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10 UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 ROBERT JACOBSEN,) No. C-06-1905-JSW
14)
Plaintiff,)
15 v.) **PLAINTIFF’S RESPONSE TO**
16 MATTHEW KATZER, et al.,) **DEFENDANT KEVIN RUSSELL’S**
17) **REPLY TO PLAINTIFF’S OBJECTIONS**
Defendants.) **TO DECLARATION OF DAVID M. ZEFF**
18) **RE: ATTORNEY FEE AWARD**
19) Courtroom: 2, 17th Floor
Judge: Hon. Jeffrey S. White
20)

21 Plaintiff Robert Jacobsen responds to Defendant Kevin Russell’s Reply to Plaintiff’s
22 Objections to Declaration of David M. Zeff re: Attorney Fee Award [Dkt 97] [hereinafter Russell
23 Reply to Objections - Docket 97]. After Mr. Russell filed his reply, Plaintiff, through his counsel,
24 contacted Mr. Russell’s counsel in an attempt to work out their differences. They have come to an
25 impasse, and Plaintiff asks the Court to resolve the matter.

26 There are a couple of key points that Plaintiff and Mr. Russell disagree about. First is
27 regarding Mr. Russell’s counsels’ hours and hourly rates. Second is whether privilege applies to the
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1 billing records. Plaintiff submits this response to present his views on the subjects that Mr. Russell
2 raised in his Reply.

3 Hours and hourly rates

4 Two important factors in determining whether the hours and hourly rates are reasonable are
5 the novelty and complexity of the issues and the special skill and experience of counsel. Morales
6 v. City of San Rafael, 96 F.3d 359, 364 n.9 (9th Cir. 1996). Mr. Russell stated in his response that
7 these two motions were simple. Plaintiff then asks, why do two counsel need to bill 140+ hours for
8 two simple motions? Mr. Zeff stated in the Reply he suggested Plaintiff's counsel compare the
9 hours that Plaintiff's counsel spent on the anti-SLAPP oppositions, and stated he received no
10 response. Plaintiff did respond, and repeats it again here: Mr. Zeff has repeatedly pointed out that
11 he has 30+ years experience, Mr. Moore has 20+ years, both of which is significantly more than
12 Plaintiff's counsel has. Thus Mr. Zeff and Mr. Moore both should be expected to draft these
13 motions more efficiently than Plaintiff's counsel would. Thus, the time Plaintiff's counsel spent is
14 irrelevant under Fed. R. Evid. 402/403. Also, as Mr. Zeff has noted in the Reply, Plaintiff produced
15 significantly more evidence in his declarations. It took a significant amount of time to collect that
16 evidence and to develop the declarations, in addition to the oppositions themselves. So, to use the
17 hours that Plaintiff's counsel spent as a comparison for reasonableness is comparing apples to
18 oranges. Again, Plaintiff objects based on Fed. R. Evid. 402/403. Plaintiff also has concerns about
19 Mr. Zeff's using a case in which litigation dragged for 3 years, resulting in a \$300,000+ award, as
20 evidence that the requested fee award is reasonable. This does not make sense. If Mr. Zeff is going
21 to use examples to support his contention that the requested fee award is reasonable, then he should
22 use examples that are more closely in line with the amount of time and work involved in this
23 litigation. ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc., 42 Cal. App. 4th 1307,
24 1323 (App. Ct. 2006), which Mr. Zeff cites in support of a \$40,000 award, involved 2 trips to the
25 state appeals court. Mann v. Quality Old Time Service, Inc., 139 Cal. App. 4th 328 (App. Ct.
26 2006) also involved 2 appeals. This case has had no appeals. And a three-year battle – Metabolife,
27 Inc. v. Wornick, 213 F. Supp. 2d 1222 (S.D. Cal. 2002) (awarding in excess of \$300,000) – in the

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1 courts is not comparable, and thus is not relevant. Fed. R. Evid. 402/403. As Plaintiff has stated in
2 his objections, Plaintiff also does not think it is relevant to compare the fee rates of attorneys at
3 large or medium size firms, to justify the rates of solo practitioners. Fed. R. Evid. 402/403.

4 Billing records

5 As Mr. Zeff knows from initial email exchanges between him and Plaintiff's counsel¹,
6 Plaintiff believes that he is entitled to see attorney billing records under Fed. R. Evid. 1006. Mr.
7 Zeff provided a summary in his declaration, and Plaintiff is entitled to see the underlying data for
8 that summary under Fed. R. Evid. 1006. Mr. Zeff stated that these records are subject to privilege.
9 However, billing records are not protected by attorney-client privilege per se. United States v.
10 Amlani, 169 F.3d 1189, 1194 (9th Cir. 2003) ("...attorney billing records ... are not protected by
11 attorney-client privilege"); accord Clarke v. Am. Commerce Nat'l Bank, 974 F.2d 127, 129 (9th
12 Cir. 1992) ("Not all communications between attorney and client are privileged. Our decisions
13 have recognized that the identity of the client, the amount of the fee, the identification of payment
14 by case file name, and the general purpose of the work performed are usually not protected from
15 disclosure by the attorney-client privilege."). There are exceptions, such as when the billing
16 records reflect litigation strategy or the motive of the client for seeking representation. Clark, 974
17 F.2d at 129. However, attorney-client privilege is a narrow privilege. "[S]ince it has the effect of
18 withholding relevant information from the fact-finder, it applies only when necessary to achieve its
19 purpose." Fisher v. United States, 425 U.S. 391, 403 (1976) (emphasis added). It "protects only
20 those disclosures necessary to obtain legal advice which might not have been made absent the
21 privilege." Id. Signing a fee agreement, and providing invoices and daily time records do not
22 involve correspondence in seeking or providing advice, and thus are not subject to attorney-client
23 privilege. The Ninth Circuit has recognized this. And the burden is on Mr. Russell to show that it
24 exists. Clark, 974 F.2d at 129. Plaintiff does not see any reason why these records cannot be
25 redacted and produced. For these reasons, Plaintiff believes that he is entitled to the records.
26 Plaintiff cannot offer an opinion on the amounts claimed in Mr. Zeff's petition until he sees them.

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28 ¹ Declaration of David M. Zeff In Support of Award of Attorneys Fees Upon Granting of Special Motion to Strike
Plaintiff's Claims Against Kevin Russell Under Cal. Civ. Proc. Code § 425.16, Ex. 2 [Dkt # 89].

1 For the record, Plaintiff objects to Mr. Zeff’s misstatements regarding Plaintiff counsel’s
2 position re the fee petition. In the initial email exchanges between Mr. Zeff and Plaintiff’s
3 counsel,² Plaintiff’s counsel did not state that Court does not have the authority to permit the fee
4 petition. Plaintiff’s counsel would not have included the section re jurisdiction in Plaintiff’s
5 objections if she thought so. Plaintiff’s counsel stated that if the Court is without jurisdiction, then
6 it cannot rule on the merits of the action. And, contrary to Mr. Zeff’s assertion, Plaintiff’s counsel
7 did provide a citation for this most basic and fundamental proposition – Pennoyer. In consideration
8 of this Court’s order to counsel to end their bickering, Plaintiff’s counsel declines to comment on
9 other remarks (slaughtering forests, “Plaintiff’s Counsel’s Complete Failure to Meet And Confer”,
10 and the like) made by Mr. Zeff in his filing, except to the extent that these comments have any
11 relevance, to deny them generally.³ Plaintiff’s counsel does note that since Mr. Russell drafted the
12 26-page patent in Appendix A of the original Complaint, he should be familiar with it and not have
13 to “wade” through it.

14 Plaintiff objects to the additional amount claimed for the same reasons stated in his earlier
15 objections, and two additional reasons. Mr. Zeff, with his 30+ years experience, should have
16 known to include relevant attorney fee awards, instead of having Plaintiff’s counsel point it out to
17 him the need for them. He also knew that Plaintiff sought the billing records, and thus should have
18 included a discussion about this in his earlier filing. Thus, this additional filing was, for the most
19 part, unnecessary, and fees incurred as a result of this filing should not be granted.

20 DATED: October 6, 2006

21 By _____ /s/
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² Id.

³ Plaintiff’s counsel did attempt to continue the discussion with Mr. Zeff. Hall Decl. Ex. A.