UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:23-cv-02147-SVW-AGR	Date	July 9, 2024
Title	*Nicole Gilbert-Daniels v. Lions Gate Ent. Corp. et al.*		

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR ATTORNEY'S FEES [137, 138]

I. Introduction

Before the Court are two motions for attorney's fees, brought by Defendant Katori Hall ("Hall") and Defendants Lions Gate Entertainment Corporation, Starz Entertainment, LLC, Chernin Entertainment, LLC, Liz Garcia, and Patrik-Ian Polk (collectively, "Lions Gate Defendants," and with Hall, "Defendants"), respectively. ECF No. 137, 138. For the following reasons, these motions are GRANTED IN PART and DENIED IN PART.

II. Overview and Procedural History

The Court has already extensively chronicled the facts of this case. *See* ECF No. 133. Briefly, Plaintiff Nicole Gilbert-Daniels ("Plaintiff") sued Hall and the Lions Gate Defendants for alleged copyright infringement. Specifically, Plaintiff claimed that Defendants' television show, *P-Valley*, infringed on her previous play, *Soul Kittens Cabaret*. In its December 7, 2023, order, the Court granted

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summary judgment for Defendants, explaining that no reasonable jury could find substantial similarity between the works in question. *Id.*

Now, Hall and the Lions Gate Defendants move the Court for an award of attorney's fees, which Plaintiff opposes. ECF No. 140.

III. Legal Standards

A. Attorney's Fees Under the Copyright Act

The Copyright Act provides that "[i]n any civil action under this title . . . the court may . . . award a reasonable attorney's fee to the prevailing party as part of the costs." 17 U.S.C. § 505. The Ninth Circuit has characterized the awarding of attorney's fees as "[a]n important remedy." *Glacier Films (USA), Inc. v. Turchin*, 896 F.3d 1033, 1035 (9th Cir. 2018). The Supreme Court has instructed district courts to consider the following factors when determining if an award of attorneys' fees is justified: "'frivolousness, motivation, objective unreasonableness (both in the factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.'" *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994). Substantial weight is given to the objective unreasonableness factor. *Shame on You Prods. v. Banks*, 893 F.3d 661, 666 (9th Cir. 2018). But this list is not exhaustive; there are additional factors which a Court should consider. For example, a court should consider whether a fee award furthers the Copyright Act's purposes. *Mattel, Inc. v. MGA Ent., Inc.*, 705 F.3d 1108, 1111 (9th Cir. 2013).[1] Of those purposes, the most important is "enriching the general public through access to

[1] "In cases pre-dating the Supreme Court's holding in *Kirtsaeng* [*v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979 (2016)], the Ninth Circuit had referred to the purposes of the Copyright Act as the 'most important factor' in determining whether to award fees; the Ninth Circuit has since found that '[a]fter *Kirtsaeng*'s 2016 endorsement of a "totality of circumstances" approach and its statement that the losing party's reasonableness carries "significant weight," it is unclear whether the purposes-of-the-Copyright-Act factor remains the "most important" one. . . . Nevertheless, consideration of the purposes of the Copyright Act 'remains important.'" *Cinq Music Grp., LLC v. Create Music Grp., Inc.*, No. 2:22-cv-07505-JLS-MAR, 2021 U.S. Dist. LEXIS 76599, * 9 (C.D. Cal. Apr. 26, 2023) (citation omitted) (quoting *Glacier Films (USA), Inc. v. Turchin*, 896 F.3d 1033, 1040–41 (9th Cir. 2018)).

creative works." *Fogerty* at 534 n.19, 527. Additional considerations include the degree of success obtained in the litigation and whether the chilling effect of attorneys' fees may be too great or impose an inequitable burden on an impecunious litigant. *Glacier Films*, 896 F.3d at 1037 (citing *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 675 (9th Cir. 2017)).

B. Calculation of Attorney's Fees

"Once a party establishes its entitlement to attorneys' fees, it remains for the district court to determine what fee is reasonable." *Animaccord Ltd. v. David Tran*, No. 23-00173 LEK-WRP, 2024 U.S. Dist. LEXIS 81957, 2024 WL 1976031, at *9 (D. Haw. Mar. 28, 2024) (internal quotations and alterations omitted) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). "District courts must calculate awards for attorneys' fees using the 'lodestar' method." *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1149 n.4 (9th Cir. 2001) (citing *Caudle v. Bristow Optical Co., Inc.*, 224 F.3d 1014, 1028 (9th Cir. 2000); *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996)). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citing *McGrath v. Cnty. of Nevada*, 67 F.3d 248, 252 (1995)). The lodestar amount is "presumptively reasonable." *Id.*

"[H]ours that are not 'reasonably expended' or which are 'excessive, redundant, or otherwise unnecessary' are not compensable. *Cano v. Kijakazi*, No. EDCV 21-1572 (JPR), 2023 U.S. Dist. LEXIS 225288, 2023 WL 8663771, at *3 (C.D. Cal. July 17, 2023) (quoting *Hensley*, 461 U.S. at 434). "The Court has wide discretion in determining the number of reasonable hours." *Id.* (citing *Gates v. Deukmejian*, 987 F.2d 1392, 1398 (9th Cir. 1993) (as amended)). "Although the district court must give reasons for reducing fees . . . it can impose a reduction of up to 10 percent — a 'haircut' — based 'purely on the exercise of its discretion and without more specific explanation.'" *Id.* (citing *Costa v. Comm'r of SSA*, 690 F.3d 1132, 1136 (9th Cir. 2012)); *Neil v. Comm'r of Soc. Sec.*, 495 F. App'x 845, 846–47 (9th Cir. 2012)).

After making the initial lodestar calculation, the district court must assess whether it is necessary to adjust the award amount pursuant to the twelve factors outlined in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975). Those factors include the following: "(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 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." *Id.* at 70 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)). The most important *Kerr* factor is "the degree of success obtained." *Dannenberg v. Valadez*, 338 F.3d 1070, 1075 (9th Cir. 2003) (degree of success is "most critical factor" in determining reasonableness of award). District courts need not analyze every *Kerr* factor but must consider those most relevant to the case at hand. *Jordan v. Multnomah Cnty.*, 815 F.2d 1258, 1263 n.11 (9th Cir. 1987).

Lastly, district courts have discretion over awards of fees associated with the preparation of fee applications (called "fees on fees"). *Treasure Island, LLC v. Affiliated FM Ins. Co.*, No. 2:20-cv-00965-JCM-EJY, 2024 U.S. Dist. LEXIS 15110, 2024 WL 324782, at *4 (D. Nev. Jan. 26, 2024) (citing *Schneider v. Cnty. of San Diego*, 32 Fed.Appx. 877, 880 (9th Cir. 2002)).

IV. Discussion

A. There Is No Reason for the Court to Defer Its Ruling

Plaintiff argues that Defendants are not entitled to attorney's fees because she has appealed this Court's ruling. Pl.'s Opp. to Def.'s Mot. for Att'y's Fees 1–3, ECF No. 140 ("Opp."). But Plaintiff has cited no caselaw supporting her argument that a pending appeal means that the district court should defer issuing a ruling on attorney's fees. Instead, Plaintiff's argument on this point focuses on the merits of her

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appeal. *See, e.g.*, Opp. 2 ("Decisions by the Ninth Circuit demonstrate that Plaintiff has a strong basis for appealing this Court's decision . . . .").

But Plaintiff's contention is wrong. "An appeal from a decision on the merits does not foreclose an award of attorney's fees by the district court." *Stross v. Zillow Inc.*, No. 2:21-cv-01489-RAJ-BAT, 2023 U.S. Dist. LEXIS 162600, 2023 WL 5952060, at *2 (W.D. Wash. Sep. 13, 2023) (citing *Masalosalo v. Stonewall Ins. Co.*, 718 F.2d 955, 957 (9th Cir. 1983)); *see also Lynwood Invs. CY Ltd. v. Konovalov*, No. 20-cv-03778-MMC, 2022 U.S. Dist. LEXIS 228212, 2022 WL 17840270, at *6 (N.D. Cal. Dec. 19, 2022) (same); *Bell v. Wilmott Storage Servs., LLC*, No. CV 18-7328-CBM-MRWx, 2019 U.S. Dist. LEXIS 161257, at *3 (C.D. Cal. Sep. 12, 2019) (noting that "[i]n the interest of judicial economy, the Court declines to defer ruling on" a motion for attorney's fees pending resolution of an appeal). Instead, district courts are instructed to apply a four-factor test to determine whether they should defer ruling on a motion for attorney's fees pending an appeal on the merits. "In determining whether to stay an award of attorneys' fees pending appeal, courts consider the following four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Lynwood*, 2022 U.S. Dist. LEXIS 228212, 2022 WL 17840270, at *7 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

The only *Hilton* factor that Plaintiff's opposition discussed was the likelihood of success on the merits of her appeal. However, those arguments are duplicative of arguments that the Court rejected in its grant of Defendants' summary judgment motion. Plaintiff is free to make these arguments to the Ninth Circuit, but this Court is not persuaded by them. *Lynwood*, 2022 U.S. Dist. LEXIS 228212, 2022 WL 17840270, at *8 ("Without more, a recitation of rejected arguments does not constitute the requisite strong showing to warrant deferral."). Accordingly, this factor weighs in favor of deciding Defendants' motions presently.

The balance of the remaining factors likewise tilts in favor of resolving these motions now. Plaintiff has made no showing that she will be irreparably injured absent a stay. Accordingly, this factor

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weighs in favor of deciding the motion presently. Conversely, Defendants have made no showing that they will be injured by a deferred ruling on this motion; this factor favors a stay. And lastly, the public interest is best served by deciding the motion now. "[J]udicial economy is better served by determining attorneys' fees promptly while the details of the proceedings are still fresh . . . ." *Spitz Techs. Corp. v. Nobel Biocare USA LLC*, No. SACV 17-00660 JVS (JCGx), 2018 U.S. Dist. LEXIS 239300, at *6 (C.D. Cal. Aug. 13, 2018).

B. Defendants Are Clearly Prevailing Parties

Plaintiff does not dispute the fact that Defendants are, in fact, a prevailing party. Rather, Plaintiff's argument is that Defendants may *no longer* be a prevailing party after her appeal. *See* Opp. 1 ("While it is true that this Court did grant Defendants' Motion for Summary Judgment . . . , Plaintiff has timely appealed that decision."). As things stand now, Defendants are unquestionably a prevailing party. *See Werner v. Evolve Media, LLC*, No. 2:18-cv-7188-VAP-SKx, 2020 U.S. Dist. LEXIS 126587, 2020 WL 4012785, at *2 (C.D. Cal. June 22, 2020) ("Local Rule 54-1 states that the prevailing party is 'the party in whose favor judgment is rendered, unless otherwise determined by the Court.'") (quoting L.R. 54-1). But "being the prevailing party is not enough alone to warrant a fee award." *Russell v. Walmart Inc.*, No. CV 19-5495-MWF (JCx), 2024 U.S. Dist. LEXIS 15631, at *6 (C.D. Cal. Jan. 2, 2024). Further analysis is required.

C. The *Fogerty* Factors Support an Award of Attorney's Fees

i. Plaintiff's Case Was Unreasonable and/or Frivolous

"A district court that has ruled on the merits of a copyright case can easily assess whether the losing party advanced an unreasonable claim or defense." *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197, 207 (2016). To be clear, reasonableness is not to be confused with liability. *Id.* at 208 ("And if some court confuses the issue of liability with that of reasonableness, its fee award should be reversed for abuse of discretion."). Here, the fact that Plaintiff's case ultimately failed does not inherently render Plaintiff's case unreasonable.

As the Court noted in its order, the works in question do resemble one another at a high level of generality. ECF No. 133 at 20. But the substantial similarity test is not performed at a high level of generality. Rather, unprotectable stock elements and scenes-a-faire must first be filtered out so that the remaining protectable elements of the works can be compared. Upon performing the substantial similarity test, the Court found that there were no substantial similarities between the works across all of the typical analytical inquiries: plot, themes, dialogue, mood, setting, pace, characters, and sequence of events.

Moreover, the Court also noted in its order that many of the alleged similarities pointed out by Plaintiff in her case relied on some element of mischaracterization of one or both of the works in question. *See, e.g.*, ECF No. 133 at 44 ("Plaintiff's characterization of the similarities between the [works'] arrangement of elements . . . is plagued with mischaracterizations."). The Court had to invest significant resources to become familiar with the works in question and to overcome "difficulties in its review that were created by Plaintiff's presentation." *Id.* at 19. Upon doing so, it became clear that "this was not 'a close and difficult case.'" *Glacier*, 896 F.3d at 1043 (quoting *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1181 (9th Cir. 2013)). If Plaintiff had more accurately engaged with the works and filtered out the unprotectible elements, she would have seen that there was no substantial similarity. In light of the facts and the law, Plaintiff's choice to take this case as far as she did was unreasonable. The Court finds that this factor supports an award of attorney's fees for Defendants and, pursuant to the Ninth Circuit's guidance, assigns it substantial weight.

ii. Some Litigation Tactics Used by Plaintiff Suggest an Improper Motivation

Defendants argue that Plaintiff's social media posts and litigation tactics reveal evidence of bad faith. Lions Gate Defs.' Mot. for Att'y's Fees ("LG MFF") 11–15, ECF No. 137.

The Court declines to attach much significance to Plaintiff's social media posts. At best, such posts suggest that Plaintiff mistakenly and unreasonably believed that her suit had merit. *See Woodland v. Hill*, No. 2:22-cv-03930-AB-MRWx, 2023 U.S. Dist. LEXIS 145551, at *7-8 (C.D. Cal. Aug. 17, 2023) ("While Plaintiff should have been counseled that his claim had a 'slim to none' chance of prevailing, the Court cannot conclude that Plaintiff was aware he was advancing a legally deficient claim. Rather, it appears Plaintiff sincerely believed that Defendant copied his photographs, and mistakenly believed he had a legitimate claim of copyright infringement.").

The Court is, however, persuaded by some of Defendant's arguments regarding Plaintiff's litigation conduct. For example, Plaintiff submitted an expert report on August 23, 2023, in *further* opposition to Defendants' summary judgment motion – nearly two months after the motion had been fully briefed. ECF No. 101, 75. This report was filed without seeking leave of Court or consent from opposing counsel. The Court is also troubled by Defendants' unrebutted claim that they were forced to depose Plaintiff's expert overnight, finishing that process at 4:30 AM. Halberstadter Decl. ¶ 25, ECF No. 137-1.

Lastly, the Court notes that Plaintiff sought extensive discovery related to her access theory, which was legally irrelevant to the motion before the Court on substantial similarity. However, because the parties ultimately needed a clarifying order from the Court and because the Magistrate Judge allowed discovery beyond the scope of the issues raised by the motion for summary judgment, the Court declines to assign any weight to this legally irrelevant fishing expedition. *See* Halberstadter Decl. ¶ 15–21, ECF No. 137-1.

The Court finds that this factor somewhat supports an award of attorney's fees to Defendants.

iii. Deterrence and Compensation

Here, Plaintiff does not have a history of bringing unreasonable claims against other parties, so there is no need to consider specific deterrence. *See Woodland v. Hill*, No. 2:22-cv-03930-AB-MRWx, 2023 U.S. Dist. LEXIS 145551, at *8 (C.D. Cal. Aug. 17, 2023) (citing *Baker v. Baker*, No. LA CV 16-08931 VAP (JPRx), 2018 U.S. Dist. LEXIS 225907, 2018 WL 6190597, at *8 (C.D. Cal. Aug. 31, 2018)).

The purpose of general deterrence is "served by awarding fees against a party who had litigated an objectively unreasonable claim, or who had brought a claim in bad faith." *Shame on You Prods. v. Banks*, 893 F.3d 661, 668 (9th Cir. 2018). "Deterring non-meritorious lawsuits against defendants seen as having 'deep pockets' and compensating parties that must defend themselves against meritless claims are both laud[a]ble ends. In this case, Defendants were forced to defend against Plaintiff's claims even after pointing out the fatal flaws from which her lawsuit suffered." *Scott v. Meyer*, No. CV 09-6076 ODW (RZx), 2010 U.S. Dist. LEXIS 69308, 2010 WL 2569286, at *9 (C.D. Cal. June 21, 2010); *see also Tresóna Multimedia, LLC v. Burbank High Sch. Vocal Music Ass'n*, 953 F.3d 638, 654 (9th Cir. 2020) ("Awarding Defendants their attorneys' fees [e]nsures that they are properly compensated for defending against overreaching claims of copyright infringement . . . .").

The Court finds that these factors somewhat support an award of attorney's fees to Defendants.

iv. The Additional Factors Outlined by the Ninth Circuit Likewise Support an Award of Attorney's Fees

a. Defendants Achieved a Complete Success in the Litigation

Defendants achieved a complete success in the litigation, as evidenced by the Court's granting of their motion for summary judgment. The extent of Defendants' success is not disputed, *see* Section IV-B *supra*, even though Plaintiff argues that such success may be reversed on appeal.

b. The Purposes of the Copyright Act Support an Award of Attorney's Fees

The ultimate purpose of the Copyright Act is the enrichment of society, achieved by incentivizing the creation and dissemination of artistic works. *See* Section III *supra*. Here, Defendants were forced to defend themselves in extensive litigation for the creation and dissemination of their television show. While Defendants are well resourced, *P-Valley* is not the sort of "multi-billion dollar . . . franchise" that Defendants had "ample incentive to vigorously defend." *Bisson-Dath v. Sony Comput. Entm't Am. Inc.*, No. CV-08-1235 SC, 2012 U.S. Dist. LEXIS 103159, 2012 WL 3025402, at *8 (N.D. Cal. July 24, 2012). Without an award of attorney's fees in cases like this, major entertainment companies might only find it worthwhile to create art that appeals to the broadest possible audience, thus leaving the public with a less rich selection of art to engage with. Accordingly, this factor favors awarding attorney's fees to Defendants.

c. An Award of Attorney's Fees in This Case Will Not Impose an Inequitable Burden or Create a Chilling Effect

Courts in the Ninth Circuit also consider "whether the chilling effect of attorney's fees may be too great or impose an inequitable burden on an impecunious plaintiff." *Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 766 (9th Cir. 2003) (citing *Fogerty*, 94 F.3d at 559–60).

Plaintiff speaks dramatically of this risk: "If this Court were to award even a penny to the Defendants, it would signal to any and every would-be copyright plaintiff that financial doom is virtually certain should they fail to prevail. The Defendants seem attuned to this scorched-earth strategy, eager to hammer their requested judgment as another pelt on the wall warning anyone who dares cross Hollywood." Opp. 10. The Court, however, is not persuaded by this fiery language.[2] A careful balance must be struck between the need to avoid chilling meritorious claims and the need to deter frivolous claims against defendants with deep pockets; here, that balance tilts in favor of awarding attorney's fees to Defendants.

D. The Fees Sought by Defendants Are Unreasonable

[2] And language is all that the Court can rely on. Plaintiff has not submitted any information about her finances.

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The Copyright Act only authorizes an award of **reasonable** attorney's fees. *See Glacier Films*, 896 F.3d at 1038 (citing *The Traditional Cat Ass'n, Inc. v. Gilbreath*, 340 F.3d 829, 832–33 (9th Cir. 2003)); *see also Queenie, Ltd. v. Nygard Int'l*, 204 F. Supp. 2d 601, 608 (S.D.N.Y. 2002) ("While a party to a litigation may choose its own level of litigation expense, it may not impose its own approach on a losing adversary."). Ensuring that attorney's fee awards are reasonable helps prevent such awards from chilling meritorious litigation.

A district court can reduce a fee award pursuant to one of two methods. First, "the court may conduct an hour-by-hour analysis of the fee request, and exclude those hours for which it would be unreasonable to compensate the prevailing party." *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1200 (9th Cir. 2013). Alternatively, "when faced with a massive fee application[,] the district court has the authority to make across-the-board percentage cuts either in the number of hours claimed or in the final lodestar figure as a practical means of excluding non-compensable hours from a fee application." *Id.* If a court opts for the latter option, it must set forth a "'concise but clear' explanation of its reasons for choosing a given percentage reduction." *Gates v. Deukmejian*, 987 F.2d 1392, 1400 (9th Cir. 1992). "The explanation need not be elaborate, but it must be comprehensible." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008). "A request for attorney's fees should not result in a second major litigation." *Hensley*, 461 U.S. at 437. District courts are "not required to write the equivalent of a law review article justifying [a] fee award." *Shayler v. 1310 PCH, LLC*, 51 F.4th 1015, 1021 (9th Cir. 2022).

Here, the Lions Gate Defendants seek $1,045,436.00 in fees; $38,610.00 in "fees on fees;" and $45,447.00 in costs. LF MGG 1. Hall seeks $143,947.75 in fees; $23,500.00 in "fees on fees;" and $22,050.20 in "costs/expenses incurred in connection with the deposition of Plaintiff's expert." Hall Mot. for Att'y's Fees 1–2 ("Hall MFF"), ECF No. 138. The Court evaluates each request in turn. And given the 'massive' nature of these requests, the Court opts to use its authority to make across-the-board percentage cuts.

i. The Lions Gate Defendants' Counsel Billed Excessively

The Lions Gate Defendants were represented by Katten Muchin Rosenman LLP ("Katten"). *See generally* LG MFF. Katten spent a staggering 1,805.2 hours defending against Plaintiff's suit. Halberstadter Decl. ¶ 42, ECF No. 137-1. A table summarizing the hours worked by various Katten attorneys and paralegals is reproduced below:

Attorney	Hours
Bruckner, Amelia (associate)	618.6
Butts, Michael (associate)	189.4
Halberstadter, David (senior partner)	644.7
Sims, Tami (junior partner)	152.4
Freedman, Janie (paralegal)	0.8
Hill, Joanna (senior associate)	173.4
Palmer, Shelby (associate)	25.9
Total	**1,805.2**

Additionally, counsel reports that Defendant incurred "approximately $38,610 in additional fees in connection with attempting to negotiate a settlement with Plaintiff to avoid this motion, as well as researching, drafting and revising this fee motion, the supporting declaration and supporting exhibits." LG MFF 25. In support of their motion, the Lions Gate Defendants submitted nearly 200 pages of billing records. These records are thorough and largely free of block billing. *See* Halberstadter Decl., Ex. 11, ECF No. 137-1.

Plaintiff's opposition to Defendant's motion largely fails to challenge the rates charged and hours worked by Defendants' counsel. Taking umbrage with Defendants' characterization of her case as frivolous, Plaintiff argues the following:

> It is fair to inquire why then, if Plaintiff's claims were so obviously frivolous, did it take over one million dollars in attorneys' fees to prevail on summary judgment? Why, if Plaintiff's claims were

> so obviously frivolous, did senior counsel for Defendants spend more time on the case than any of his junior colleagues? *See* ECF-137, at pg. 3287 (Noting that Mr. Halberstadter spent 644.7 hours on this matter – over 1/3 of the entire 1,805.2 hours alleged to have been spent by all Defendants' attorneys). Surely, if Plaintiff's claims were as frivolous as Defendants assert, Defendants could have prevailed with far fewer attorneys and far fewer hours by the senior partner. Mr. Halberstadter's significant involvement in this case strongly supports the position that Defendants—including Defendants' experienced counsel—believed Plaintiff's claims were cognizable and raised serious issues of potential liability.

Opp. 8 (emphasis omitted). While not required, Plaintiff could have made this argument stronger by submitting evidence about the number of hours her counsel expended in the prosecution of this case. *See Democratic Party of Wash. State v. Reed*, 388 F.3d 1281, 1287 (9th Cir. 2004) (footnote omitted) (explaining that while "numerous factors can cause the prevailing party to have spent more time than the losing party, such a comparison is a useful guide in evaluating the appropriateness of time claimed"). She did not do so, and therefore the Court cannot compare the respective hours spent by the parties. Regardless, Plaintiff raises a compelling point about the number of hours expended, although the Court disagrees with her conclusion. The high number of hours worked does not suggest that the case was unusually close or complex.

Defendant cites two cases in which courts in the Ninth Circuit have approved attorney's fee awards reflecting even higher numbers of hours worked. The Court first notes that "comparisons to fee awards in other cases are largely irrelevant, and certainly not determinative, inasmuch as the reasonableness of a particular fee award depends on a case-by-case analysis." *Fantasy, Inc. v. Fogerty*, 94 F.3d 553, 561 (9th Cir. 1996). Nevertheless, the Court considers the cases cited by the Lions Gate Defendants. In *Moi v. Chihuly Studio, Inc.*, No. C17-0853RSL, 2019 U.S. Dist. LEXIS 197837, 2019 WL 6033367 (W.D. Wash. Nov. 14, 2019), *aff'd*, 846 Fed. App'x 497 (9th Cir. 2021), a district court awarded $1.65 million in fees, representing over 3,500 hours worked, to a defendant who successfully defended against a frivolous infringement suit. The plaintiff in *Moi* claimed, with absolutely no evidence, to have truly authored a vast number of works by glassblower Dale Chihuly. The *Moi* court noted that the plaintiff in that case "chose not to review the time records to identify tasks or entries that may have been unnecessary, duplicative, or otherwise unreasonable." *Id.* at *6–7. While the same is true here, the Court nevertheless reviews the Lions Gate Defendants' bill due to its immense size. In *Perfect 10, Inc. v. Giganews, Inc.*, No. CV 11-07098-AB (SHx), 2015 U.S. Dist. LEXIS 54063, 2015 WL 1746484 (C.D. Cal. Mar. 24, 2015), *aff'd*, 847 F.3d 657 (9th Cir. 2017), a court in this district awarded $5.2 million in fees, representing nearly 9,400 hours worked, to a successful defendant who prevailed on a motion for summary judgment. However, *Perfect 10* was litigated far more extensively than this case: it "involved more than 30 noticed motions, including a motion for change of venue, two motions to dismiss, three *Daubert* expert witness motions[,] eight motions for summary judgment, and multiple discovery and sanctions motions. The docket in this action includes nearly 700 entries and exceeds 38,000 pages." *Id.* at *2. Here, the litigation included one combined motion to dismiss and motion to transfer, one motion for summary judgment which was resubmitted after discovery, one motion for further discovery, and one motion to strike an expert report. That tally falls far short of the litigation juggernaut outlined in *Perfect 10*. Of course, Defendants here are requesting a proportionally smaller award.

The Court has performed an extensive review of the Lions Gate Defendants' bill, which spans nearly 200 pages. Halberstadter Decl. Ex. 11 (Katten Bill), ECF No. 137-1. In so doing, the Court encountered several points of confusion and frustration. For example, several lengthy billing entries had their text cut off by the formatting of the chart submitted by the Lions Gate Defendants. At the end of the bill, the total number of hours billed is listed as 2,456.87 hours billed, yet the Lions Gate Defendants' motion claims that only 1,805.2 hours were billed; this discrepancy is not explained. Most significantly, review was made more difficult by the Lions Gate Defendants' failure to provide the Court with a summary of how many hours were broadly expended on each stage of the litigation (i.e., reviewing the works in question, drafting the motion to dismiss and the motion for summary judgment, etc.). The Court was forced to make these calculations itself to understand how nearly one year's worth of billable hours were expended on a handful of motions in a relatively uncomplicated case. Counsel for the Lions Gate Defendants billed their time, approximately, as follows: 65.53 hours responding to Plaintiff's demand letter and settlement offers; 375.45 hours strategizing their defense and working on a motion to dismiss and motion to transfer, and responding to the Court's order to show cause; 396.0 hours working on a

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motion for summary judgment, a motion to strike Plaintiff's expert report, and supplemental briefing on the impact of *Skidmore* on the summary judgment motion; 194.4 hours on discovery, mediation, and a few scheduling joint stipulations; 39.1 hours on a protective order regarding the deposition of Lions Gate's CEO, John Feltheimer; 41.22 hours communicating with clients; 34.62 hours watching the works in question; and more. The Court has prepared its analysis despite these difficulties.

"[I]f the court believes the overall award is too high, it needs to say so and explain why, rather than making summary cuts in various components of the award." *Moreno*, 534 F.3d at 1113. Such explanations are "accord[ed] deference." *Id.* For the following reasons, the Court finds that the award requested by the Lions Gate Defendants is too high.

The Court begins its discussion with *Kerr* factor 1 (the labor required) and factor 2 (the complexity of the case)—both of which suggest that the Lions Gate Defendants' requested fee award is grossly excessive. This Court's order granting summary judgment proceeded on a straightforward analysis pursuant to the extrinsic test of substantial similarity. Legally, this test has been clearly established for at least 30 years. *See, e.g.*, *Kouf v. Walt Disney Pictures & TV*, 16 F.3d 1042, 1045 (9th Cir. 1994) ("For summary judgment, only the extrinsic test is important. A plaintiff avoids summary judgment by satisfying the extrinsic test which makes similarity of the works a triable issue of fact. . . . In contrast, a plaintiff who cannot satisfy the extrinsic test necessarily loses on summary judgment, because a jury may not find substantial similarity without evidence on both the extrinsic and intrinsic tests."). In fact, this Court has applied this test repeatedly. The difficult part of this case (and where the most hours should have been invested) was reviewing and comparing the works in question. Reviewing the works in question takes approximately 11 hours. This Court reviewed each work twice, thus totaling 22 hours. Even if multiple attorneys viewed the works multiple times, the number of hours that would take would fall far short of the stratospheric sums involved here.[3]

[3] By the Court's own tabulation, the Lions Gate Defendants spent approximately 34.62 hours reviewing the works in question. The Court is mindful that some of this work may have been categories instead as work on the motions involved. Regardless, the Court cannot envision a scenario in which repeated viewings for the sake of factual comparisons of the work resulted in such high numbers of hours billed.

Further supporting the Court's conclusion that the hours billed are excessive is the fact that the attorneys employed by the Lions Gate Defendants are eminently skilled in this area of the law and should have been able to handle this case more efficiently. *See Wynn v. Chanos*, No. 14-cv-04329-WHO, 2015 U.S. Dist. LEXIS 80062, 2015 WL 3832561, at *16 (N.D. Cal. June 19, 2015) ("With a First Amendment expert on their team, little work was needed to determine the contours of state and federal law on defamation. Billing a substantial amount of hours for such work is not reasonable."). Mr. David Halberstadter, a senior partner at Katten, billed the highest number of hours of any of the Lions Gate Defendants' counsel. Mr. Halberstadter "has practiced intellectual property and entertainment litigation continuously for more than 35 years." LG MFF 18. Mr. Halberstadter's work was supplemented by Ms. Joanna Hill (a senior associate) and Ms. Tami Sims (a junior partner), who respectively had "approximately seven years of notable copyright litigation experience" and "over 16 years of practice as an entertainment and IP litigator" at the time they began working on this case. *Id.* at 19.

Additionally, the Lions Gate Defendants appear to have billed for time spent unnecessarily reinventing the wheel between their motion to dismiss and their motion for summary judgment, even though the legal and factual analysis should have been quite similar for these two motions. The Court's first order in this case ordered Defendants "to re-submit their previously denied motion to dismiss . . . as a motion for summary judgment." ECF No. 60. That motion to dismiss (ECF No. 23) already contained the major ideas, arguments, and comparisons which would define Defendants' eventual motion for summary judgment.[4] And yet, the Lions Gate Defendants somehow managed to expend an even higher number of hours on the motion for summary judgment than the motion to dismiss.

Lastly, the Court has considerable experience with dozens of cases of this type, which have required the same sort of substantial similarity analysis. Based on this experience, the hours billed are grossly excessive of what a reasonable attorney should have billed to adequately litigate this case. *See*

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[4] Some additional legal research was necessitated by the transfer of this case from the Eleventh Circuit to the Ninth Circuit. But the differences in the law between the two circuits are hardly great enough to necessitate such a massive re-investment of time.

Garcia v. LA Florence Prop., Inc., No. 2:20-cv-08383-SVW, 2021 U.S. Dist. LEXIS 68191, 2021 WL 1234718, at *7 (C.D. Cal. Jan. 27, 2021) ("Based on this Court's experience with hundreds of ADA cases, Plaintiff's counsel submitted unreasonably inflated billing records."); *Cancio v. Fin. Credit Network, Inc.*, No. C04-03755 TEH, 2005 U.S. Dist. LEXIS 13626, 2005 WL 1629809, at *11-12 (N.D. Cal. July 6, 2005) ("Upon review of the record, and given this Court's experience, the amount of time requested for these tasks is indeed excessive and unreasonable."); *Samuels v. Wells Fargo Bank, N.A.*, No. CV 11 - 6067 PSG (PJWx), 2012 U.S. Dist. LEXIS 200587, 2012 WL 13008997, at *8 (C.D. Cal. Sep. 26, 2012) ("In the Court's experience, 15.4 hours is an excessive amount of time to spend preparing a motion to dismiss in a foreclosure case, especially at a rate of $290."); *Custer v. Cristo Armstrong Powers, Inc.*, No. 8:20-cv-00154-JLS-ADS, 2020 U.S. Dist. LEXIS 247776, 2020 WL 8028236, at *4 (C.D. Cal. Nov. 17, 2020) ("Based on the Court's experience in similar cases, the Court reduces Plaintiff's requested hours by approximately 20% and awards compensation for 15 hours . . . ."); *cf. Flynn v. Love*, No. 3:19-CV-00239-MMD-CLB, 2023 U.S. Dist. LEXIS 59785, 2023 WL 2795869, at *9 (D. Nev. Apr. 5, 2023) ("Based on the Court's experience, the Court finds 75.1 hours spent on bringing the two motions to compel and two motions for sanctions to be reasonable in amount.").

Lastly, Mr. Halberstadter's declaration explains that a larger number of attorneys was staffed on this case over time due to lawyer turnover at Katten. Halberstatder Decl. ¶¶ 29–40, ECF No. 137-1. Some degree of "necessary duplication" is inevitable "based on the vicissitudes of the litigation process." *Moreno*, 534 F.3d at 1113. Here, however, the Court finds it inappropriate to saddle Plaintiff with charges associated with Katten's staff turnover. *Cano v. Kijakazi*, No. EDCV 21-1572 (JPR), 2023 U.S. Dist. LEXIS 225288, 2023 WL 8663771, at *9 (C.D. Cal. July 17, 2023) (citing *Hensley*, 461 U.S. at 434) (declining to hold an opposing party responsible for a "firm's inefficiency" and therefore imposing a 10% "haircut").

In total, the Court imposes a 66% reduction in fees requested by the Lions Gate Defendants. The Court finds this amount appropriate as a reflection of the following problems: (1) excessive hours spent on a legally straightforward case, which should have involved largely duplicative motions to dismiss and motions for summary judgment, and which was staffed by experts in the field, and (2) excessive staff turnover. Accordingly, the Court awards the Lions Gate Defendants with $355,448.24 in attorney's fees.

This reduction is likewise imposed on the amount requested as "fees on fees." *See Schwarz v. Sec'y of Health & Hum. Servs.*, 73 F.3d 895, 909 (9th Cir. 1995) ("[A] district court does not abuse its discretion by applying the same percentage of merits fees ultimately recovered to determine the proper amount of the fees-on-fees award."); *Hirsch v. Compton Unified Sch. Dist.*, No. CV 12-01269 RSWL MRW, 2013 U.S. Dist. LEXIS 64556, 2013 WL 1898553, at *6 (C.D. Cal. May 3, 2013) (awarding the same share of the fees on fees as the requesting party received on its merits fees); *Harris v. McCarthy*, 790 F.2d 753, 759 (9th Cir. 1986) (because plaintiffs received only 11.5% of the merits fees they sought, court properly awarded 11.5% of plaintiffs' requested fees-on-fees). Accordingly, the Court awards the Lions Gate Defendants $13,127.40 in "fees on fees."

ii. Hall's Counsel Billed Excessively

Hall was represented by Shapiro Arato Bach LLP, which staffed one partner and one associate on the case. The partner was Ms. Cynthia S. Arato, a cofounder of her firm and "an experienced litigator . . . widely recognized for her substantial experience and skill in copyright, entertainment, and media litigation" and "ranked in Chambers USA as a top media and entertainment lawyer." Hall MFF 7. Ms. Arato billed Hall $725 per hour; with regards to services which she billed to all Defendants, she charged a rate of $660 per hour. *Id.* at 8. The associate was Ms. Alice Buttrick, who "has served as the lead associate on a broad range of commercial cases and handled extensive discovery." *Id.* Ms. Buttrick billed Hall at a rate of $525 per hour; with regards to services which she billed to all Defendants, she charged a rate of $465 per hour. *Id.* Plaintiff has not objected to these hourly rates and, in light of the Court's experience and comparable rates charged in the district, they are reasonable. The Court includes the chart below for the reader's convenience:

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Attorney	Hours
Arato, Cynthia (partner)	119.15
Buttrick, Alice (associate)	120.10
Total	**239.25**

Ms. Arato and Ms. Buttrick "focused primarily on issues specific to Ms. Hall and her work." *Id.* Specifically, their work encompassed the following: "(1) responding to written discovery on Ms. Hall's behalf; (2) overseeing and directing the collection of Ms. Hall's documents and addressing confidentiality issues; (3) preparing and defending Ms. Hall for her deposition; and (4) deposing Mr. Rob Aft, the Plaintiff's purported expert, and helping to develop the successful motion to strike his report based on that work." *Id.* at 8–9. Hall's counsel further breaks these hours down into two main categories: 155.85 hours spent on discovery and preparing and defending Hall during her deposition and 83.4 hours spent preparing for and deposing Plaintiff's expert and participating in the drafting of the related motion to strike. Arato Decl. ¶¶ 17–20, ECF No. 138-1. Additionally, Arato and Buttrick spent another 22 hours and 15 hours, respectively, preparing their motion for fees. *Id.* ¶ 21. Summed up, Hall requests $143,947.75 in fees, $22,050.20 in costs, and $23,500.00 in "fees on fees."

The Court first considers the total hours billed. The hours worked here are not nearly as inflated as those listed by the Lions Gate Defendants' counsel; however, the Court still sees fit to impose a reduction pursuant to the *Kerr* factors. Once again, the Court notes that this was not a legally complex case. To the extent that significant amounts of time were spent responding to Plaintiff's overbroad discovery requests, Defendants could have sought an order narrowing the scope of discovery earlier; in fact, the Court eventually issued such an order when Plaintiff attempted to reopen discovery once it had closed. Additionally, a close review of the bill submitted by Hall's counsel leaves the Court skeptical of how much value was added by the involvement of a second law firm. Approximately 57.6 hours of the bill consist of entries for emails and phone calls. While correspondence is of course important, the Court sees little in the way of substantive contributions to the briefing that was key to this case. By contrast, only 9.2 hours are listed as explicitly reviewing the works in question. The Court again notes that comparing the works in question was the only complex part of this case. For these reasons, evaluated in light of the Court's substantial experience, the Court imposes a reduction of 50%. *See Shayler*, 51 F.4th at 1023 ("[T]he district court's concerns about the lack of complexity with respect to the legal, factual, and procedural issues in this case . . . track the factors that a court is supposed to consider in calculating a fee award."); *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 949 (9th Cir. 2007) ("The district court, which oversaw preparation of the case for trial, was in the best position to determine whether case analysis by Welch's counsel was or was not necessary."); *Custer*, 2020 U.S. Dist. LEXIS 247776, 2020 WL 8028236, at *4 (reducing requested hours by approximately 20% in light of the "Court's experience in similar cases"). The Court likewise applies that reduction to the amounts sought as "fees on fees." These reductions result in a final award to Hall of $71,973.88 in fees and $11,750.00 in "fees on fees."

E. The Costs Requested Must Also Be Reduced

"In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof." 17 U.S.C. § 505. Under Ninth Circuit precedent, fee shifting statutes allow for the award of costs beyond those considered taxable under 28 U.S.C. § 1920. *See Grove v. Wells Fargo Fin. Cal., Inc.*, 606 F.3d 577, 579–81 (9th Cir. 2010). Non-exhaustively, these costs can include travel expenses, courier costs, and online research charges. *Id.* The awarding of such costs lies within the discretion of the district court because they are awarded pursuant to 17 U.S.C. § 505 and not pursuant to 28 U.S.C. § 1920.

i. The Court Proportionally Reduces the Lions Gate Defendants' Costs

The Lions Gate Defendants request $45,447.00 in litigation costs. This amount includes charges for "deposition reporting and transcripts, express delivery charges, PACER fees, Westlaw legal research charges and Copyright Office charges." LG MFF 24–25. The Court imposes the same 66% reduction on this discretionary award of costs, for a total award of $15,451.98.

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ii. The Court Proportionally Reduces Hall's Costs and Declines to Award Her for Unexplained Costs Supposedly Incurred by Plaintiff

Hall requests $22,050.20 in costs. This amount includes "the videotaping and transcribing of the deposition ($6,295.20) and reimbursing the fees that Plaintiff paid to her purported expert ($15,755)." Hall MFF 9. Hall does not explain why Plaintiff should be reimbursed for fees she paid to her expert, nor why the reimbursement of such fees is included in a motion for Hall's costs. For these reasons, the Court only awards $3,147.60 in costs, representing a 50% reduction from the $6,295.20 requested for the videotaping and transcribing of deposition testimony.

V. Conclusion

For the reasons explained above, it is proper for the Court to award Defendants with attorney's fees at this time. However, as explained above, the fees requested in this case are grossly excessive. For this reason, the Court has made reductions to the requested fees, which it summarizes below:

The Court's reductions and final award to the Lions Gate Defendants are below:

	Requested Amount	**Awarded Amount (66% Reduction)**
Attorney's Fees	$1,045,436.00	$355,448.24
"Fees on Fees"	$38,610.00	$13,127.40
Costs	$45,447.00	$15,451.98
Total	$1,129,493.00	$384,027.62

The Court's reductions and final award to the Hall are below:

	Requested Amount	**Awarded Amount (50% Reduction)**
Attorney's Fees	$143,947.75	$71,973.88

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:23-cv-02147-SVW-AGR	Date	July 9, 2024
Title	*Nicole Gilbert-Daniels v. Lions Gate Ent. Corp. et al.*		

"Fees on Fees"	\$23,500.00	\$11,750.00
Costs	\$22,050.20 but only eligible for \$6,295.20	\$3,147.60
Total	\$189,497.95	\$86,871.48

IT IS SO ORDERED.

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