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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

OBESITY RESEARCH
INSTITUTE, LLC,

Plaintiff,

v.

FIBER RESEARCH
INTERNATIONAL, LLC,

Defendant.

Case No. 15-cv-595-BAS-MDD

**ORDER ON FIBER RESEARCH'S
MOTION FOR ATTORNEYS' FEES**

[ECF NO. 102]

Before the Court is Defendant Fiber Research's motion for the attorneys' fees and costs it expended to obtain this Court's December 15, 2015, Order striking Plaintiff Obesity Research's disclosure of non-retained experts Henny den Uijl, Jim Ayres, and Brian Salerno. (ECF No. 102; *and see* ECF No. 76 ("the underlying Order")). In the underlying Order, the Court found the position taken by Plaintiff during the required meet and confer session "frivolous" and its required disclosures "patently deficient." *See* ECF No. 76 at 5, 8. The Court, *sua sponte*, determined that sanctions beyond striking the offending disclosures may be appropriate and offered Defendant the opportunity to seek fees. *Id.* at 3 fn. 1, 8-9. This motion followed.

1 Fiber Research seeks a total award of \$36,735. In its initial motion,
2 Fiber Research sought \$27,687.50 (corresponding to 58.9 hours) for
3 preparation and filing of the ex parte motion and joint discovery motion
4 including its efforts in meet and confer sessions regarding this dispute. (ECF
5 No. 102-1 at 2). In its reply, Fiber Research agreed to two reductions of the
6 amount requested for work performed on the underlying successful motion:
7 \$1,637.50 and \$437.50 (a total reduction of \$2,075, for a total of \$25,612.50).
8 (ECF No. 109 at 12 at 14). Fiber Research also seeks \$11,122.50
9 (corresponding to 25.2 hours) for the preparation and filing of the present
10 motion for fees. (*Id.*). Combined, the amount requested for the underlying
11 motion and this motion totals \$36,735. Fiber Research has not sought
12 reimbursement for the time expended in preparing the reply.

13 LEGAL STANDARD

14 The Supreme Court has made clear that determining the appropriate
15 amount of attorneys' fees "should not result in a second major litigation."
16 *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). In determining the size of a
17 fee award, "trial courts need not, and indeed should not, become green-
18 eyeshade accountants." *Fox v. Vice*, 131 S. Ct. 2205, 2216 (2011). Courts
19 should not strive to "achieve auditing perfection" but should attempt "to do
20 rough justice." *Id.* In so doing, courts may "take into account [] overall sense
21 of a suit" and may even "use estimates in calculating and allocating an
22 attorney's time." *Id.*

23 Even though it is impossible to determine with mathematical precision
24 the amount of attorneys' fees incurred by one party as a direct result of
25 misconduct, courts must "abide by the injunction of the arithmetic teacher:
26

1 Show your work!” *Padgett v. Loventhal*, 706 F.3d 1205, 1208 (9th Cir. 2013);
2 *Salstrom v. Citicorp Credit Services, Inc.*, 74 F.3d 183, 185 (9th Cir. 1996).

3 In the Ninth Circuit, courts calculate awards for attorneys’ fees using
4 the “lodestar” method. *Haeger v. Goodyear Tire and Rubber Co.*, 813 F.3d
5 1233, 1249 (9th Cir. 2016); *Hensley*, 461 U.S. at 429. “The ‘lodestar’ is
6 calculated by multiplying the number of hours the prevailing party
7 reasonably expended on the litigation by a reasonable hourly rate.” *Camacho*
8 *v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008) (quoting *Ferland v.*
9 *Conrad Credit Corp.*, 244 F.3d 1145, 1149 n.4 (2001)). The reasonableness of
10 the hourly rate is determined by the prevailing market rates in the
11 community in which the court sits, for similar litigation by attorneys of
12 comparable experience, skill and reputation. *Blum v. Stenson*, 465 U.S. 886,
13 895 and n.11 (1984).

14 ANALYSIS

15 I. Reasonable Hourly Rate

16 Fiber Research lists the hourly rates for each of the partners and
17 associates whose time entries are at issue.

18 Timekeeper	Position	Graduation Year	Hourly Rate
19 Jack Fitzgerald	Partner, LOJF	2004	\$625
20 Thomas A. Canova	Partner, LOJF	1985	\$725
21 Melanie Persinger	Associate, LOJF	2010	\$400
22 Chris Sullivan	Partner, PPK	1995	\$675
23 Jason Kerr	Partner, PPK	1998	\$650

24
25 Fiber Research supports the hourly rates with a declaration from lead
26 counsel Jack Fitzgerald describing the skill and experience of each

1 professional. (ECF No. 102-1 at 6; ECF No. 102-2 (Fitzgerald Decl.) ¶¶ 7-40
2 and Exh. 1). Fiber Research further provides support in the form of two
3 surveys showing rates charged by other attorneys. (Fitzgerald Decl. ¶¶ 41-42
4 and Exhs. 4-5). Fiber Research also supports attorney Fitzgerald and
5 Canova’s rates with prior findings by the Superior Court of the State of
6 California, San Diego County that their rates are reasonable in this market.
7 (*Id.* at ¶ 10 and Exh. 3).

8 In its opposition, Obesity Research contends that these rates are
9 unreasonable. (ECF No. 108). In support of that contention, Obesity
10 Research distinguishes each of the cases in which Fiber Research’s attorneys’
11 hourly rates have been found reasonable. (*Id.* at 9-16). Obesity Research
12 argues that most of the cases approving Mr. Fitzgerald’s (or rates similar to
13 his) hourly fee (at rates ranging from \$525/hr. to \$625/hr.) were class action
14 settlements in which the defendants agreed not to challenge the
15 reasonableness of the hourly rate as part of the settlement. (*Id.*). Fiber
16 Research responds that class actions, like any other case, can be simple or
17 complex. Fiber Research further replies that, although the class action fee
18 applications were unopposed, they were scrutinized by objectors, class
19 representatives, and courts, which owe fiduciary duties to class members.
20 The Court agrees with Fiber Research that courts do not rubber stamp
21 unopposed class action fee applications, and considers the findings in these
22 cases as evidence of the reasonableness of counsel’s fees in this matter.

23 Obesity Research also challenges the two surveys, noting that the “2010
24 NLJ Billing Survey” is outdated, only lists one firm in this District, and that
25 firm (Luce, Forward, Hamilton & Scripps) no longer exists. Obesity Research
26 contends that the second “NLJ Billing Survey” lists national firms without

1 reference to San Diego. Fiber Research responds that courts in this District
2 rely on the very type of survey evidence—and even one of these exact
3 surveys—in finding hourly rates reasonable. (ECF No. 109 at 10 (citing
4 *Makaeff v. Trump Univ., LLC*, 2015 WL 1579000, at *4-5 (S.D. Cal. Apr. 9,
5 2015) (Curiel, G.) (approving rates of \$250-\$440 for associates and \$600-\$825
6 for partners after considering the National Law Journal “NLJ” Survey))).

7 Finally, Obesity Research offers the declaration of its lead counsel, Mr.
8 Sybert, stating that the hourly rates his firm is charging their client in this
9 matter are much lower, specifically: “associate \$325, senior counsel \$375,
10 partner \$425, and senior partner \$475.” (ECF No. 108-1 at 3). In response,
11 Fiber Research argues that Mr. Sybert recites his firm’s rates “in this case,”
12 but does not identify his firm’s customary rates. Fiber Research suggests
13 that Obesity Research may have obtained a reduced rate with counsel
14 because Obesity Research’s new in-house counsel is a former partner of Mr.
15 Sybert. In support of that suggestion, Fiber Research points out that Obesity
16 Research’s “original counsel, Scott Ferrell, for example, charged his ‘new
17 defense clients’ \$750 per hour *six years ago*, in 2010.” (ECF No. 109 at 11
18 n.5). The Court considers the evidence presented by Mr. Sybert but declines
19 to accord it substantial weight.

20 The Court finds that Fiber Research has produced satisfactory evidence
21 that the hourly rates for its associates and partners are reasonable. The
22 hourly rates are supported by counsel’s detailed declaration, are consistent
23 with those previously approved by this Court and in this District, are
24 consistent with the survey data provided, and are consistent with this Court’s
25 experience regarding the rates charged in the San Diego community.
26 Although the Court has considered the lower rates charged by Obesity

1 Research’s counsel and its challenges to the evidence presented by Fiber
2 Research, the Court finds Fiber Research has met its burden to produce
3 “satisfactory evidence, in addition to the affidavits of its counsel, that the
4 requested rates are in line with those prevailing in the community for similar
5 services of lawyers of reasonably comparable skill and reputation.” *Jordan v.*
6 *Multnomah County*, 815 F.2d 1258, 1263 (9th Cir.1987); *see also United*
7 *Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990)
8 (courts should consider affidavits of the movant’s attorney and other
9 attorneys regarding prevailing fees in the community, and rate
10 determinations in other cases, particularly those setting a rate for the
11 movant’s attorney).

12 II. Reasonably Expended Hours

13 Fiber Research provides detailed time entries in support of its request.
14 (ECF Nos. 102-4 and 102-10). Fiber Research contends that the timekeeper
15 records “demonstrates that this work was staffed properly,” with “fifth-year
16 associate Melanie Persinger perform[ing] most of the work (36 of 50.2
17 hours).” (ECF No. 102-1 at 7-8). Fiber Research emphasizes the difficulty of
18 responding to new arguments raised by Obesity Research at each step of the
19 meet and confer and joint motion drafting process. Fiber Research explained
20 that it already deducted 8.7 hours (\$3,617.50) for time spent on researching,
21 conferring about, and briefing related to the 5-factor test courts use when
22 considering Rule 37(c) forms of relief. Finally, Fiber Research deducted half
23 of the 50.4 hours (\$22,245) it spent in preparing the fee motion, and is
24 instead only seeking 25.2 hours (\$11,122.50). Fiber Research did not include
25 or seek any fees for the time it spent preparing its reply.

26

1 Obesity Research opposes on the grounds that Fiber Research’s portion
2 of the “simple and straightforward” underlying motion “was only five pages.”
3 (ECF No. 108). Obesity Research objects that Fiber Research overstaffed the
4 case by “pil[ing] on multiple attorneys, including one not even admitted in
5 California.” (*Id.*). Obesity Research argues that it is unreasonable to bill
6 four separate partners’ time for reviewing the drafts prepared by the
7 associate. Obesity Research contends that Fiber Research “seeks to recover
8 for an excessive and duplicative number of hours.” Obesity Research only
9 spent 19.6 hours (compared to Fiber Research’s 67.6 hours) on the underlying
10 motions. In addition, Obesity Research notes that the documents filed by Mr.
11 Fitzgerald reveal that he routinely files fee motions and argues that as a
12 result of their prior fee motions, they should have been able to draft this
13 motion and fee declaration in less time. In response to this assertion, Fiber
14 Research explains that it did indeed leverage prior work product to achieve
15 efficiencies of scale, but significant effort was still required to tailor the work
16 to this dispute. Obesity Research further contends that Ms. Persinger
17 improperly block-billed her time.

18 The Court finds that 40.2 hours of the time requested for the work on
19 the underlying motion is reasonable. At the outset, the Court notes that
20 Fiber Research chose not to pursue the time drafting the reply in support of
21 this motion and in addition deducted 37.2 hours of time actually billed for the
22 underlying motion and this moving brief.

23 The Court further notes that the time was expended not just on writing
24 a five page brief, as Obesity Research contends, but on repeatedly meeting
25 and conferring with Obesity Research prior to and during the drafting of the
26 brief. In addition, it is usually more time-consuming to write a succinct brief

1 than it is to write a lengthy (though unfocused) brief. And, as Fiber Research
2 contends, designations of non-retained experts in Lanham Act litigation is
3 not a regular occurrence.

4 The Court disagrees with Obesity Research's contention that Ms.
5 Persinger performed clerical work or block-billed her time, and instead finds
6 that her entries are sufficiently specific for the Court to determine the
7 reasonableness of the time she spent on each task. *See e.g., Sunstone*
8 *Behavioral Health, Inc. v. Alameda County Med. Ctr.*, 646 F.Supp.2d 1206,
9 1217 (E.D. Cal. 2009) (even block-billed entries are permissible so long as
10 entries provide sufficient detail for the court to evaluate what the lawyers
11 were doing and whether the time was reasonably spent).

12 The Court finds that Obesity Research's evidence that it only spent 19.6
13 hours on the underlying dispute is of little weight. The Court's underlying
14 Order found that Obesity Research did not do enough to comply with its Rule
15 26 obligations and engaged in gamesmanship that caused the unnecessary
16 expenditure of Fiber Research's time.

17 The Court agrees with Obesity Research, however, that Fiber Research
18 overstaffed the case and therefore excludes as unreasonable the 6.7 hours
19 billed by Mr. Thomas Canova for the underlying dispute, in addition to the
20 amounts Fiber Research proactively deducted. The timekeeper records show
21 that four different supervising attorneys actively participated in internal
22 conferences and multiple reviews of Ms. Persinger's work product. (ECF No.
23 102-4). This overstaffing resulted in duplication of efforts and unreasonable
24 time spent on internal conferencing. Also, Mr. Canova is not licensed to
25 practice in California, is not listed as counsel of record on the docket in this
26

1 case, is not admitted pro hac vice, and the timekeeping records show his
2 efforts to be redundant of the work performed by the other three partners.

3 Obesity Research specifically conceded that the 0.1 hours spent by Mr.
4 Kerr on 10/20/15 and the 0.2 hours spent by Mr. Sullivan on 10/28/15 were
5 reasonable, so the Court will not deduct those amounts. (ECF No. 108 at 22).

6 The Court further notes that in its reply Fiber Research took the
7 initiative to deduct 0.5 hours spent by Mr. Kerr on November 6, 2.1 hours
8 spent by Mr. Fitzgerald on November 9, and 0.7 hours spent by Mr.
9 Fitzgerald on November 10 (totaling a deduction of 3.3 hours and \$2,075), in
10 response to Obesity Research's argument that the case was overstaffed by
11 partners redundantly reviewing Ms. Persinger's work. The Court accepts
12 those deductions, and finds that deduction of the work performed by Mr.
13 Canova is sufficient to address any remaining concern about duplication of
14 efforts caused by the overstaffing.

15 Accordingly, the Court finds the following hours billed for the underlying
16 motion that are shown in the chart below to be reasonable, and finds the
17 resulting lodestar figure of \$17,137.50 for the underlying motion is
18 reasonable.

19 **Fees for Underlying Motion**

20 Timekeeper	Hours Ultimately Requested	Hours Awarded	Hourly Rate	Total Ultimately Requested	Total Awarded
21 Fitzgerald	1.9	1.9	\$625	\$1,187.50	\$1,187.50
22 Canova	6.7	0.0	\$725	\$4,857.50	\$0.00
23 Persinger	36	36	\$400	\$14,400.00	\$14,400.00
24 Sullivan	2.2	2.2	\$675	\$1,485.00	\$1,485.00
25 Kerr	.1	.1	\$650	\$65.00	\$65.00
26 Lodestar				\$21,995.00	\$17,137.50

1 The Court further finds that the 25.2 hours and \$11,122.50 requested
2 for this fee application are reasonable. Although the time entries for work
3 performed on this motion include time spent by Mr. Canova, Fiber Research
4 has already deducted half of all of the time spent on the motion, more than
5 sufficient to avoid inclusion of the time spent by Mr. Canova. (ECF No. 102-
6 10). Consequently, the Court finds the combined lodestar figure of \$28,260 is
7 reasonable.

8 III. Adjustments


9 There is no reason to adjust the lodestar figure of \$28,260. *See Evon v.*
10 *Law Offices of Sidney Mickell*, 688 F.3d 1015, 1033 n.11 (9th Cir. 2012)
11 (“After computing the ‘lodestar,’ the district court may then adjust the figure
12 upward or downward taking into consideration twelve ‘reasonableness’
13 factors....”). Obesity Research contends the lodestar figure should be
14 adjusted downward by 50% on the grounds that the underlying motion had
15 only limited success and minimal impact on the case. The Court disagrees
16 and declines to adjust the lodestar figure.

17 CONCLUSION

18 The Court **GRANTS** Fiber Research’s motion for attorneys’ fees and
19 **ORDERS** Obesity Research to pay Fiber Research \$28,260.00 within 30 days
20 of this Order, absent further order of the Court or agreement of the parties.

21 **IT IS SO ORDERED.**

22
23 Dated: April 18, 2016

24 
25 Hon. Mitchell D. Dembin
26 United States Magistrate Judge