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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 11-08283-GAF-SP	Date	December 11, 2012
Title	Marc S Kirschner v. Timothy L Blixseth		

Present: The Honorable	**GARY ALLEN FEESS**	
Renee Fisher	None	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: **(In Chambers)**

ORDER RE: MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS

I.
INTRODUCTION

Trustee in bankruptcy, Marc S. Kirschner, moves for an award of attorney's fees after successfully obtaining dismissal of the pending counterclaims, defeating a motion to amend the counterclaim, and succeeding on a motion for imposition of sanctions against Timothy Blixseth, the founder of the bankrupt Yellowstone Mountain Club ("the Club"). The present motion for a fee award has been brought in response to the Court's order issued in its ruling on the foregoing three motions. The Court concludes that a fee award is appropriate and **GRANTS** the motion. The Court's reasoning is discussed in detail below.

II.
BACKGROUND

This lawsuit arises out of a bankruptcy proceeding filed in the District of Montana. The suit is brought by Marc S. Kirschner, the trustee in bankruptcy, against Timothy Blixseth, the founder of the bankrupt Yellowstone Mountain Club ("the Club"). During its operations, the Club borrowed $375 million from Third Party Defendants, various Credit Suisse entities ("Credit Suisse"), and thereafter transferred approximately $200 million to Blixseth through his former business entity, BLX Group ("BLX"). In return for the funds, Blixseth executed two promissory notes (the "Notes") in favor of BLX. BLX later purportedly cancelled the notes and

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released Blixseth from any liability to repay the $200 million. Those notes were later transferred to the Club, which was BLX's creditor, and the Club's bankruptcy estate, through the present lawsuit, seeks to set aside, under federal and state law, the allegedly fraudulent release and to recover the $200 million.

Blixseth unsuccessfully sought dismissal of the pending complaint. When that tactic failed, Blixseth filed a Counterclaim and Third Party Complaint in which he contended that Credit Suisse and related entities, Blixseth's ex-wife, Edra Blixseth, and now Kirschner have participated in a RICO conspiracy with the object of gaining control of the Club and its assets through predatory lending practices, the transfer of ownership of the Club to Edra during the Blixseths' divorce proceedings, and the pending bankruptcy proceedings against the Club. Blixseth also made three contract-based counterclaims against Kirschner related to his attempt to collect on the Notes. (Docket No. 26 (Countercl.).) In the Third Party Complaint, Blixseth sought recovery from five Credit Suisse entities, in the event that he was found liable on the Notes, on theories of contribution and unjust enrichment. (Docket No. 27 [Third Party Compl.].)

Kirschner filed a Motion to Dismiss Blixseth's Counterclaim (the "Motion to Dismiss"), a Motion for Sanctions, and an Opposition to Defendant and Counterclaimant's Motion to Amend the Counterclaim. (Docket Nos. 29, 30, 52.) On November 1, the Court issued an order granting all three of these motions and ordering Kirschner "to file a specific request for fees and costs incurred in moving to dismiss the Counterclaim, moving for sanctions, and opposing Blixseth's motion for leave to amend the Counterclaim, supported by billing records and other appropriate documentation." (11/1/12 Order at 38–39.) In response to the Order, Kirschner filed his present Motion for Attorneys' Fees and Costs. (Docket No. 73 [Mem.].) Kirschner requests $85,014.75 in attorneys' fees. (Mem. at 6.) Kirschner's request for attorneys' fees is itemized by attorney, three of whom work for Bailey & Glasser, LLP ("B&G"), and three of whom are with the firm of Bienert, Miller & Katzman ("BMK"). (Id.) Kirschner also requests $5,167.96 in costs, related to online legal research expenses. (Id. at 9.)

Blixseth filed a late Opposition to Kirschner's motion for attorneys' fees, objecting to Kirschner's requested figure on a number of grounds: (1) Kirschner never properly met and conferred with Blixseth prior to filing the Motion to Dismiss and Motion for Sanctions, (2) the attorneys' billing "contains countless entries that are block-billed, which brings the reasonableness of each block-billed entry into question," (3) the billing records "contain significant entries where the description of work rendered is partially redacted," (4) the billing records reveal duplicative billing by B&G and BMK, (5) B&G and BMK's hours for the Motion

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to Dismiss the Counterclaim and Motion for Sanctions are grossly excessive, (6) Kirschner improperly seeks fees for BMK's preparation of an Opposition to Blixseth's Ex Parte Motion for Continuance, and (7) Kirschner request for computer research costs is improper because the billing records are unclear and because "this Court's local rules do not specify computer research as a taxable cost." (Docket No. 75 [Opp.].) Under Local Rule 7–12, "[t]he failure to file any required document, or the failure to file it within the deadline, may be deemed consent to the granting or denial of the motion." C.D. Cal. Rule 7–12. Because the Court favors decisions on the merits, the Court nevertheless **GRANTS** Blixseth's ex parte request for consideration of the belatedly-filed Opposition.

In spite of the Opposition, however, and for reasons discussed in further detail below, the Motion for Attorneys' Fees and Costs is **GRANTED.**

III.
DISCUSSION

A. LEGAL STANDARD

"Reasonableness is the benchmark for sanctions based on attorneys' fees." Mirch v. Frank, 266 Fed. App'x. 586 (9th Cir. 2008) (citing 28 U.S.C. § 1927 (authorizing fees 'reasonably incurred')). A two-step approach is employed in assessing whether attorneys' fees are reasonable. Intel Corp. v. Terabyte Int'l, 6 F.3d 614, 622 (9th Cir. 1993)(citing Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)). First, the court calculates the lodestar figure by multiplying the hours reasonably spent on the litigation by a reasonable hourly rate. Costa v. Commissioner of Social Sec. Admin., 690 F.3d 1132, 1135 (9th Cir. 2012) (quotation omitted); Morales v. City of San Rafael, 96 F.3d 359, 363 (9th Cir. 1996). Second, after computing the "lodestar," the district court may then adjust the figure upward or downward taking into consideration twelve "reasonableness" factors:

> (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to the acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

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Evon v. Law Offices of Sidney Mickell, 688 F.3d 1015, 1033 (9th Cir. 2012) (quoting Morales, 96 F.3d at 363 n.8.) "The most critical factor is the degree of success obtained." Hensley, 461 U.S. at 436. Furthermore, "[t]here exists a 'strong presumption' that the fee determined by multiplying a reasonable billing rate by the number of hours justifiably expended on a litigation constitutes an appropriate fee award." Chandler v. Koon, 996 F.2d 1223, at *3 (9th Cir. 1993) (citing United Steelworkers of America v. Phelps Dodge Corp., 896 F.2d 403, 406 (9th Cir. 1990)). And, finally, the Ninth Circuit has made clear that reasonable fees "are to be calculated according to the prevailing market rates in the relevant community." Van Skike v. Director, Office of Workers' Compensation Programs, 557 F.3d 1041, 1046 (9th Cir. 2009) (quoting Blum v. Stenson, 465 U.S. 886, 895 (1984).) "The relevant community is generally defined as 'the forum in which the district court sits.'" Id. (quoting Barjon v. Dalton, 132 F.3d 496, 500 (9th Cir. 1997)).

B. APPLICATION

1. ATTORNEYS' FEES

Here, Kirschner requests only the lodestar figure at issue—$85,014.75—with no upward adjustment, and the Court concludes that such an award is appropriate, particularly in light of Kirschner's success with respect to each of the three motions filed. Kirschner's requests for attorneys' fees is as follows: (1) $9,800.00 for 24.5 hours worked by Brian A. Glasser of B&G at $400/hour; (2) $30,920.00 for 77.3 hours worked by J.B. Perrine of B&G at $400/hour; $24,333.75 for 108.15 hours worked by Leona Goldshaw of B&G at $225/hour; (4) $7,371.00 for 11.7 hours worked by Steven Jay Katzman of BMK at $630/hour; (5) $3,750.00 for 10 hours worked by Susann K. Narholm at $375/hour; and (6) $8,840.00 for 27.2 hours worked by Tony Bisconti at $325/hour. (Mem. at 6.)

"[I]n most cases, [t]he lawyers' actual billing rates reflect market rates—they provide an efficient and fair short cut for determining the market rate." Student Public Int. Research Group of N.J., Inc. v. AT&T Bell Labs., 842 F.2d 1436, 1445 (3d Cir. 1988). Here, the billing rates listed for each of these attorneys is reasonable given the market rate in Los Angeles, and the ample experience of each of the attorneys, as detailed by Kirschner in his request. (See Mem. at 6–8 (describing qualifications of each of the above-referenced attorneys, including law school, additional education, and former employment).) The Court thus concludes that the $85,014.75 lodestar calculation is based on a reasonable billing rate.

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The time spent drafting the three motions in question—258.95 hours—is also reasonable especially considering the complexity of the issues presented and the vexatious conduct of the opposition. (Mem. at 6.) As the Supreme Court noted in Hensley, in determining both a reasonable billing rate and a reasonable number of hours, "[t]here is no precise rule or formula . . . ." Hensley, 461 U.S. at 436. However, "the most critical factor is the degree of success obtained." Id. Here, Kirschner filed three motions and the Court granted all three. (11/1/12 Order.) The motions were complex, involving "hundreds of pages of pleadings," "thousands of pages of exhibits," and requiring the Court to issue an order spanning some thirty-nine pages to dispose of the case. (Mem. At 2; 11/1/12 Order) Finally, Kirschner has voluntarily excluded the "time of two partners and two paralegals at B&G" and Mr. Glasser's time "was reduced from 47.70 to 24.50 hours." (Mem. at 7.)

Blixseth's Opposition does not alter the Court's conclusion that Kirschner's request for attorneys' fees is reasonable. His argument that Kirschner failed to meet and confer as required by Local Rule 7–3 is utterly unpersuasive. Not only is Blixseth raising this argument nearly eight months after the filing of the motions in question, but Kirschner effectively rebuts these allegations with Mr. Glasser's billing records, which demonstrate that the parties did, in fact, meet and confer. (Reply at 2 (citing Glasser Decl., Exhibit A, entry item dated March 27, 2012 ("Call to Conant [Blixseth's attorney], left message re: our desire for him not to refile the spurious counterclaim.").)

Furthermore, Blixseth's arguments with respect to block-billing, redactions, duplicative hours, and "grossly excessive" hours are too vague to be persuasive. As the Ninth Circuit recognized in Beltran Rosas v. County of San Bernardino, objections to a fee request should be specific. 260 F. Supp. 2d 990, 996 n.4 (citing Gates, 39 F.3d 1439 (9th Cir. 1994) (stating as a reason for rejecting the defendants' contention that an attorney's fee award was invalid, that the defendants failed to make adequate specific objections)); see also Lawyers' Mut. Ins. Co. v. Home Ins. Co., No. 93-3839, 1995 WL 150556, at *1 (N.D. Cal., Mar. 20, 1995). The potential pitfalls of block-billed or redacted entries is that they will prevent the Court from determining precisely how attorneys spent particular hours. Here, Blixseth fails to point to even one block-billed or redacted entry that would cause this purported confusion. And the Court does not find the billing records unintelligible or opaque as a result of Kirschner's minor redactions and the block-billing in some of the entries.

With respect to the allegation that BMK and B&G have duplicative time entries, a review of the billing records substantiates Kirschner's explanation that

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> [c]ontrary to the Opponents' suggestion, BMK and B&G were not simply reviewing each other's work and communicating without any substantive response. Rather, extensive strategy, review, analysis, and communications performed by both BMK and B&G were substantive in nature and necessary, addressing complex substantive and procedural issues arising in this case due to several factors, including but not limited to: the nature of the specious claims asserted by Mr. Blixseth; the preexisting litigation across several forums; and complex legal questions of intersecting state, federal, and bankruptcy law.

(Reply at 7.) Furthermore, the one case Blixseth cites in support of the proposition that the number of hours at issue here is excessive—Maughan v. Google Tech., Inc.—involved an attorney who billed over 200 hours for the preparation of *one* motion. 143 Cal.App.4th 1242, 1251 (2006). Here, Kirschner's counsel spent 258.95 hours preparing *three* motions. (Mem. at 6.) Thus, Blixseth's Opposition does not alter the Court's conclusion that these hours are reasonable in light of the complexity of the case and the degree of success Kirschner obtained.

Finally, Blixseth's argument that the fees relating to the preparation of Kirschner's Opposition to Blixseth's Ex Parte Application to continue the hearing on the Motion to Dismiss and Motion for Sanctions was unnecessary is also unavailing. The Court agrees with Kirschner's assessment that "[t]he time incurred opposing the Ex Parte Application directly relates to both the Motion to Dismiss and the Motion for Sanctions, as the Ex Parte Application was filed by Blixseth in an attempt to delay the Court's ruling on those matters for the strategic purpose of having Blixseth's Motion to Amend heard first." (Reply at 8.)

2. COSTS

In addition to attorneys' fees, Kirschner requests $5,167.96 in costs "related to online legal research expenses." (Mem. at 9 (citing Glasser Decl. ¶ 7; Exhibit B).) The Court finds this figure reasonable and Blixseth's contention that Local Rule 54–4 "do[es] not specify computer research as a taxable cost" is inapposite. (Opp. at 7.) The type of cost recovery permitted or prohibited under Local Rule 54–4 is not dispositive of the determination of appropriate costs here because these costs are being imposed as a form of sanctions pursuant to 28 U.S.C. § 1927.

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III. CONCLUSION

Accordingly, the Court **GRANTS** Blixseth's Motion for Extension of Time to File Response to Plaintiff's Motion for Attorneys' Fees. Notwithstanding Blixseth's Opposition, the Court **GRANTS** in its entirety Kirschner's Motion for Attorneys' Fees and Costs, awarding Kirschner a total of **$90,182.71**. As set forth in the Court's November 1 Order, Blixseth is "responsible for two-thirds of the total award and Conant[, Blixseth's attorney, is] responsible for one-third." (11/1/12 Order at 39.)

The hearing set for Monday, December 17, 2012 is **VACATED**.

IT IS SO ORDERED.