied without prejudice to Erickson to make a further submission in support of an award. Erickson has done so. Kast has filed a supplemental opposition. Upon consideration of all of the moving and responding papers, the court grants Erickson's request for fees in part and denies it in part.

¹ Jim Erickson and Erickson Productions, Inc. will be referred to collectively as "Erickson."

1 **A. Reasonable Hourly Rates**

2 Whether calculating attorney’s fees under California or federal law, courts follow the
3 lodestar approach. “The most useful starting point for determining the amount of a reasonable fee
4 is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly
5 rate.” Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L.Ed.2d 40 (1983), abrogated
6 on other grounds by Tex. State Teachers Ass’n. v. Garland Indep. Sch. Dist., 489 U.S. 782, 109 S.
7 Ct. 1486, 103 L.Ed.2d 866 (1989). “In determining a reasonable hourly rate, the district court
8 should be guided by the rate prevailing in the community for similar work performed by attorneys
9 of comparable skill, experience, and reputation.” Chalmers v. City of Los Angeles, 796 F.2d
10 1205, 1210-11 (9th Cir. 1986), reh’g denied, amended on other grounds, 808 F.2d 1373 (9th Cir.
11 1987) (citing Blum v. Stenson, 465 U.S. 886, 895 n.11, 104 S. Ct. 1541, 79 L.Ed.2d 891 (1984)).
12 “Generally, the relevant community is the forum in which the district court sits.” Barjon v.
13 Dalton, 132 F.3d 496, 500 (9th Cir. 1997). The fee applicant has the burden of producing
14 evidence, other than declarations of interested counsel, that the requested rates are in line with
15 those prevailing in the community for similar services by lawyers of reasonably comparable skill,
16 experience and reputation. Blum, 465 U.S. at 896 n.11. Additionally, the court can rely on its
17 own knowledge and experience in evaluating a request for fees. Ingram v. Oroudjian, 647 F.3d
18 925, 928 (9th Cir. 2011) (agreeing that “judges are justified in relying on their own knowledge of
19 customary rates and their experience concerning reasonable and proper fees.”).

20 Erickson seeks fees of \$215,087.50 for 383.20 hours of work performed by attorney Kevin
21 McCulloch and for 83.90 hours of work by his paralegal, Ms. Ayala. McCulloch’s identified rates
22 for the relevant time period are \$500/hour and \$550/hour,² and Ms. Ayala’s rate is \$75/hour.
23 According to his declaration, McCulloch graduated from Yale Law School in 2005, worked at a
24 large law firm for several years, and then clerked for one year on the Sixth Circuit Court of
25 Appeals. For purposes of this litigation, during the relevant time period, he worked at Nelson &
26 McCulloch, a firm he formed with another attorney. (Dkt. 109, McCulloch Decl., ¶ 8). He

27 _____
28 ² Submitted timesheets indicate that McCulloch’s hourly rate increased from \$500 to \$550
sometime around 2013. (Dkt. 109-5).

1 provides the 2013 Economic Survey Benchmark Tool from the American Intellectual Property
2 Law Association showing that the average hourly rate for intellectual property attorneys in San
3 Francisco is \$547. (Dkt. 178, Suppl. McCulloch Decl. ¶ 3, Ex. 1). Indeed, courts in this district
4 have looked to that survey to ascertain the reasonableness of hourly rates. See, e.g., Automatic,
5 Inc. v. Steiner, 82 F. Supp.3d 1011, 1032-33 (N.D. Cal. 2015) (observing in a Digital Millennium
6 Copyright Act case that the average billing rate for intellectual property attorney is \$547/hour and
7 awarding fees at \$418.50/hour for three attorneys and at \$680/hour for 1 hour of work performed
8 by a partner); Livingston v. Art.com, Inc., No. 13-cv-03748-JSC, 2015 WL 4319851 at *12 (N.D.
9 Cal., Apr. 17, 2015) (observing in a photograph copyright infringement case that the average rate
10 for intellectual property attorneys in San Francisco is \$547 and finding an hourly rate of \$325/hour
11 to be reasonable for an attorney with 2.5 years of experience); see also generally Apple, Inc. v.
12 Samsung Elecs. Co., Ltd., No. C 11-1846 LHK (PSG), 2012 WL 5451411 at *6 (Nov. 7, 2012)
13 (noting that in patent cases, “courts in this district have looked to the [AIPLA] annual survey of
14 hourly rates to ascertain the reasonableness of fees, a practice that the Federal Circuit condones.”).

15 McCulloch also submits information from the Valeo Attorney Hourly Rates Database from
16 April 2014, showing that intellectual property attorneys who graduated from law school in the
17 same year as him charged \$575 and \$635. (Dkt. 178, Suppl. McCulloch Decl. ¶ 4, Ex. 2). Courts
18 in this district have also found Valeo relevant in assessing fee awards. See Banas v. Volcano
19 Corp., 47 F.Supp.3d 957, 965 (N.D.Cal.2014) (finding rates set forth in Valeo database to be
20 relevant).

21 This court finds that McCulloch’s hourly rates of \$500 and \$550 are reasonable. As for
22 Ms. Ayala’s paralegal rate of \$75/hour, the court finds that it is also reasonable, falling below rates
23 that have been accepted in a range of other cases. See, e.g., Art.com, Inc., 2015 WL 4319851 at
24 *14 (observing in a copyright case that “courts in this District recently have awarded fees for
25 paralegals at a rate of \$120 through \$150 per hour.”); Hernandez v. Yen, No. 13-CV-01830-
26 RMW, 2015 WL 5185669 at *3-4 (N.D. Cal., Sept. 4, 2015) (in a disability access case, finding
27 reasonable a \$150/hour rate for a paralegal with over 10 years experience, \$125/hour rate for a
28 paralegal with 6 years experience, and a \$95/hour rate for a paralegal with over 2 years

1 experience); Wynn v. Chanos, No. 14-cv-04329-WHO, 2015 WL 3832561 *3 (N.D. Cal., June 19,
2 2015) (in a defamation case, finding a paralegal rate of \$170/hour reasonable).

3 **B. Reasonableness of Time Spent**

4 “In determining reasonable hours, counsel bears the burden of submitting detailed time
5 records justifying the hours claimed to have been expended.” Chalmers, 796 F.2d at 1210
6 (citation omitted). “Those hours may be reduced by the court where documentation of the hours is
7 inadequate; if the case was overstaffed and hours are duplicated; if the hours expended are deemed
8 excessive or otherwise unnecessary.” Id.

9 Kast raises a number of objections to the time for which Erickson seeks fees. But, the
10 court turns first to what is not disputed: Kast argues that the requested fees include \$8,470.00
11 incurred in motions practice in litigation in the Southern District of New York (“New York
12 Action”), where Erickson initially sued Kast. Erickson withdraws those hours from consideration,
13 saying that they were inadvertently included in the sums sought here. Accordingly, the court will
14 disregard \$8,470.00 in fees and will deduct that amount from the sum originally sought by
15 Erickson. (Dkt. 109-5 at ECF pp. 5, 7).

16 As to the disputed items, the court rules as follows:

17 **1. Fees sought in the New York Action**

18 Kast contends that Erickson’s submitted time sheets duplicate many of the same amounts
19 sought in the New York Action. In particular, he objects to \$19,650.00 in charges incurred prior
20 to September 6, 2013, which he says all stem from the New York Action and are sums for which
21 Erickson also sought reimbursement from the New York court. Erickson says that they excluded
22 fees incurred between May 8, 2012 and September 6, 2013 incurred during the New York Action.
23 However, they contend that all other fees incurred prior to September 6, 2013 properly should be
24 awarded because those time entries pertain to time spent in pre-suit investigation, as well as time
25 spent preparing the New York complaint. Erickson argues that this time is compensable because
26 this court ruled on a motion in limine that Kast’s responses to Erickson’s pre-suit letters was
27 admissible at trial.

28 Erickson misses the point. The record indicates that they already sought these same fees in

1 the New York Action. (Dkt. 112-1, Ranallo Decl. ¶ 2, Ex. F). While it appears that the District
2 Court in New York did not award all of Erickson’s requested fees (Dkt. 179, Ex. 4), it apparently
3 considered Erickson’s request and awarded the sum to which it determined Erickson was entitled.
4 To the extent Erickson now seeks a second bite at the apple or to have this court, in effect, second-
5 guess the decision of the court in New York, this court declines to do so. Accordingly, \$19,650.00
6 will be deducted from the requested fees.

7 **2. Duplicate entries**

8 Kast objects to two identical entries (each for \$1,595.00 for 2.90 hours of work) made on
9 February 11, 2014 and February 13, 2014 for “Exchange correspondence with opposing counsel
10 (PR) re CMC and service; contact counsel for Atherton Trust (Peter Dee “PD”) re: subpoena in
11 ND Cal case.” (Dkt. 109-5 at 7). These entries are duplicative, and Erickson offers no
12 explanation why they should not be so construed. Accordingly, \$1595.00 will be deducted from
13 the requested fees.

14 **3. Fees for an unfiled sanctions motion**

15 Kast objects to 8.3 hours of time (for a total of \$4,565.00 in fees) incurred from May 30,
16 2014 to June 17, 2014 in connection with a sanctions motion that never was filed. (Dkt. 109-5 at
17 10-11). “Courts have allowed recovery of costs related to claims and defenses that ultimately
18 proved unnecessary.” Micromesh Technology Corp. v. American Recreation Products, Inc., No.
19 C-06-6030 MHP, 2007 WL 2501783, at *10 (N.D. Cal., Aug. 30, 2007) (citation omitted); see
20 also Guttman v. Ole Mexican Foods, Inc., No. 14-cv-04845-HSG, 2016 WL 9107426 at *5 (N.D.
21 Cal., Aug. 1, 2016) (awarding fees for 18.1 hours spent drafting an unfiled motion for class
22 certification). Kast contends that the threatened motion was simply an attempt to intimidate him
23 into dropping his fair use defense. Erickson, on the other hand, contended throughout these
24 proceedings that Kast’s defense was frivolous. It is not clear on this record why Erickson
25 ultimately decided not to pursue its sanctions motion, and Kast’s fair use defense eventually was
26 dismissed on summary judgment. (Dkt. 70). While this court declined to find Kast’s defense
27 frivolous, it also finds no reason on this record to fault Erickson for initially pursuing what they
28 apparently believed to be a viable means of challenging Kast’s defense. Having reviewed the

1 subject entries, the court finds the time incurred reasonable. No deductions will be made here.

2 **4. Record-Keeping Objections and Excessive Fees**

3 Kast objects to Erickson’s requested fees because McCulloch’s declaration does not
4 “describ[e] the manner in which time records were maintained,” Civ. L.R. 54-5(b)(2), or state that
5 the requested fees are based on contemporaneous time records. Contemporaneous time records
6 are strongly preferred, and the absence of such records has led courts in this district to find that
7 billing entries are inherently less reliable. See, e.g., Joe Hand Promotions, Inc. v. White, No. C11-
8 01331 CW (JSC), 2011 WL 6749061 at *2 (N.D. Cal., Dec. 6, 2011). Even so, contemporaneous
9 time records are not absolutely necessary, and the lack of such records cannot be the basis for
10 denying a fee request in its entirety, as Kast requests. Fischer v. SJB-P.D., Inc., 214 F.3d 1115,
11 1121 (9th Cir. 2000).

12 Kast nonetheless argues that the requested fees are excessive due to a number of block-
13 billing time entries. Erickson contends that block billing is not an issue because time entries
14 pertain to single task. Block billing is discouraged where discrete and unrelated tasks are lumped
15 together because that practice can make it difficult, if not impossible, for the court to assess the
16 reasonableness of the time spent on each task. Thus, “entries describing closely related tasks with
17 a level of particularity generally do not impede the Court’s ability to review the reasonableness of
18 the hours expended.” Kalani v. Starbucks Corp., No. 13-cv-00734-LHK, 2016 WL 379623 at *7
19 (N.D. Cal., Feb. 1, 2016), remanded on other grounds, --- Fed. Appx. ---, 2017 WL 2813864 (9th
20 Cir., June 28, 2017); see also Cruz v. Starbucks Corp., No. C-10-01868 JCS, 2013 WL 2447862 at
21 *7 (N.D. Cal., June 5, 2013) (declining to reduce the requested fee award for alleged block billing
22 where the time records were adequate to allow the court to determine whether the time spent on
23 particular tasks is reasonable).

24 Having reviewed Erickson’s timesheets, this court finds that, for the most part, the time
25 entries pertain to a single task (or to closely related tasks) and do not impede the court’s ability to
26 determine whether the time spent was reasonable. However, there are several block billing entries
27 where disparate activities were lumped together, making it impossible for the court to assess the
28 reasonableness (or not) of the time spent on any given task. Those entries represent 26.3 hours for

1 a total of \$14,465.00 in fees as follows:

- 2 • February 7, 2014 (McCulloch): 4.30 hours, \$2,365.00
- 3 • February 11, 2014 (McCulloch): 2.90 hours, \$1,595.00
- 4 • April 16, 2014 (McCulloch): 3.20 hours, \$1,760.00
- 5 • April 22, 2014 (McCulloch): 2.80 hours, \$1,540.00
- 6 • May 7, 2014 (McCulloch): 4.80 hours, \$2,640.00
- 7 • May 16, 2014 (McCulloch): 5.10 hours, \$2,805.00
- 8 • September 19, 2014 (McCulloch): 3.20 hours, \$1,760.00

9 (Dkt. 109-5). Courts in this district have observed that block-billing may inflate hours as much as
10 10%-30%. See, e.g., Apple, Inc., 2012 WL 5451411 at *5. The court cannot impose across-the-
11 board deductions over all time entries, including those that are not improper. Welch v. Met. Life
12 Ins. Co., 480 F.3d 942, 948 (9th Cir. 2007). Nevertheless, the court finds that a deduction of 10%
13 as to the above specified block-billed entries is appropriate. In view of the relatively modest
14 occurrence of these improper block-billing entries, the court finds this deduction sufficient to
15 balance the hours billed in block format. Accordingly, the court will deduct \$1,446.50 from the
16 fee award.

17 Additionally, based on its independent review of the timesheets, this court finds the
18 following entries to be excessive:

- 19 • On January 10, 2014, Ayala incurred \$60.00 in fees (0.8 hours) drafting and filing a
20 motion for telephonic appearance at a case management conference. McCulloch
21 then incurred \$605.00 in fees (1.1 hours) revising and finalizing that motion.
22 Those entries apparently pertain to Dkt. 21, which is an entirely perfunctory motion
23 to appear by phone. The court will deduct 0.2 hours (\$15.00) from Ayala's time
24 and 0.9 hours (\$495.00) from McCulloch's time for a total deduction of \$510.00.
- 25 • On September 9, 2014, McCulloch incurred \$495.00 in fees (0.90 hours) drafting
26 and filing a document re-noticing the hearing for Erickson's earlier filed summary
27 judgment motion. That time entry appears to pertain to Dkt. 55, which aside from
28 the title of the document and the date of the requested hearing, simply replicates the

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preamble to Erickson’s summary judgment motion (Dkt. 51) that had been filed a week beforehand. The court deducts 0.70 hours, for a total deduction of \$385.00.

- On September 17, 2014, Ayala incurred \$60.00 in fees (0.8 hours) drafting and filing a straightforward motion for telephonic appearance at a motion hearing (Dkt. 58), and McCulloch incurred \$165.00 (0.30 hours) reviewing and approving that motion. The court will deduct 0.2 hours (\$15.00) from Ayala’s time and 0.1 hour (\$55.00) from McCulloch’s time for a total deduction of \$70.00.

Based on the foregoing, the court deducts a total of \$32,126.50 from Erickson’s requested fees, for a total fees award of \$182,961.00.

C. Costs


Erickson also seeks \$3,730.63 in costs. Kast objects to the filing fee (\$350.00) and service of process (\$105.00) costs incurred in the New York Action as duplicative of those sought in that case. Those costs will be deducted. Additionally, \$50.05 in “FedEx Charges” incurred on April 1, 2014 will not be allowed as there is no explanation for this expense. See Lewis v. Activision Blizzard, Inc., No. C12-1096 CW, 2014 WL 4953770 at *5 (N.D. Cal., Sept. 25, 2014) (declining to award unexplained costs). Costs are otherwise awarded in the amount of \$3,225.58.

ORDER

Based on the foregoing, Erickson’s renewed request for fees is granted in part and denied in part as follows: Erickson is awarded \$182,961.00 in fees and \$3,225.58 in costs, for a total award of \$186,186.58.

SO ORDERED.

Dated: August 25, 2017



HOWARD R. LLOYD
United States Magistrate Judge