

Attorneys Fees
Contempt
Discharge Injunction
11 U.S.C. § 330
11 U.S.C. § 524

David and Linda Culpepper, Case No. 09-38599-rld7

2/11/2013 RLD

Unpub.

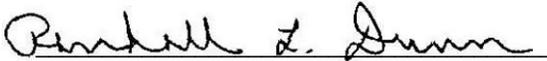
In its Memorandum Opinion entered November 5, 2012, the bankruptcy court determined that Wells Fargo Bank, N.A. ("Wells Fargo") was in contempt for violation of the discharge injunction set forth in 11 U.S.C. § 524 (see P12-9(20)).

In subsequent contested proceedings the bankruptcy court awarded attorneys fees and costs based on detailed findings to Ms. Culpepper.*

P13-1(12)

*Following the entry of the order with respect to the attorneys fees and costs, Wells Fargo requested reconsideration based upon which an amended order was entered 3/1/13 for the limited purpose of correcting computational errors.

Below is an Opinion of the Court.


RANDALL L. DUNN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
DAVID AND LINDA CULPEPPER,) No. 09-38599-rld7
Debtors.) MEMORANDUM OPINION

Following the entry of the order granting debtor Linda Marie Culpepper's ("Ms. Culpepper") Motion for Order of Contempt on November 14, 2012, I held a hearing on the request of Ms. Culpepper's counsel ("Counsel") for an award of attorneys' fees and costs ("Request for Attorneys' Fees") on January 30, 2013. Wells Fargo Bank, N.A. ("Wells Fargo") previously had filed detailed objections ("Objection"), supported by exhibits, to the Request for Attorneys' Fees. After hearing argument from counsel for the parties, I took the matter under advisement.

In deciding this matter, I have considered carefully the written submissions presented by the parties and the arguments they have made. I also have reviewed relevant legal authorities, both as cited to me and as discovered during the course of my own research.

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1 In light of that consideration and review, this Memorandum
2 Opinion sets out the court's findings and conclusions under Civil Rule
3 52(a), applicable with respect to this contested matter under Rules 7052
4 and 9014.¹

5 I. Awards of Attorneys' Fees and Costs in Civil Contempt Proceedings

6 The Ninth Circuit has recognized that an award of attorneys'
7 fees and costs is appropriate to the prevailing movant in a civil
8 contempt proceeding. Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178,
9 1195 (9th Cir. 2003) ("We emphasize that attorneys' fees are an
10 appropriate component of a civil contempt award.") (emphasis in
11 original); Walls v. Wells Fargo Bank, 276 F.3d 502, 507 (9th Cir. 2002).
12 Wells Fargo does not contest that basic proposition, but rather argues on
13 a number of grounds that the totals of \$55,113 attorneys' fees and \$5,404
14 costs requested by Counsel are not reasonable and should be reduced
15 substantially. I have considered the parties' arguments and have come to
16 the following conclusions.

17 II. Appropriate Billing Rates

18 In the Request for Attorneys' Fees, Counsel list their billing
19 rates as follows:

20 ///

21 ///

22
23 ¹ Unless otherwise indicated, all chapter and section references are
24 to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references
25 are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
26 Federal Rules of Civil Procedure are referred to as "Civil Rules." The
Local Bankruptcy Rules for the Bankruptcy Court for the District of
Oregon are referred to as "LBRs."

Partners	\$345 per hour
Attorneys	\$300 per hour
Senior Paralegals	\$100 per hour
Cert. Law Clerks	\$100 per hour

As highlighted by Wells Fargo in Exhibit C to the Objection, the judges of the Bankruptcy Court for the District of Oregon have "determined that [they] will use the Oregon State Bar Economic Survey as [the] initial benchmark" in evaluating whether attorneys' hourly rates are reasonable. That position is consistent with the rule stated by the Supreme Court in a different context that "reasonable fees" are "to be calculated according to the prevailing market rates in the relevant community." Blum v. Stenson, 465 U.S. 886, 895 (1984). Both sides argue from information in the Oregon State Bar Economic Survey points favorable to their respective positions.

Of greater help in this situation is the information included by Wells Fargo in Exhibit A to the Objection, which is a copy of the form Professional Services Agreement ("Professional Services Agreement") posted on Counsel's website. At the Hearing, Counsel did not contest that the Professional Services Agreement from their website included current information.

In the Professional Services Agreement, the following billing rates are stated: "\$285.00 an hour for a Partner (Eric W. Olsen, Lars H. Olsen, Rex K. Daines, Kevin D. Swartz), \$185.00 an hour for an Associate (Neal Peton, Keith Karnes, Dwayne Murray or others), Paralegal time shall not exceed \$95.00 an hour." While the Professional Services Agreement covers basic services to be rendered in a consumer chapter 7 or 13 bankruptcy case, there is nothing in the agreement form indicating that

1 the referenced billing rates would not apply with respect to any other
2 services to be performed for clients by the firm.

3 In this matter, I am considering an appropriate award of
4 attorneys' fees and costs with respect to prosecuting a motion for civil
5 contempt based on a violation of the discharge injunction in a consumer
6 chapter 7 case. An objective of the Bankruptcy Code, noted in the
7 legislative history to § 330 (see, e.g., H. Rept No. 95-595 to accompany
8 H.R. 8200, 95th Cong., 1st Sess. (1977), at 329-30), was to confirm
9 attorneys' bankruptcy related services are to be compensated consistently
10 with the cost of comparable services outside of bankruptcy. "Ultimately,
11 the standard for the awarding of fees in consumer bankruptcy cases is the
12 same as in other bankruptcy cases, the value of comparable services in
13 nonbankruptcy matters of similar difficulty." 3 Collier on Bankruptcy
14 ¶ 329.04[1][a] (Alan N. Resnick and Henry J. Sommer, eds., 16th ed.).
15 "The fee applicant has the burden of 'produc[ing] satisfactory evidence -
16 in addition to the attorney's own affidavits - that the requested rates
17 are in line with those prevailing in the community for similar services
18 by lawyers of reasonably comparable skill, experience and reputation.'" In re Parreira,
19 464 B.R. 410, 420 (Bankr. E.D. Cal. 2012) (quoting Blum
20 v. Stenson, 465 U.S. at 895 n.11).

21 To determine an appropriate market billing rate, I cannot think
22 of a better indicator of the market rate than the current rates being
23 advertised by Counsel to the public. Accordingly, consistent with the
24 uncontradicted terms of the Professional Services Agreement, I find that
25 the appropriate billing rates for Counsel are \$285 per hour for partners,
26 including Eric Olsen and Rex Daines, \$185 per hour for associate

1 attorneys, including Michael Fuller, the primary attorney for Ms.
2 Culpepper in this matter, and \$95 per hour for paralegals and certified
3 law clerks.

4 III. "Reasonableness" of Itemized Services

5 "The [Bankruptcy] Code mandates that professional fees must be
6 actual, necessary and reasonable." In re Parreira, 464 B.R. at 414.
7 Wells Fargo challenges the reasonableness of Counsel's itemized fees on a
8 number of grounds, which I will deal with in turn.

9 A. Clerical Work

10 "[C]osts associated with clerical tasks are typically
11 considered overhead expenses reflected in an attorney's hourly billing
12 rate, and are not properly reimbursable." Sterling Sav. Bank v. Sequoia
13 Crossing, LLC, 2010 WL3210855, at *7 (D. Or. Aug. 11, 2010) (quoting
14 Whitworth v. Nat'l Enter. Sys., 2010 WL1924504, at *7 (D. Or. Apr. 21,
15 2010)); In re Lindquist, 2006 Bankr. LEXIS 2003, at *18-19 (Bankr. D. Or.
16 Aug. 25, 2006) (denying application for supplemental fees and expenses
17 submitted by debtor's counsel for time entries covering "the performance
18 of administrative tasks that more appropriately should be charged to
19 overhead and [are] not reasonably included in client billings."); LBR
20 2016-1(b)(2)(D). "Tasks considered clerical include, but are not limited
21 to, filing motions with the court, filling out and printing documents,
22 preparing affidavits and drafting certificates of service, organizing
23 files, calendaring dates, rescheduling depositions, and sending
24 documents." Sterling Sav. Bank v. Sequoia Crossing, LLC, 2010 WL3210855,
25 at *7.

26 In Exhibit B to the Objection, Wells Fargo marked a number of

1 time entries on Counsel's itemization that appear to be clerical.
2 Following my own review of the itemization, I agree that many of the
3 marked time entries are clerical in nature, should be included in billing
4 rates as overhead and are not reimbursable as reasonable attorneys' fees.
5 Typical of such time entries are the following:

6 12/21/2011	file certificate of service re motion for contempt hearing	DG	.20
7 1/27/2012	respond to mf, prepare mailing	DG	.40
8 1/29/2012	file correspondence re service on wf	MRF	.10
9 2/3/2012	File cert. of service re order to show cause	MRF	.10

10
11 I find that it is appropriate to disallow 0.10 hours of partner itemized
12 time, 2.4 hours of associate attorney itemized time and 12.65 hours of
13 paralegal itemized time as essentially clerical in nature.

14 B. Duplicative Work; More than One Attorney Appearing at Hearings and
15 Attorney Conference Time

16 Wells Fargo complains that "eight different people (RD, DG,
17 MRF, EO, JV, JE, AH, and DJ), at least four of whom are attorneys, all
18 recorded time on this case." Objection, at p. 10. Wells Fargo also
19 objects to the billing rate requested for Mr. Fuller, the primary
20 attorney working for Ms. Culpepper on this matter, based on his limited
21 experience as a 2009 law school graduate. See Objection, at p. 4. Wells
22 Fargo further objects that "two attorneys for [Ms. Culpepper] attended
23 the October 5, 2012, evidentiary hearing. In contrast, only one attorney
24 represented Wells Fargo at the same evidentiary hearing." Objection, at
25 p. 10.

26 It is not surprising, considering how extended litigation of

1 Ms. Culpepper's contempt motion became and in light of the difficult
2 issues involved, that a number of hands at the firm touched this
3 litigation. Further, in light of his limited experience, Mr. Fuller is
4 to be commended, rather than penalized by a fee reduction, for having
5 consulted with his colleagues at the firm, strategically and otherwise,
6 as litigation of the contempt motion proceeded.

7 It appears that Counsel made some effort to eliminate billing
8 for duplicate services. In his Declaration in support of the Request for
9 Attorneys' Fees, Mr. Fuller states,

10 10. The ledger has been substantially discounted by
11 Ms. Culpepper's counsel, including reductions in the
12 hours expended to prevail at evidentiary hearing. In
13 addition, over 100 attorney time entries were reduced
14 to a 20th of an hour, and over 50 attorney tasks were
15 not billed at all.

16 I have reviewed the itemization submitted in light of Wells
17 Fargo's objection that duplicate work is reflected, and I find the
18 itemization neither unreasonable nor excessive on this ground.
19 Accordingly, I am not making any reduction to the fees requested by
20 Counsel for duplicative services.

21 C. Vague Time Entries

22 It is axiomatic that entries in a time billing itemization must
23 be clear enough for the court to determine their reasonableness. Wells
24 Fargo objects to the vagueness of some time entries in the itemization
25 submitted by Counsel, and after reviewing the itemization, I must agree
26 with respect to several time entries. I find the following time entries
to be too cryptic to allow for effective reasonableness review:

///
///

12/28/2011	read email from clts, update file, review letters	MRF	1.00
2/2/2012	respond to mike's email	EO	.10
2/2/2012	email mf re order	RD	.10
3/2/2012	call w/mrf re transcripts, value of case	RD	.30
6/25/2012	meet w/mrf re: first draft of brief	JE	1.00
11/5/2012	reply to rd quick msg	MRF	.05

Accordingly, I will disallow 0.50 hours of partner itemized time, 1.05 hours of associate attorney itemized time and 1.00 hour of paralegal time.

D. Time Spent on Mr. Culpepper's Claim

Because Mr. Culpepper was not a borrower/obligor with respect to the Wells Fargo debt, the Motion for Order of Contempt was not properly brought in his behalf, as Counsel ultimately recognized. Wells Fargo objects that fees requested for time spent with respect to a claim(s) for Mr. Culpepper should be disallowed, and I agree.

Because it is difficult to differentiate between time spent as to each of the Culpeppers in certain time entries, I will allow 50% with respect to each of the following time entries:

12/9/2011	draft memo in support of motion	MRF	3.00
12/9/2011	draft declaration of lc	MRF	1.00
12/11/2011	cont. draft declaration of lc	MRF	.50

In addition, I will disallow entirely, the following time entry:

5/30/2012	call w/philip re depos, expert report, letter to chambers	MRF	.20
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1 E. Time Respecting Expert Witnesses

2 Wells Fargo argues that attorney time spent with respect to
3 consultation with Dr. Grossman, who ultimately did not appear as a
4 witness, should not be allowed. However, Dr. Grossman's unavailability
5 to testify at the final hearing resulted from the hearing date being set
6 over at Wells Fargo's request, and I do not find it appropriate to
7 penalize Counsel in those circumstances.

8 IV. Reasonable Costs

9 Neither Civil Rule 54 nor Rule 7054 is particularly
10 illuminating as to specifically what costs are allowable to a prevailing
11 party. Accordingly, in determining appropriate awards of costs, the
12 court relies primarily on the detailed provisions of LBR 2016-1(b).
13 Wells Fargo objects to four categories of costs included in the Request
14 for Attorneys' Fees that I consider in turn: 1) expert witness fees; 2)
15 fees for attorney travel time; 3) travel and lodging costs for the
16 Culpeppers to attend hearings and appointments; and 4) two cost entries
17 that I consider as miscellaneous.

18 A. Expert Witness Fees

19 Generally, expert witness fees are not recoverable by the
20 prevailing party as part of the attorney fee award or costs unless
21 specifically authorized by statute. Malbco Holdings, LLC v. AMCO Ins.
22 Co., 2010 WL2572849, at *15-16 (D. Or. June 22, 2010); Thomas v. U.S.
23 Bank, N.A., 2008 WL974734, at *5-6 (D. Or. Apr. 8, 2008) ("Unless
24 explicitly authorized by statute, expert witness fees are not
25 recoverable.").
26

1 Counsel has cited no statutory authority for me to award expert
2 witness fees in this matter, and I am not aware of any such statutory
3 authority. Accordingly, I will disallow any expert witness fees
4 requested as costs.

5 B. Attorney Travel Time

6 Wells Fargo objects to my approving any fees with respect to
7 Mr. Daines' travel time from Bend to Portland for the final hearing on
8 the contempt motion. LBR 2016-1(b)(2)(C)(III) in relevant part provides:

9 If the applicant did not work on client matters while
10 traveling, travel time will be allowed at one-half of
the applicant's hourly rate.

11 In the Request for Attorneys' Fees, Mr. Daines is requesting fees at no
12 more (and possibly less) than one-half his hourly rate for the subject
13 travel time between Bend and Portland for the final hearing. I find that
14 Mr. Daines attending and participating in the final hearing with Mr.
15 Fuller was not unreasonable. Mr. Daines' request that his travel time be
16 compensated is consistent with what is allowed under the applicable LBR,
17 and I will overrule Wells Fargo's objection on this point.

18 C. The Culpeppers' Travel and Lodging Costs

19 LBR 2016-1 addresses "Compensation for Services Rendered &
20 Reimbursement of Expenses," primarily of professionals. There is no
21 provision for reimbursement of the client's travel expenses in the LBR.
22 However, I have some discretion in the imposition of reasonable costs.

23 Subdivision (d) of [Civil Rule] 54 contains provisions
24 with respect to costs and, although ultimately leaving
25 the question of costs to the discretion of the court,
26 provides that the court "should" allow costs to the
prevailing party unless it, a federal statute or a
Civil Rule otherwise directs.

1 10 Collier on Bankruptcy ¶ 7054.05 (Alan N. Resnick & Henry J. Sommer,
2 eds., 16th ed.) (emphasis added).

3 Wells Fargo objects to my allowing any of the Culpeppers'
4 lodging and travel costs. Ms. Culpepper chose her own counsel, and to
5 the extent she seeks an allowance of lodging and travel costs for meeting
6 with Counsel, I will disallow such costs as not reasonable. However, the
7 Culpeppers live in Bend, and when the parties could not settle their
8 differences, they were required to travel to Portland for the final
9 hearing on the Motion for Order of Contempt. I will allow the
10 Culpeppers' lodging and travel costs to attend the final hearing in
11 Portland. I also will allow their limited reimbursement request for
12 costs associated with meeting with the expert. Wells Fargo has raised no
13 objection as to the amounts requested for such lodging and travel costs.

14 D. Miscellaneous Costs

15 Wells Fargo challenges two other cost items from Counsel's
16 itemization: 1) the \$90.00 cost for a deposition videographer and 2)
17 \$485.00 for graphic design of the demonstrative exhibit. Wells Fargo
18 argues that the videographer cost claim should not be reimbursed because
19 there was no videographer used at the deposition. I agree and will
20 disallow the \$90.00 cost claim. As to the demonstrative exhibit design
21 cost of \$485.00, Wells Fargo argues that it is excessive and should be
22 reduced by half.

23 The demonstrative exhibit was submitted early and basically
24 provided an enlarged time line for postdischarge telephone calls made by
25 Wells Fargo to Ms. Culpepper. As I recall, the demonstrative exhibit was
26 not used during the evidentiary hearing because the included information

1 was available from admitted exhibits and discussed thoroughly during
2 witness testimony and oral argument. In these circumstances, I find that
3 Wells Fargo's objection is well taken, and I will deduct one-half of the
4 requested reimbursement for the demonstrative exhibit and allow \$242.50
5 as a cost reimbursement.

6 V. Ultimate Calculations and Conclusions

7 I have made calculations of allowable Counsel fees and costs in
8 light of the foregoing analysis and findings. Accordingly, I will allow
9 Counsel attorneys' fees in the total amount of \$37,011 and costs in the
10 total amount of \$1,359.50, for a total award of \$38,370.50. The court
11 will prepare and enter a consistent order contemporaneous with entry of
12 this Memorandum Opinion.

13 # # #

14 cc: David and Linda Culpepper
15 Michael R. Fuller, Esq.
16 Robert J. Bocko, Esq.