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7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA
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10 FERNANDO RUIZ, individually and on
11 behalf of all others similarly situated,
12 Plaintiff,
13 v.
14 XPO LAST MILE, INC., formerly
15 AFFINITY LOGISTICS
16 CORPORATION,
17 Defendant.

Case No.: 5cv2125 JLS (KSC)

**ORDER GRANTING (1) *EX PARTE*
MOTION TO FILE SUR-REPLY
AND (2) MODIFIED APPLICATION
FOR ATTORNEYS' FEES AND
COSTS**

(ECF Nos. 328, 352)

18 Presently before the Court is Plaintiffs' Application for Attorneys' Fees and Costs
19 ("Fee Appl."), (ECF No. 328), Defendant's Response in Opposition to Plaintiff's
20 Application for Attorney Fees and Costs ("Opp'n"), (ECF No. 342), and Plaintiffs' Reply
21 in Support of Application for Attorneys' Fees ("Reply"), (ECF No. 347). Defendant has
22 also submitted an *Ex-Parte* Motion to File Sur-Reply in Opposition to Plaintiff's Motion
23 for Fees and Costs, ("Sur-Reply Mot."). (ECF No. 352.) The Court vacated the scheduled
24 hearing and took the matter under submission without oral argument pursuant to Civil
25 Local Rule 7.1(d)(1). Having considered the Parties' arguments and the law, the Court
26 **GRANTS** Defendant's Sur-Reply Mot. and **GRANTS**, after modification, Plaintiffs' Fee
27 Application.

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BACKGROUND

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2 In August of 2015, the parties submitted to Magistrate Judge Karen S. Crawford a
3 Joint Motion for Determination of Discovery Dispute. (ECF No. 275.) In the Joint Motion,
4 Plaintiffs sought many specific documents Defendants' had previously failed to produce.
5 (Order Granting in Part and Den. in Part Pls.' Mot. for Sanctions ("Sanctions Order") 2,
6 ECF No. 321.) Ultimately, Judge Crawford ruled in Plaintiffs' favor on all requests. (Order
7 re Joint Mot. for Determination of Disc. Dispute 4–10, ECF No. 292.)

8 After Judge Crawford's Order, Defendant produced more than 75,000 pages of
9 documents, barely any of which responded to Plaintiffs' request. (Sanctions Order 2–3.)
10 Defendant, in part, explained the deficiency was due to lack of access to certain documents
11 and other documents having potentially been "inadvertently disposed of some time during
12 the past decade" (*Id.* 3.) Judge Crawford then held a status conference regarding the
13 deficient discovery. (ECF No. 300.) Plaintiffs argued that Defendant had not complied with
14 the Order Compelling Discovery; Defendant asserted compliance. (Sanctions Order 3.)
15 Judge Crawford "invited Plaintiffs to make a motion under Rule 37 if they believed it was
16 appropriate." (*Id.*)

17 Several weeks later, Plaintiffs filed a Motion for Sanctions, (ECF No. 301), which
18 the Court granted nearly in its entirety, (*see generally* Sanctions Order). Specifically, the
19 Sanctions Motion requested relief in the form of:

- 20
21 (1) precluding Defendant from using or relying upon Settlement Statements, pay
22 summaries, ADP Master Control Reports or documents from Paychex, Inc. to
23 dispute the expense reimbursement estimates developed by Plaintiffs;
24 (2) precluding Defendant from using or relying upon Settlement Statements, pay
25 summaries, ADP Master Control Reports or documents from Paychex, Inc. to
26 support its defense of "enhanced compensation;"
27 (3) precluding Defendant from using or relying upon manifests or load out . . . /
28 pay reports to dispute (a) the hours and mileage estimates developed by
Plaintiffs and (b) the fuel expense estimates developed by Plaintiffs; and
(4) awarding Plaintiffs reasonable attorneys' fees and costs associated with the
filing of this motion and the motion to compel.

1 (Sanctions Order 4.) The Court granted the requested relief in all aspects except as it
2 pertained to the ADP Master Control Reports; i.e., Defendants are precluded from using or
3 relying on all the above-cataloged documents except for ADP Master Control Reports. (*Id.*
4 at 8.) The awarded relief also included reasonable attorney fees, (*id.*), the application for
5 which, and documents in support of and in opposition to, are now presently before the
6 Court.

7 **LEGAL STANDARD**

8 To calculate an appropriate attorney fee award, a court begins by “multiplying the
9 number of hours reasonably spent on the litigation by a reasonable hourly rate.” *McCown*
10 *v. City of Fontana*, 565 F.3d 1097, 1102 (9th Cir. 2009) (citing *Hensley v. Eckerhart*, 461
11 U.S. 424, 433 (1983)). The number of hours reasonably spent on litigation does not include
12 those “that are excessive, redundant, or otherwise unnecessary.” *Id.* (quoting *Hensley*, 461
13 U.S. at 434). To determine the reasonable hourly rate, a court looks to the “rate prevailing
14 in the community for similar work performed by attorneys of comparable skill, experience,
15 and reputation.” *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008)
16 (quoting *Barjon v. Dalton*, 132 F.3d 496, 502 (9th Cir.1997)). In this case, the relevant
17 community is the Southern District of California because it is “the forum in which the
18 district court sits.” *Id.* “The party seeking the award should provide documentary evidence
19 to the court concerning the number of hours spent, and how it determined the hourly rate(s)
20 requested.” *McCown*, 565 F.3d at 1102 (citing *Hensley*, 461 U.S. at 433).

21 **ANALYSIS**

22 **I. The Parties’ Arguments**

23 In the present case, Plaintiffs request a total award of \$26,980, based on (1) Counsel
24 Osborn’s 5.3 hours of allegedly \$600-an-hour-compensable time, and (2) Counsel Trust’s
25 59.5 hours of allegedly \$400-an-hour-compensable time. (Fee Appl. 4.) Plaintiffs attached
26 to their Fee Application all relevant time-sheet entries, including fields indicating a
27 description of each particular piece of work done along with corresponding date, attorney,
28 time, rate, and amount entries. (Osborn Decl. Ex. A, ECF No. 328-2.) Plaintiffs only initial

1 support for the reasonableness of the \$600 and \$400 hourly rates was a statement by
2 Counsel Osborn that “[t]he hourly rates set forth in Exhibit A are consistent with those
3 customarily charged by litigation firms performing similar work in the area.” (Osborn Decl.
4 ¶ 4, ECF No. 328-1.)

5 Defendant responded that Plaintiffs’ “bare allegations regarding the rate charged as
6 well as . . . the excessive hours he claims were expended on these two motions warrant a
7 reduction in the fee amount requested.” (Opp’n 1.) In particular, regarding the amount of
8 hours reasonably expended, Defendant claims that the following deductions should be
9 made:

- 10 (1) At least 2.6 hours corresponding to tasks more appropriately classified as
11 “administrative” work; and
- 12 (2) 10.0 hours of document review that “would have to have been completed
13 regardless of whether Plaintiff filed” the subsequent Motions here at issue;

14
15 (*Id.* at 4–6.) The alleged administrative work comprises: (1) 2.0 hours for editing a Joint
16 Motion and Declaration, which Defendant argues “is excessive” given surrounding time
17 entries, and (2) 0.6 hours for “tasks [that] could have been completed by administrative
18 staff” (*Id.* at 4–5.) The allegedly duplicative review concerns (1) 7.0 hours “in
19 connection with the review of ‘discovery documents’ ” that Plaintiffs would have had to
20 review even had they not filed the Motions here at issue; and (2) 3.0 hours out of a 6-hour
21 time entry because those three hours dealt with “review of ‘discovery documents’ ” that
22 Plaintiffs would have had to review even had they not filed the Motions here at issue. (*Id.*
23 at 5–6.)

24 Defendant also notes Plaintiffs’ unsupported hourly rate determinations, and argues
25 that \$400 and \$275 rates are more appropriate given both that another Court in this District
26 used these exact rates, *Blair v. CBE Grp., Inc.*, No. 13CV134-MMA WVG, 2014 WL
27 4658731 (S.D. Cal. Sept. 17, 2014), and that here the Fee Application is based on “a simple
28 discovery dispute.” (Opp’n 6–8). Finally, Defendants additionally argue that the overall

1 fee calculation should be reduced “by 33% to account for Plaintiff[s]’ partial success on
2 the Motion for Sanctions.” (*Id.* at 9–10.)

3 Plaintiffs respond specifically to each of Defendant’s hours-expended challenges,
4 asserting that (1) 13.9 hours to address “multiple (deficient) document productions,
5 thousands of pages of documents and a discovery dispute that spanned almost a year” is in
6 no way excessive and should not be reduced by two hours; (2) the 0.5 hour entry for work
7 was not “administrative” but rather entailed “substantive edits”; (3) Plaintiffs have no
8 objection to shifting to a paralegal rate the 0.1 hour calling the Court, despite the fact that
9 “it is counsel’s practice to have lawyers communicate with the Court”; and (4) the 10.0
10 hours spent reviewing documents would not have been completed in the absence of the
11 underlying motions because Plaintiffs had to carefully compare for compliance the latest
12 production with past productions, make sure that the “thousands of pages of documents
13 [Defendant produced] for non-class members” were in fact non-responsive, and create a
14 “detailed index of Defendant’s March 2016 production” in “order to effectively address
15 the discovery dispute with the Court.” (Reply 5.) Plaintiffs also provide case citations, a
16 copy of the Laffey Matrix (a District-of-Columbia-based attorney-fee data table), and
17 additional information regarding Counsel Osborn’s and Counsel Trust’s experience and
18 qualifications in support of the reasonableness of Counsels’ rates. (*Id.* at 5–8.) Finally,
19 Plaintiffs also disagree with Defendant’s percentage-reduction approach, noting that “the
20 Court, in very large part, granted Plaintiffs’ requests for relief” in the underlying Sanctions
21 Motion. (*Id.* at 8–10 (emphasis in original).)

22 Given that Plaintiffs only addressed the reasonableness of their hourly rates for the
23 first time in their Reply, Defendant moved *ex parte* to file a sur-reply and attached its
24 proposed sur-reply (“Sur-Reply”) to the Motion. (ECF No. 352.) Because Defendant
25 should have an opportunity to oppose Plaintiffs’ reasonableness contentions, the Court
26 **GRANTS** Defendant’s Sur-Reply Motion. The substance of the Sur-Reply argues that (1)
27 the Laffey Matrix is not an appropriate gauge of the reasonableness of an attorney’s hourly
28 rate in our locality, and (2) Plaintiffs’ supplied declarations from “other lawyers . . .

1 submitted in three other cases to support the ‘reasonableness’ of his requested rates” do not
2 meet Plaintiffs’ burden to demonstrate the “rates he seeks are consistent with those in the
3 community ‘for similar work.’ ” (Sur-Reply 2–3 (several emphases removed, one
4 maintained).)

5 The Court addresses these arguments in turn, turning first to the disputed individual
6 time entries, next addressing the reasonableness of Plaintiffs’ Counsels’ proposed hourly
7 rates, and finally discussing Plaintiffs’ Counsels’ success on the merits of the Sanctions
8 Motion.

9 **II. Individual Time Entries**

10 “By and large, the court should defer to the winning lawyer’s professional judgment
11 as to how much time he was required to spend on the case; after all, he won, and might not
12 have, had he been more of a slacker.” *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112
13 (9th Cir. 2008).

14 In the present case, the Court is not inclined to depart from any of Plaintiffs’ hourly
15 calculations other than the 0.1-hour entry spent calling the Court. The underlying dispute
16 involved extensive discovery misconduct, including Defendant allegedly “inadvertently”
17 losing or destroying many documents that were required to be preserved. (Sanctions Order
18 5–7.) The Court will not subtract two hours from drafting a Joint Motion and Declaration
19 when both the substance of the underlying misconduct was so severe and far-reaching and
20 Plaintiffs, in good faith, argue the two hours were “necessary to obtain the desired result
21” (Opp’n 3.) Nor will the Court subtract ten hours for document review. Although
22 Defendant argues that such review would have occurred as a matter of course regardless of
23 any discovery dispute, such an argument misses the whole substance of the dispute. It was
24 because of Defendant’s discovery misconduct, and Defendant’s deficient substitute
25 discovery—which included many documents related to no class member in this case—that
26 Plaintiffs had to expend extra resources in untangling the mess Defendant created. Finally,
27 Plaintiffs have also in good faith argued that the 0.5-hour entry for “editing, formatting and
28 transmitting the July 15, 2015 follow-up letter” involved “substantive edits[,]” and

1 therefore “that time should certainly be included in Plaintiffs’ award.” (Opp’n 4.) Again,
2 given the gravity of the dispute and misconduct here at issue, the Court declines to second
3 guess a thirty-minute time entry Plaintiffs have sufficiently explained.

4 The only aspect of Defendant’s argument to which Plaintiffs do not object is the 0.1-
5 hour entry being reduced from an attorney rate to a paralegal rate of \$125 per hour.
6 Accordingly, the Court will adjust Plaintiffs’ final award downward by this measure.

7 **III. The Reasonableness of Counsels’ Hourly Rates**

8 The reasonableness of a proposed hourly rate “should be established by reference to
9 the fees that private attorneys of an ability and reputation comparable to that of prevailing
10 counsel charge their paying clients for legal work of similar complexity.” *Davis v. City &*
11 *Cty. of S.F.*, 976 F.2d 1536, 1545 (9th Cir. 1992), *opinion vacated in part on other grounds*,
12 984 F.2d 345 (9th Cir. 1993). The Ninth Circuit has endorsed several factors a court may
13 consider in making such a determination, including:

14
15 the novelty and difficulty of the issues involved in a case, the skill required to
16 litigate those issues, the preclusion of other employment, the customary fee,
17 relevant time constraints, the amount at stake and the results obtained, the
18 experience, reputation, and ability of the attorneys, the nature and length of
19 their professional relationship with the client, the “undesirability” of a case,
and awards in similar suits.

20 *Id.* at 1546. “[T]he fee applicant has the burden of producing ‘satisfactory evidence’ that
21 the rates he requests meet these standards.” *Gonzalez v. City of Maywood*, 729 F.3d 1196,
22 1206 (9th Cir. 2013) (quoting *Dang v. Cross*, 422 F.3d 800, 814 (9th Cir. 2005)).
23 “Affidavits of the plaintiffs’ attorney and other attorneys regarding prevailing fees in the
24 community, and rate determinations in other cases, particularly those setting a rate for the
25 plaintiffs’ attorney, are satisfactory evidence of the prevailing market rate.” *United*
26 *Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990).

27 In the present case, Plaintiffs cite in and attach to their Reply several cases where
28 Courts approved rates in excess of those Plaintiffs currently request, (Reply 6–8);

1 Defendant cites a different case where the Court diminished rate requests similar to those
2 of Plaintiffs in this case, (Opp’n 7–8), and distinguish Plaintiffs’ cited cases, (Reply 2–3).

3 That different Courts reach different outcomes in the context of this discretionary
4 paradigm is unsurprising, if not terribly helpful. *See Fox v. Vice*, 563 U.S. 826, 838 (2011)
5 (“But trial courts need not, and indeed should not, become green-eyeshade accountants.
6 The essential goal in shifting fees (to either party) is to do rough justice, not to achieve
7 auditing perfection. So trial courts may take into account their overall sense of a suit, and
8 may use estimates in calculating and allocating an attorney’s time.”). However, Defendant
9 here is correct that Plaintiffs’ cited cases are distinguishable in meaningful ways: one was
10 unopposed as to the reasonableness of the hourly rate, (*Dilts v. Penske Logistics, LLC*, No.
11 08-CV-318-CAB-BLM, 2016 WL 4530816, at *5 (S.D. Cal. Mar. 11, 2016)), one was
12 within the context of a class action settlement and was not a similar wage-and-hour case,
13 (*see generally* Reply Ex. E, ECF No. 347-5), and one—again within the context of a class
14 action settlement—merely found “that the hourly rates charged by class counsel . . . are
15 within the prevailing range of rates charged by attorneys providing similar services in class
16 action, wage-and-hour cases in California” without supplying any reasoning for the
17 finding, (*id.*, ECF No. 347-5 at 47). Furthermore, all of Plaintiffs’ supporting declarations
18 are from the *Penske* case, which, as previously mentioned, was unopposed regarding the
19 reasonableness of Counsels’ hourly rate. (*See* Reply Exs. C, D, ECF Nos. 347-3 at 1–30,
20 50–54; 347-4.)¹

21 Given the foregoing, Defendants are correct that Plaintiffs have not met their burden
22 of showing that their requested rates are reasonable in light of customary rates in the
23 community for similar work. And the Court agrees with Defendants that a downward
24 departure is appropriate, given the balance of the other factors guiding its discretion, *supra*
25

26 ¹ Additionally, the Court does not consider the Laffey Matrix. As Defendant notes, Courts in our Circuit
27 do not find the Laffey Matrix persuasive regarding the prevailing rates for our community for similar
28 work. *E.g.*, *Perez v. Cozen & O’Connor Grp. Long Term Disability Coverage*, No. 05CV0440-DMS AJB,
2007 WL 2142292, at *2 (S.D. Cal. Mar. 27, 2007); *see also Prison Legal News v. Schwarzenegger*, 608
F.3d 446, 454 (9th Cir. 2010).

1 at 7. Specifically, the difficulties Plaintiffs’ encountered underlying the fee award here
2 stemmed almost exclusively from the sheer volume of data the Defendant supplied and the
3 amount of time it took for Plaintiffs to ferret out the truth of what happened to the
4 documents they originally requested. While Defendant’s conduct was inappropriate, it does
5 not necessarily follow that it was difficult for Plaintiffs to detect or brief. And although
6 Plaintiffs obtained favorable relief, the underlying discovery dispute—despite having
7 large-scale ramifications for this twelve-year-old case—did not preclude Plaintiffs’
8 Counsel from other employment nor was it achieved under substantial time constraints.

9 Accordingly, the Court finds it appropriate to deduct \$100 from Counsel Osborn’s
10 rate and \$75 from Counsel Trust’s rates. This results in a \$500 hourly rate for Counsel
11 Osborn and a \$325 hourly rate for Counsel Trust—almost precisely the midpoint between
12 Plaintiffs’ request and Defendant’s counter-request.

13 **IV. Counsels’ Success on the Merits of the Sanctions Motion**

14 Defendant is correct that generally “[w]here the plaintiff has failed to prevail on a
15 claim that is distinct in all respects from his successful claims, the hours spent on the
16 unsuccessful claim should be excluded in considering the amount of a reasonable fee.”
17 *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983). However, “[w]here a lawsuit consists of
18 related claims, a plaintiff who has won substantial relief should not have his attorney’s fee
19 reduced simply because the district court did not adopt each contention raised.” *Id.*

20 In the present case, Plaintiffs prevailed on their Sanctions Motion in all aspects
21 except relief regarding one particular category of document. And the substance of the
22 Sanctions Motion would likely have been nearly identical even had Plaintiffs not requested
23 the specific relief the Court denied; i.e., the Motion addressed Defendant’s deficient
24 production generally in order to explain the need for several types of preclusion
25 specifically. The Court here is satisfied that Plaintiffs “won substantial relief” through their
26 Sanctions Motion, and therefore declines to reduce the corresponding attorney fee award
27 due to the one aspect of requested relief the Court denied.

28 ///

1 **CONCLUSION**

2 Given the foregoing, the Court **GRANTS** Plaintiffs' Fee Application with the
3 following modifications: (1) 0.1 hour of time shall be billed at a \$125-per-hour rate, and
4 (2) Counsel Osborn's time shall be billed at \$500 an hour and Counsel Trust's time shall
5 be billed at \$325 an hour. This results in the following fee breakdown:

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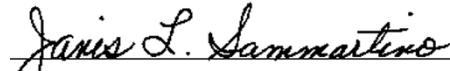
7 ATTORNEY NAME	HOURS	RATE	TOTAL
8 Daniel A. Osborn, Esq.	5.3	\$500	\$2,650.00
9 Lindsay M. Trust, Esq.	59.4	\$325	\$19,305.00
10 Lindsay M. Trust, Esq.	0.1	\$125	\$12.50

11

12 Accordingly, Plaintiffs' Counsel are **AWARDED** \$21,967.50 in attorney fees.

13 **IT IS SO ORDERED.**

14 Dated: April 20, 2017

15 
16 Hon. Janis L. Sammartino
United States District Judge