

Closed

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:08-cv-00810-RGK-E	Date	August 11, 2016
Title	<i>STEPHEN STETSON, et al v. WEST PUBLISHING CORP., et al</i>		

Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE		
Sharon L. Williams	Not Reported	N/A	
Deputy Clerk	Court Reporter / Recorder	Tape No.	
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:		
Not Present	Not Present		
Proceedings:	(IN CHAMBERS) Order re: Motion for Attorneys Fees on Remand		

On February 6, 2008, Stephen Stetson, et al (“Plaintiffs”) filed a class action complaint for Violation of the U.S. Antitrust Laws (15 U.S.C. §§1 and 2) against West Publishing Corp. dba BAR/BRI and Kaplan, Inc. (“Defendants”). The case was originally assigned to Judge Phillip Gutierrez, then transferred to Judge Manuel Real as a related case.

The current matter is before this Court as a remand and reassignment by the Ninth Circuit to determine the appropriate attorney’s fees and costs related to a class action settlement.

In their settlement agreement, the parties agreed to a \$9.5 million gross settlement fund, from which attorneys fees and costs, administrative fees and costs, and incentive awards would be deducted. Plaintiffs sought \$1.9 million in fees, and \$49,934.89 in costs. Certain class members (“Objectors”) objected to the fee request, asserting that Class Counsel was entitled to no more than \$380,000 in fees. Objectors then sought 20 percent of any reduction in fees as their own fee award, as well as \$1,000 in incentive awards for each individual objector.

The trial judge approved the underlying settlement. However, as to attorney’s fees, the judge applied the lodestar method of calculation, and awarded \$585,000 to Class Counsel. As to costs, the judge found that Class Counsel had inadequately supported its claim for certain expert fees, and awarded \$20,588.17. The trial judge denied Objectors’ fee request in its entirety,

finding that Objectors did not add anything to the Court's independent analysis.

Both Plaintiffs and Objectors appealed the trial judge's order. On review, the Ninth Circuit found that Objectors' objection was timely, and that the trial judge abused his discretion by failing to provide specific reasons for his decisions. The Ninth Circuit reversed the trial judge's order and remanded with the following instructions to the Court: (1) clearly provide reasons for the factors in its lodestar computation; (2) expressly consider both a risk multiplier and the *Kerr* factors; and (3) base its decision on facts supported by the record. As to Objectors' appeal, the Ninth Circuit stated that if the district court again reduces Class Counsel's fee award, it can also determine the extent to which Objectors' arguments influenced its decision, and rule on Objectors' request for fees accordingly.

With these instructions in mind, the Court addresses Plaintiffs' request for attorney's fees, Plaintiffs' request for costs, and Objectors' request for fees.

A. Attorney's Fees

In a common-fund case, the district court has discretion to apply either the lodestar method or percentage-of-the-fund method in calculating a fee award. *Fischel v. Equitable Life Assurance Soc'y*, 307 F.3d 997, 1006 (9th Cir. 2002). Here, trial judge used the lodestar method to calculate fees, and the Ninth Circuit found that he acted well within his discretion to do so. Under the lodestar method, the court multiplies a reasonable number of hours by a reasonable hourly rate. *Id.* Once the lodestar is determined, depending on the circumstances of the case, the court may apply a multiplier based on an assessment of risk and the *Kerr* factors.

1. Lodestar Calculation

Class Counsel contends that the unadjusted lodestar is \$920,250, based on 1,541.20 hours of work expended, and hourly rates ranging from \$125 per hour to \$800 per hour. (*See* Pls.' Memorandum of Points and Authorities in Response to Objections to Class-Action Settlement (DE 173) at 15:19-16:11.) The Court addresses both the hours spent and the hourly rates.

a. Hours Spent

This Court has been placed in the unenviable position of determining the reasonableness of hours spent on litigation over which it did not preside. It is clear that the trial judge, who is best situated to make this decision, determined that a large number of hours spent were not reasonable. However, having only the time records and the parties' arguments to aid its analysis, this Court is unable to arrive at the same determination based on the information provided.

In their objection, Objectors identify roughly \$45,000 in fees related to Class Counsel's

preparation of the complaint.¹ (*See* Disner Decl., Ex. 1, pp. 1-2.) Objectors challenge the reasonableness of these hours. As support, they point to evidence indicating that the complaint in this matter is essentially the same as that of a related case, *Rodriguez v. West Publishing Corp, et al.* (*See* Pls.’ Request for Judicial Notice, Ex. 9.) Class Counsel offers no rebuttal to this evidence. In the absence of any response, the Court assumes the evidence is accurate. Assuming, as the evidence indicates, that preparation of the complaint was simply a matter of making minor modifications to an already existing complaint, the Court agrees that the number of hours attributed to this task is excessive. Moreover, the Court finds that the extensive use of the most senior attorney on this task is unreasonable.

In reviewing the hours attributed to the complaint, the Court notes that some of the entries attribute the hours solely to preparation of the complaint (“single-task entries”). Many other entries, however, attribute the hours to both preparation of the complaint, as well as various forms of correspondence with class representatives and co-counsel (“multiple-task entries”).

As to the single-task entries, 14.3 hours of work were performed by J. Bennet, 10.5 hours of work were performed by F. Ung, and 1 hour of work was performed by P. Disner. In light of the evidence discussed above, the Court finds that all but two of the hours attributed to J. Bennet are unreasonable. Specifically, the Court finds that the nature of the task did not require any hours additional to those of F. Ung’s and P. Disner’s, plus two hours by J. Bennet. The additional 12.3 hours logged by J. Bennet are unjustified with respect to (1) the amount of time spent in general, and (2) the allocation of that time to an attorney with more than 40 years of experience, and a billable rate of \$800 per hour. Therefore, the Court deducts 12.3 hours attributed to J. Bennet, leaving intact, 13.5 total hours for preparation of the complaint.

As to the multiple-task entries, the time records do not provide any detail as to what portion of the time was spent on which tasks. Without a more detailed breakdown of the hours, the Court assumes that 50 percent of the hours were spent on preparation of the complaint, and the remaining 50 percent were spent on correspondence. In light of the evidence above, the Court finds that the reasonable hours spent on this task are limited to the 13.5 hours already reflected in the single-task entries. Therefore, with respect to the multiple-task entries, the Court deducts 50 percent of the hours performed by each of the attorneys listed - P. Disner, E. Disner, and F. Ung. The deductions total 4.6 hours for P. Disner; 30.25 hours for E. Disner; and 7.5 hours for F. Ung.

Regarding the hours attributed to preparing the class action complaint, the Court finds that a total of 54.65 hours² are not reasonable and deducts those hours from the lodestar

¹ Objectors also point to other entries they deem suspect, based on contemporaneous activity occurring in the *Rodriguez* matter. (*See* Objection to Class Counsels’ Motion for Attorney Fees and Reimbursement of Expenses (DE 159), 7:11-9:24.) However, in its Response to Objections, Class Counsel provide explanation for these entries. Without the benefit of having presided over this litigation, the Court has no basis for finding these hours unreasonable.

² 12.3 hours + 4.6 hours + 30.25 hours + 7.5 hours = 54.65 hours

calculation.

As to the remaining hours not related to the complaint, Class Counsel submitted lengthy time records. Without the benefit of presiding over the litigation, the Court has no independent information to aid its assessment of the legal tasks logged by Class Counsel. Except for the hours spent on preparation of the complaint, the face of the time records reveals no obvious unreasonableness in the number of hours spent. Therefore, the Court makes no further deductions.

Based on the foregoing, the Court finds that the reasonable time spent is 1,486.55 hours.³

b. Hourly Rate

Class Counsel applies hourly rates ranging from \$125 (Junior Clerks) to \$800 (Senior Attorneys with more than 20 years experience). Class Counsel lists the exact hourly rates corresponding to specific time keepers in its Motion for Attorney Fees and Reimbursement of Costs (DE 146), pages 22-23.

The Real Rate Report is a CEB and TyMetrix publication that identifies attorney rates by location, experience, firm size, areas of expertise, and industry, as well as the specific practice areas. It is based on actual legal billing, matter information, and paid and processed invoices from more than 80 companies. As other courts have found, the Real Rate Report is a persuasive source of information for determining reasonable hourly rate, as it is a reflection of true market rates. *See Hicks v. Toys 'R' Us-Delaware, Inc.*, No. CV13-1302-DSF JCGX, 2014 WL 4670896, at *1 (C.D. Cal. Sept. 2, 2014); *see also Tallman v. CPS Sec. (USA), Inc.*, 23 F. Supp. 3d 1249, 1258 (D. Nev. 2014); *G.B. ex rel. N.B. v. Tuxedo Union Free Sch. Dist.*, 894 F. Supp. 2d 415, 433 (S.D.N.Y. 2012).

The 2015 Real Rate Reports offer relevant data points for fees. The Report states that the median rate for corporate litigation partners in Los Angeles is \$670. *2015 Real Rate Report* at 83. The median rate for associates in the same category is \$440. *Id.* The Report also states that in the major US markets, the average hourly rates for litigation attorneys within the specific practice area of antitrust are: Partners: \$663.72; Associates: \$395; Paralegals: \$216.74. *Id.* at 14.

The evidence indicates that the rates charged by the more senior attorneys (E. Disner, A. Harris, L. Owen) far exceed the prevailing hourly rates in the community for similar work. However, the figures above represent the median, while the top third quartile of rates in Los Angeles reach \$870 for partners and \$555 for associates. *Id.* Moreover, the Ninth Circuit found that there was evidence of risk in this matter. (*See Remand Opinion (DE 205) at 14.*) In consideration of these additional factors, and particularly in light of the risk found by the appellate court, the Court finds that the rates charged by Class Counsel are reasonable under the

³ 1,541.2 hours - 54.65 hours = 1,486.55 hours

totality of the circumstances.

c. Total Lodestar Amount

Based on the discussion above, the Court finds that the total lodestar amount is \$883,475.50.⁴

2. Risk Multiplier

“The district court *must* apply a risk multiplier to the lodestar ‘when (1) attorneys take a case with the expectation they will receive a risk enhancement if they prevail, (2) their hourly rate does not reflect that risk, and (3) there is evidence the case is risky.’ Failure to apply a risk multiplier in cases that meet these criteria is an abuse of discretion.” *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 741 (9th Cir. 2016)(quoting *Fischel v. Equitable Life Assurance Soc’y*, 307 F.3d 997, 1008 (9th Cir. 2002) (emphasis added).

As stated by the Ninth Circuit, the decision to apply a risk multiplier is within the discretion of the district court. While the Ninth Circuit found evidence of risk, it also conceded that the record is not developed on the extent of that risk, or on the other two elements. The trial judge, who is best situated to make this determination, chose not apply a risk multiplier. Given the discretionary nature of this issue, the Court assumes that unless it *must* apply a risk multiplier, sound discretion dictates that applying a multiplier is unwarranted.

On the question of whether a risk multiplier must be applied, the Court answers in the negative, as all three factors are not present. While the Ninth Circuit has already found evidence of risk, the mandate to apply a multiplier does not get triggered if Class Counsel’s rates already reflect the risk. As discussed in Section A.1.b., above, the rates charged by the more senior attorneys far exceed the prevailing hourly rates in the community for similar work. Nonetheless, the Court found the higher rates reasonable, based among other things, on the Ninth Circuit’s finding of risk. Therefore, the Court finds that the hourly rates applied by Class Counsel already reflect the risks of this action. In its discretion, the Court will not apply a risk multiplier.

3. Kerr Factors

As stated by the Ninth Circuit, the district court also has discretion to adjust the lodestar upward or downward based on consideration of the *Kerr* factors. *See Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975). The *Kerr* factors include the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941-42 (9th Cir. 2011).

Upon consideration of the relevant factors, the Court finds the result to be net-neutral.

⁴ \$920,250 - ((42.55 hours x \$800) + (4.6 hours x \$195) + (7.5 hours x \$245)) = \$883,475.50

Regarding quality of representation, as stated previously, this Court is hindered by its lack of historical knowledge in this case. However, the information provided by Objectors indicates that the number of hours and the hourly rate related to the class complaint were excessive in light of the preceding *Rodriguez* complaint, which is substantially similar. This factor weighs against a positive multiplier, as one of the metrics for quality of representation includes efficiency. As to the benefit obtained for the class, it is clear that Class Counsel obtained a benefit by negotiating a \$9.5 million settlement, which is greater than the amount originally agreed upon. This factor weighs in favor of a positive multiplier. While antitrust litigation is inherently complex relative to other practice areas, there is no indication that the issues were novel. In fact, as previously discussed, *Rodriguez*, which preceded the current case, was substantially similar, and in fact, designated as a related case. Regarding complexity, time records indicate that even taking into account the time deducted in Section A.1.a. above, 47% of the total time billed were hours spent by attorneys with over 35 years of experience, who billed at \$800 per hour. Therefore, the complexity of this case and how it bears upon attorneys fees has already been accounted for in the lodestar amount. Finally, as to risk of nonpayment, there is no indication of such risk. Defendants are well-established corporations that show no evidence of financial strain or hardship.

Based on the foregoing, the Court finds that neither a negative or positive multiplier should apply based on the *Kerr* factors.

4. Total Amount of Attorneys Fees

In light of the analysis above, the Court awards Class Counsel a total of \$883,475.50 in attorney's fees.

B. Costs

In its original motion, Class Counsel requested \$49,934.89 in costs. The trial judge reduced that amount to \$20,588.17, based on a finding that Class Counsel inadequately supported its claim for expert fees. Specifically, the trial judge found that Class Counsel did not provide any information regarding how crucial or indispensable the unnamed experts were to the litigation. Based on this reasoning, the judge deducted three costs itemized in the time records that were related to the unnamed experts. (*See Harris Decl.* (DE 150-4) at p. 136.)

In its Opinion, the Ninth Circuit found the trial judge's ruling clearly erroneous and pointed to a declaration submitted on August 12, 2013, providing "almost two full pages explaining how these experts were used and why their input was crucial or indispensable." (Remand Opinion (DE 205) at p. 15.) The Court has searched through the record and finds no such document. The only August 12, 2013 declaration on file that addresses expert fees is the Declaration of Alan Harris in Response to Objections to Class-Action Settlement (DE 171). In that declaration, Class Counsel presents the qualifications of Drs. Safir, Gikas, and Rook. (Harris Decl. at ¶¶8 and 9.) Class counsel provides a statement specifying Dr. Rook's contribution to the action (*Id.* at 9), but provides no such statement regarding Drs. Safir and

Gikas. The only statement that possibly relates to Drs. Safir's and Gikas's contributions is contained in two sentences: "Prior to the commencement of settlement negotiations, I consulted with our experts regarding both the range of possible damages and the various ways in which settlement might be achieved. As a result of those discussions, a settlement strategy was developed to focus on Kaplan and a possible settlement that would include the use of coupons." (*Id.* at 10.) This statement is inadequate to support Drs. Safir's and Gikas's fees. First, the statement does not identify which experts Class Counsel consulted with. Second, even assuming the statement refers to Drs. Safir and Gikas, the Court can only speculate as to which experts contributed to what issues, and whether there was duplication of expert services. Finally, even if the Court could accurately surmise the roles of Drs. Safir and Gikas, the time records fail to specify what fees are attributed to which expert. Therefore, the Court would still be unable to ascertain the reasonableness of the fees charged.

Without more information, the Court simply cannot find that the unnamed expert fees are justified and reasonable. Therefore, the Court deducts \$29,200 in costs from the amount requested.⁵ The Court awards costs in the amount of \$20,734.89.

C. Objectors' Request for Fees

In his original order regarding Objectors' request for fees, the trial judge found that Objectors' role was not material in bringing about the successful settlement because Objectors did not add anything to the Court's independent analysis. (*See* Remand Opinion at p. 7.) As such, the judge denied the request. *Id.* Objectors appealed. In its decision, the Ninth Circuit found that (1) Objectors had standing to appeal the district court's denial of their fee request, and (2) Objectors timely filed their objection. The court then remanded the matter, stating that "if the district court again reduced Class Counsel's fee award, it can also determine – with specificity – the extent to which Objectors' arguments influenced its decision. (*Id.* at p.10.) Because this Court has reduced Class Counsel's fee award, it will consider the extent to which Objectors' argument influenced the decision and as a result, the amount of fees warranted.

The district court has a special duty to protect the interests of the class. *Staton Boeing Co.*, 327 F.3d 938, 970 (9th Cir. 2003). "Because in common fund cases the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage, courts have stressed that when awarding attorney's fees from a common fund, the district court must assume the role of fiduciary for the class plaintiffs." *In re Wash. Pub. Power Supply Sys. Sec. Litig. (WPPSS)*, 19 F.3d 1291, 1302 (9th Cir. 1994). This role is especially important when the requested fee award appears high. *In re Chiron Corp. Sec. Litig.*, 2007 WL 42499902 *6 (N.D. Cal. Nov. 30, 2007). Therefore, objectors play a particularly valuable role in providing the court with information to aid the process of determining the reasonableness of attorney's fee requests by class counsel. *See id.* Counsel for objectors whose actions confer a benefit upon the class are entitled to reasonable fees and expenses. *Winger v. SI Management L.P.*, 301 F.3d 1115, 1123 (9th Cir. 2001).

⁵ \$1,200 + \$13,400 + \$14,600 = \$29,200 (*See* Harris Decl. (DE 150), Ex. 4, p. 136.)

Here, the Court utilized Objectors' arguments and evidence regarding the hours and fees attributed to Class Counsel's preparation of the class complaint. Based on Objectors' contribution, the Court found that Class Counsel's fees were unreasonable and reduced the lodestar amount by \$36,774.50.⁶ Moreover, the Court considered Objectors' arguments and evidence when it decided that the *Kerr* factors yielded no positive multiplier. Therefore, Objectors conferred a benefit to the class. Taking this benefit into account, the Court finds the following fees appropriate: (1) attorney's fees based on 20% of \$36,774.50, and (2) a \$500 fee award to each of the six individual objectors.⁷

D. Conclusion

Based on the foregoing, the Court awards Class Counsel attorney's fees in the amount of \$883,475.50, and costs in the amount of \$20,734.89. The Court also awards attorney's fees to Objectors in the amount of \$7,354.90, and fee awards of \$500 to each of the six individual objectors.

IT IS SO ORDERED.

Initials of Preparer _____ : _____

⁶ (42.55 hours x \$800/hour) + (4.6 hours x \$195/hour) + (7.5 hours x \$245/hour) = \$36,774.50

⁷ The six individual objectors are Seth Bryant Grissom, James Ralph Garrison III, Dustin Kennemer, Nathan Hunt, John Kelley, and John Amari. (*See* Grissom Objectors' Supplemental Brief on Remand (DE 209) at 1:2-3.)