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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BRANCH BANKING AND TRUST
COMPANY,

Plaintiff,

v.

SMOKE RANCH DEVELOPMENT, LLC, *et*
al.,

Defendants.

Case No. 2:12-cv-00453-APG-NJK

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR ATTORNEY'S FEES
AND NONTAXABLE COSTS**

ECF No. 183

11 Plaintiff Branch Banking and Trust Company has moved for an award of its attorney's
12 fees and nontaxable costs incurred in connection with this matter. BB&T brought this action in
13 March 2012, alleging that the defendants had failed to repay a loan. It sought judgment for the
14 unpaid principal due on the loan plus fees, costs, and interest. ECF No. 1. I granted summary
15 judgment in BB&T's favor on the defendants' liability for breaches of the loan's promissory note
16 (the "Promissory Note") and commercial guaranties (the "Commercial Guaranties"). ECF No.
17 130. Judgment was subsequently entered in favor of BB&T and against the defendants, jointly
18 and severally, in the amount of \$630,401.15. ECF No. 182. BB&T now seeks attorney's fees in
19 the amount of \$234,382.16¹ and nontaxable costs and expenses in the amount of \$11,399.12.

20 The defendants oppose the motion, arguing that BB&T has failed to comply with Local
21 Rule 54-16 and therefore the motion should be denied in its entirety. They also contend that
22 BB&T's fee request is unreasonable for various reasons. They argue that BB&T's request for
23 nontaxable costs should also be denied because the loan documents do not permit recovery of
24 such costs.

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¹ BB&T's original motion requests \$234,382.16 in attorney's fees, but in its reply it amended its request to \$233,456.16 based on items addressed in its reply. ECF No. 192.

1 **I. LEGAL STANDARD**

2 “If state substantive law governs a case, then an award of attorney fees is also governed by
3 state law.” *Muniz v. United Parcel Serv., Inc.*, 738 F.3d 214, 218 (9th Cir. 2013). Federal courts
4 in diversity cases follow the law of the state in which the district court sits, including with respect
5 to issues of conflict of laws. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). “Nevada tends to
6 follow the Restatement (Second) of Conflict of Laws (1971) in determining choice-of law
7 questions involving contracts.” *Progressive Gulf Ins. Co. v. Faehnrich*, 752 F.3d 746, 750 (9th
8 Cir. 2014) (citation omitted). “The law of the state chosen by the parties to govern their
9 contractual rights and duties will be applied.” Restatement (Second) of Conflict of Laws § 187(1)
10 (1971). Regarding the right to attorney’s fees, Nevada law “ha[s] consistently held that attorney’s
11 fees are only available when authorized by a rule, statute, or contract.” *Flamingo Realty, Inc. v.*
12 *Midwest Dev., Inc.*, 879 P.2d 69, 73 (Nev. 1994) (citations and quotation omitted).

13 The reasonableness of an attorney’s fee award is also determined by state law when a
14 federal court is sitting in diversity. *Mangold v. Cal. Pub. Util. Comm’n*, 67 F.3d 1470, 1478 (9th
15 Cir. 1995). In Nevada, “the method upon which a reasonable fee is determined is subject to the
16 discretion of the court,” which “is tempered only by reason and fairness.” *Shuette v. Beazer*
17 *Homes Holdings Corp.*, 124 P.3d 530, 548-49 (Nev. 2005) (quoting *Univ. of Nev. v. Tarkanian*,
18 879 P.2d 1180, 1188, 1186 (Nev. 1994)). One permissible method of calculation is the lodestar
19 approach, which involves multiplying “the number of hours reasonably spent on the case by a
20 reasonable hourly rate.” *See id.* at 549 & n.98 (quoting *Herbst v. Humana Health Ins. of Nev.*, 781
21 P.2d 762, 764 (Nev. 1989)); *see also Sobel v. Hertz Corp.*, 53 F. Supp. 3d 1319, 1325-26 (D.
22 Nev. 2014). In most cases, the lodestar figure is a presumptively reasonable fee award. *Camacho*
23 *v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008).

24 In determining the reasonableness of a fee request, I am guided by the factors listed in
25 *Brunzell v. Golden Gate National Bank*:

- 26 (1) the qualities of the advocate: his ability, his training, education,
27 experience, professional standing and skill; (2) the character of the work to
28 be done: its difficulty, its intricacy, its importance, time and skill required,

1 the responsibility imposed and the prominence and character of the parties
2 where they affect the importance of the litigation; (3) the work actually
3 performed by the lawyer: the skill, time and attention given to the work; (4)
the result: whether the attorney was successful and what benefits were
derived.

4 455 P.2d 31, 33 (Nev. 1969); *see also* *Haley v. Dist. Ct.*, 273 P.3d 855, 860 (Nev. 2012) (“[i]n
5 determining the amount of fees to award, the court is not limited to one specific approach; its
6 analysis may begin with any method rationally designed to calculate a reasonable amount, so long
7 as the requested amount is reviewed in light of the factors set forth in *Brunzell*” (quotation and
8 citation omitted)).

9 I also am guided by the factors set forth in Local Rule 54-16(b). *See Schneider v. Elko*
10 *Cty. Sheriff’s Dep’t*, 17 F. Supp. 2d 1162, 1166 (D. Nev. 1998). That rule provides that the
11 motion must include the following:

- 12 (1) A reasonable itemization and description of the work performed;
- 13 (2) An itemization of all costs sought to be charged as part of the fee
award and not otherwise taxable pursuant to LR 54-1 through 54-15;
- 14 (3) A brief summary of:
 - 15 (A) The results obtained and the amount involved;
 - 16 (B) The time and labor required;
 - 17 (C) The novelty and difficulty of the questions involved;
 - 18 (D) The skill requisite to perform the legal service properly;
 - 19 (E) The preclusion of other employment by the attorney due to
acceptance of the case;
 - 20 (F) The customary fee;
 - 21 (G) Whether the fee is fixed or contingent;
 - 22 (H) The time limitations imposed by the client or the
circumstances;
 - 23 (I) The experience, reputation, and ability of the attorney(s);
 - 24 (J) The undesirability of the case, if any;
 - 25 (K) The nature and length of the professional relationship with the
client;
 - 26 (L) Awards in similar cases; and,
- 27 (4) Such other information as the Court may direct.

28 Local Rule 54-16(b)

Although state law governs whether a party is entitled to attorney’s fees, federal law
dictates the procedure for requesting attorney’s fees. *Carnes v. Zamani*, 488 F.3d 1057, 1059 (9th
Cir. 2007). A motion for attorney’s fees and nontaxable costs must be filed no later than 14 days

1 after the entry of judgment. Fed. R. Civ. P. 54(d)(2)(B)(i). The motion must state the amount
2 sought or provide a fair estimate. Fed. R. Civ. P. 54(d)(2)(B)(iii). The motion must be
3 accompanied by an affidavit from the attorney responsible for the billings in the case to
4 authenticate the information contained in the motion and to confirm that the bill has been
5 reviewed and edited and that the fees and costs charged are reasonable. LR 54-16(c). “Failure to
6 provide the information required by LR 54–16(b) and (c) in a motion for attorneys’ fees
7 constitutes a consent to the denial of the motion.” LR 54-16(d). The Local Rules also permit an
8 award of attorney’s fees to include costs and expenses that are not otherwise taxable pursuant to
9 Rule 54(d)(2) (*i.e.*, nontaxable costs). *See* LR 54-16(b)(2).

10 **II. ANALYSIS**

11 **A. Attorney’s Fees**

12 BB&T’s motion requests an attorney’s fee award of \$234,382.16. In support, it attaches
13 the affidavit of Jeremy J. Nork, Esq., lead counsel for BB&T, and a table detailing the requested
14 attorney’s fees. BB&T argues that the Promissory Note and Commercial Guaranties authorize
15 such an award. The Promissory Note is governed by Nevada law and, with respect to attorney’s
16 fees and costs, states:

17 **ATTORNEYS’ FEES; EXPENSES.** Lender may hire or pay someone else to
18 help collect this Note if Borrower does not pay. Borrower will pay Lender that
19 amount. This includes, subject to any limits under applicable law, Lenders’
20 attorneys’ fees and Lender’s legal expenses, whether or not there is a lawsuit,
21 including attorneys’ fees, expenses for bankruptcy proceedings (including
22 efforts to modify or vacate any automatic stay or injunction), and appeals. If
23 not prohibited by applicable law, Borrower also will pay any court costs, in
24 addition to all other sums provided by law.

25 ECF No. 80 at 19. The Commercial Guaranties are also governed by Nevada law and contain
26 similar language. *See id.* at 41, 45, 49, 53, 57. The parties do not dispute that the provisions in the
27 Promissory Note and Commercial Guaranties entitle BB&T to some amount of attorney’s fees
28 related to this litigation. Because Nevada law states that attorney’s fees are available when

1 authorized by a contract, BB&T is entitled to attorney's fees and costs based on the Promissory
2 Note and the Commercial Guaranties.

3 It appears that BB&T's proposed attorney's fee award was calculated by multiplying the
4 number of hours spent on the case by the hourly rate of each associate or employee. This is the
5 basic formation of the lodestar method and is presumed reasonable unless the factors listed in
6 *Brunzell* or Local Rule 54-16 dictate a different result.

7 *i. Failure to Comply with Local Rule 54-16*

8 The defendants argue that BB&T has failed to comply with Local Rule 54-16(b)(3)
9 because it has failed to address each of the twelve factors individually and in depth, which has
10 resulted in prejudice to the defendants' ability to oppose the fee request. They argue that failure
11 to comply with Local Rule 54-16 is sufficient grounds to deny a motion for attorney's fees in its
12 entirety. BB&T replies that there is no set form to satisfying the twelve factors and that Local
13 Rule 54-16(b)(3) only requires a "brief summary" of each. BB&T argues that it has sufficiently
14 addressed each of the twelve factors and that where its summaries are short, it is because the
15 factor in question does not apply or does not warrant a longer summary.

16 There is no set form to satisfying the factors listed in Local Rule 54-16. Depending on the
17 facts of a particular case, some factors may require more detailed analysis while others may be
18 satisfied in a single sentence.² BB&T's motion analyzes the *Brunzell* factors, noting in footnotes
19 when the facts outlined in the motion address the factors listed in Local Rule 54-16(b)(3). The
20 motion sufficiently addresses all but one of the twelve factors listed in Local Rule 54-16. The
21 one factor left unaddressed does not change the analysis of BB&T's proposed fee award.³ While
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23 ² For example, Local Rule 54-16(b)(3)(G) requires a party to state whether the attorney's
24 fees are fixed or contingent.

25 ³ BB&T's motion does not provide examples of awards in similar cases as listed in Local
26 Rule 54-16(b)(3)(L). In its reply, BB&T states that this a general commercial case and therefore
27 "the awards fall in line with the standards set forth in Local Rule 54-16 and the *Brunzell* factors."
28 ECF No. 192 at 3 n.3. While this response does not specifically satisfy the requirements of Local
Rule 54-16(b)(3)(L), Mr. Nork swears under oath in his affidavit that he has reviewed the fees
related to this litigation and states they were reasonable and necessary. The defendants do not

1 the defendants argue that BB&T's alleged noncompliance with Local Rule 54-16 demonstrates
2 that its requested attorney's fee award and associated billing rates are "high, void of any
3 economies of scale," they cite no evidence to support this argument. I find that BB&T's motion
4 complies with Local Rule 54-16's requirements.

5 *ii. Reasonableness of Attorney's Fees*

6 The defendants argue that the attorney's fees BB&T requests are unreasonable for various
7 reasons.

8 *1. Utilization of Numerous Personnel*

9 The defendants argue that "[o]n its face, utilizing thirteen different people for one case is
10 unreasonable." ECF No. 187 at 5. They cite no case law in support of this argument. They also
11 argue that BB&T has failed to demonstrate why it should recover fees associated with the practice
12 support work of Catherine Bradshaw and a Lexis Technician.

13 BB&T responds that the lead partner and lead associate on the case have never changed,
14 but that at times it utilized other associates and employees for various assignments to be cost-
15 effective. It also contends that the litigation has been ongoing for several years and therefore
16 various associates who have worked on the matter needed to be replaced over time if they left the
17 firm or took leave. With respect to the work of Catherine Bradshaw and the Lexis Technician,
18 BB&T states it is willing to forgo those fees, totaling \$926.

19 Because BB&T is withdrawing its request for the \$926 in fees associated with Catherine
20 Bradshaw and the Lexis Technician, those fees will not be awarded and its motion is denied as to
21 that amount. The use of different associates at various times throughout a case is not *per se*
22 unreasonable and the defendants have given no explanation why BB&T's use of different
23 associates during the course of this case was unreasonable.

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25 offer any evidence or argument on why this factor is specifically important to this case, nor do
26 they argue that the fee awards in similar cases are different from the one proposed here.
27 Therefore, this deficiency does not change my analysis of the proposed award.

1 *D.M.S.I., LLC*, No. 2:11-cv-01778-APG-VCF, ECF No. 141 (Sept. 10, 2015) and *Branch*
2 *Banking and Tr. Co. v. Regena Homes, LLC*, No. 2:12-cv-00451-APG-GWF, ECF No. 180 (Sept.
3 10, 2015). The tables of fees submitted in those two cases also included the exact same four
4 billing entries of Mr. Novaceck. *See D.M.S.I., LLC*, No. 2:11-cv-01778-APG-VCF, ECF No. 141-
5 1 at 9; *Regena Homes, LLC*, No. 2:12-cv-00451-APG-GWF, ECF No. 180-1 at 9-10. Because it
6 is impossible to determine to which matter these entries rightly belong—and against which
7 defendant they should be awarded—I deny BB&T’s motion as it relates to these fees, totaling
8 \$640.

9 *4. Work Not Sufficiently Described, or Repetitive, or Block Billed*

10 The defendants argue that numerous entries in the fee table are not sufficiently described
11 and are block-billed, specifically, work by various paralegals. For example, they highlight
12 various entries by paralegal Ebony Hardy related to discovery responses, document productions,
13 and disclosures, and various entries related to legal research. They also highlight entries by Mr.
14 Nork related to preparation for a deposition that they claim was also partly included in one of
15 BB&T’s other motions in a different case. BB&T responds that all of the work performed was
16 sufficiently and accurately described and is reasonable.

17 Upon review of the entries highlighted by the defendants, the vast majority sufficiently
18 detail the character of the work done and are presumptively reasonable. “[B]lock-billed time
19 entries are generally amenable to consideration under the *Brunzell* factors.” *In re Margaret Mary*
20 *Adams 2006 Trust*, No. 61710, 2015 WL 1423378, at *2 (Nev. Mar. 26, 2015) (citing *Mendez v.*
21 *Cnty. of San Bernardino*, 540 F.3d 1109, 1129 (9th Cir. 2008), *overruled on other grounds by*
22 *Arizona v. ASARCO LLC*, 773 F.3d 1050 (9th Cir. 2014)); *see also Fischer v. SJP-P.D. Inc.*, 214
23 F.3d 1115, 1121 (9th Cir. 2000) (block billing is not inappropriate *per se* when the party seeking
24 fees meets the basic requirements of “listing his hours and identifying the general subject matter
25 of his time expenditures” (internal quotations omitted)); *Hensley v. Eckerhart*, 461 U.S. 424, 433
26 (1983) (noting that although the fee applicant bears the burden of submitting “evidence
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1 supporting the hours worked and rates claimed,” an applicant is “not required to record in great
2 detail how each minute of his time was expended”).

3 Regarding the February 12, 2013 entry by Mr. Nork related to the “PMK” deposition, I
4 agree that part of this entry was also included in the billing on another matter. *See D.M.S.I., LLC*,
5 No. 2:11-cv-01778-APG-VCF, ECF No. 141-1 at 11 (2/12/2013 entry by Mr. Nork). It is
6 therefore appropriate to deduct from this bill the amount charged in the other matter, totaling
7 \$445.50. This amount will not be awarded.

8 5. *Work Performed on Unsuccessful Motions*

9 The defendants argue that BB&T is not entitled to fees related to unnecessary and
10 unsuccessful work. They cite to BB&T’s failed motion for sanctions based on their motion for a
11 negative inference. *See* ECF Nos. 65, 85. In response, BB&T argues that because the defendants’
12 underlying motion for a negative inference was subsequently denied, the fees spent on its motion
13 for sanctions, while unsuccessful, was not meritless or unnecessary.

14 The fees related to BB&T’s failed motion for sanctions were not reasonable or necessary.
15 BB&T is entitled to recover fees related to responding to the defendants’ motion for a negative
16 inference, but it is not entitled to fees related to its failed motion for sanctions. Work on that
17 motion was performed in February 2013. *See* ECF No. 183-1 at 12-13. Because the motion for
18 sanctions was included in BB&T’s opposition to the defendants’ motion for a negative inference
19 (*see* ECF Nos. 64, 65), the billing entries for both are combined in most instances and total over
20 \$5,300 for both motions combined. *See id.* (billing entries on 2/6/2013, 2/7/2013, 2/8/2013,
21 2/10/2013, 2/11/2013). Upon review of the bills and the motions, reducing the award by \$1,354
22 is appropriate. This amount will not be awarded.

23 **B. Nontaxable Costs**

24 BB&T also requests nontaxable costs in the amount of \$11,399.12. It argues that it is
25 entitled to costs under the loan documents and that both Rule 54(d)(1) and Local Rule 54-1 allow
26 a prevailing party to recover nontaxable costs. The defendants argue that BB&T fails to identify
27 the contractual language that entitles it to nontaxable costs. They further argue that the itemized
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1 table of costs includes both taxable and nontaxable costs, lacks the appropriate descriptions, and
2 that BB&T has failed to provide receipts.

3 Rule 54(d) contains two separate provisions for costs. To request taxable costs, the
4 prevailing party must file a bill of costs with the clerk. LR 54-1. Taxable costs are taxed by the
5 clerk rather than the Court. Fed. R. Civ. Proc. 54(d)(1); LR 54-1. The categories of taxable costs
6 are circumscribed by 28 U.S.C. § 1920. *See also* LR 54-1. For example, filing fees and service of
7 process expenses are taxable costs. *See* 28 U.S.C. § 1920(1).

8 By contrast, nontaxable costs are recoverable on a motion to the court under Rule 54(d)(2)
9 along with attorney’s fees. Fed. R. Civ. Proc. 54(d)(2) (“claim for attorney’s fees and related
10 nontaxable expenses”) & Advisory Comm. Note to 1993 Am. (“This new paragraph establishes a
11 procedure for presenting claims for attorneys’ fees, whether or not denominated as ‘costs.’ It
12 applies also to requests for reimbursement of expenses, not taxable as costs, when recoverable
13 under governing law incident to the award of fees.”); *see also* LR 54-16(b)(2) (a motion for
14 attorney’s fees must include “[a]n itemization of all costs sought to be charged as part of the fee
15 award and not otherwise taxable pursuant to LR 54-1 through 54-15”). For example, copy,
16 postage, travel, research, and Pacer expenses are nontaxable costs.

17 An award of costs involves a two-step inquiry. I must first determine who is a “prevailing
18 party” under Rule 54, and then I must determine “how much (if any) costs should be awarded to
19 the prevailing party.” *Shum v. Intel Corp.*, 629 F.3d 1360, 1366 (Fed. Cir. 2010); *Ass’n of Mex.-*
20 *Am. Educators v. Cal.*, 231 F.3d 572, 593 (9th Cir. 2000) (noting that district courts have
21 discretion in choosing to award costs under Rule 54(d)). In the Ninth Circuit, there is a
22 presumption in favor of awarding costs to the prevailing party. *Dawson v. City of Seattle*, 435
23 F.3d 1054, 1070 (9th Cir. 2006). To overcome this presumption, the losing party must establish a
24 reason to deny costs. *Id.*

25 The Promissory Note contains a provision stating that the borrower will pay for “Lender’s
26 attorneys’ fees and Lender’s legal expenses” and “[i]f not prohibited by applicable law, Borrower
27 also will pay any court costs, in addition to all other sums provided by law.” ECF No. 80 at 19.

1 The Commercial Guaranties contain similar language. *See id.* at 41, 45, 49, 53, 57. Additionally,
2 Rule 54 and Local Rule 54-1 allow a prevailing party⁴ to recover nontaxable costs. Therefore,
3 BB&T is entitled to some award of nontaxable costs based on the federal and local rules and the
4 Promissory Note and Commercial Guaranties.

5 However, it is unclear from the motion and exhibits what costs BB&T is seeking in its
6 request. The motion cites Rule 54(d)(1) for its request for nontaxable costs, but that subsection
7 relates to taxable costs. BB&T provides a table outlining various costs presumably associated
8 with this case, but the table includes both taxable and nontaxable expenses. *See* ECF No. 183-1 at
9 24-26. Additionally, the bottom of the table includes a total of \$17,188.98 in costs, yet BB&T
10 requests \$11,399.12. Thus, even if I assume BB&T mistakenly cited to the wrong subsection of
11 Rule 54 in its request for nontaxable costs, it is still unclear how BB&T calculated the \$11,399.12
12 it requests. It is therefore also impossible to determine if that amount is accurate or if the costs
13 listed are the types covered under Rule 54(d)(2). I therefore deny BB&T's request for nontaxable
14 costs without prejudice. BB&T has 14 days from the date of this Order to file a new motion for
15 nontaxable costs consistent with this Order, Federal Rule of Civil Procedure 54(d)(2), and Local
16 Rule 54-16(b)(2).⁵

17 **III. CONCLUSION**

18 IT IS THEREFORE ORDERED that plaintiff Branch Banking and Trust Company's
19 motion for attorney's fees and nontaxable costs (**ECF No. #183**) is **GRANTED in part and**
20 **DENIED in part**. It is denied as to the \$926 in fees associated with Catherine Bradshaw and the
21 Lexis Technician, the \$640 in fees associated with the FDIC assignment, the \$445.50 in fees
22 associated with the PMK deposition, and the \$1,354 in fees associated with the motion for
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24 ⁴ Neither party disputes that BB&T is a prevailing party for purposes of awarding costs.

25 ⁵ The defendants also argue that BB&T did not submit receipts for its nontaxable costs,
26 yet they cite no case law, statute or local rule which requires this. Local Rule 54-16(b) requires
27 "[a]n itemization of all costs sought to be charged as part of the fee award and not otherwise
28 taxable." If there are specific itemized costs which the defendants wish to dispute because they
believe them to be unreasonable, they are free to highlight those specific entries in their
opposition to any renewed motion for nontaxable costs BB&T may file.

1 sanctions. It is also denied without prejudice as to nontaxable costs. Branch Banking and Trust
2 Company has 14 days from the date of this Order to file an updated motion for nontaxable costs
3 consistent with this Order.

4 IT IS FURTHER ORDERED that the clerk of court shall enter judgment in favor of the
5 plaintiffs and against the defendants for attorney's fees in the amount of \$231,016.66.

6 DATED this 6th day of September, 2016.

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9 ANDREW P. GORDON
10 UNITED STATES DISTRICT JUDGE
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