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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BARBARA HUBBARD,)	Civil No. 09-1581-JLS(WVG)
)	
Plaintiff,)	ORDER SUSTAINING IN PART AND
)	OVERRULING IN PART PLAINTIFF'S
v.)	COUNSEL'S OBJECTIONS TO
)	DEFENDANTS' COUNSEL'S BILLING
PLAZA BONITA, L.P., et al.,)	STATEMENTS
)	
Defendants.)	ORDER REGARDING MONETARY
)	SANCTIONS
_____)	

I

BACKGROUND

On June 13, 2011, this Court issued an Order After Order To Show Cause Hearings. The Order directed Defendant Flava's counsel, David Peters ("Peters") to submit to the Court, for *in camera* review, his billing statements for all work and expenses incurred that directly resulted from Plaintiff's counsel's, Lynn Hubbard III, ("Hubbard"), submitting to him a proposed settlement agreement in this case which purported to bear Barbara Hubbard's genuine signature, but was not, in fact, Barbara Hubbard's genuine signa-

1 ture. The Court noted that after it reviewed Peters' billing
2 statements *in camera*, it would issue appropriate monetary sanctions
3 against Hubbard. (June 13, 2011 Order at 24-25).

4 On June 23, 2011, Hubbard filed Objections to this Court's
5 June 13, 2011 Order.

6 On November 16, 2011, Peters filed a Response to Hubbard's
7 June 23, 2011 Objections.

8 On November 29, 2011, the District Judge assigned to this
9 case overruled Hubbard's Objections.

10 On December 1, 2011, this Court issued an Order For Briefing
11 On Monetary Sanctions. The Order directed Peters to submit to the
12 Court, for *in camera* review, redacted and unredacted copies of his
13 billing statements for all work and expenses incurred that directly
14 related to the Barbara Hubbard signature falsification issue.

15 On January 3, 2012, Peters filed a Declaration In Response To
16 Order of 13 June 2011. In this Declaration, Peters stated his
17 qualifications pertaining to work done on cases involving the
18 Americans With Disabilities Act, his \$300 per hour hourly billing
19 rate, his claim for \$263,692.12 for his work on this case, as well
20 as for work on other cases,^{1/} and argument regarding why his time
21 spent on the other cases is related to the signature falsification
22 issue. The Declaration includes Exhibits A - I, which are Peters'
23 billing statements.

24 On February 24, 2012, Hubbard filed his Objections To Fee
25 Requests. The Objections argue that Peters did not represent
26 Defendant Hot Topic and therefore cannot seek reimbursement on its

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28 ^{1/}Peters included his billings for work in other cases that he believed directly resulted from Hubbard's falsification of Barbara Hubbard's signature. See discussion, infra at Section II.C. of this Order.

1 behalf, there was insufficient evidence that Hubbard retaliated
2 against Peters and his clients by filing the other cases (see fn.
3 1), Peters double-, triple- and quadruple-billed numerous billing
4 entries, and unreasonable amounts of time were spent on various
5 tasks. The Objections assigned a number to each billing entry on the
6 billing statements. (Appendix A). The Objections also attached
7 Exhibits B-F, which contain Hubbard's specific objections to
8 numerous billing entries.

9 On May 15, 2012, Peters filed a Response To Hubbard's
10 Objections Re Defense Counsel's Billing Statements. The Response
11 attached Exhibits A-D, Appendices B-F, and a Response To Section "D-
12 4" of Hubbard's Objections Re Defense Counsel's Billing Statements.
13 The Response argues that Peters represented Hot Topic (as well as
14 Flava), and therefore may seek reimbursement on its behalf, there is
15 sufficient evidence that Hubbard retaliated against Peters and his
16 clients by filing the other cases, and the time spent on various
17 tasks was reasonable. The Response admitted that in numerous
18 instances, the billing statements contain double-, triple- and
19 quadruple-billed entries.

20 On May 16, 2012, Hubbard filed Objections To Peters' May 15,
21 2012 Response.

22 On May 21, 2012, Peters filed his Declaration in Response To
23 Hubbard's May 16, 2012 Objection.

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II

HUBBARD'S OBJECTIONS ARE GRANTED IN PART
AND DENIED IN PARTA. Peter's Billing Rate

On January 3, 2012, Peters filed his Declaration ("Declaration"). The Declaration essentially states the following: (1) Peters has been consulted in over 850 ADA/accessibility lawsuits, and has been counsel of record in over 300 such cases; (2) Peters is the Subject Matter Expert on ADA/accessibility lawsuits for a number of statewide organizations and regularly assists legislators and city officials on issues arising in this area of the law; (3) Peters has practiced law in the ADA/accessibility area since 2003 and first began dealing with ADA issues in 1991 when he was first licensed to practice law; (4) Peters is a contributing editor of the accessibility sections of the Labor Law Digest and Labor Law Administration, which are published by the California Chamber of Commerce; (5) Peters wrote "Accommodating Customers With Disabilities," a mini book published by the California Chamber of Commerce; (6) Peters has been consistently rated "AV Preeminent" with a peer rating of 5/5.0 at Martindale.com, and has held that AV rating for more than ten years; and (7) Peters' normal hourly billing rate is \$300.00.

Hubbard did not object to Peter's billing rate.^{2/} Nevertheless, the Court accepts Peter's representations regarding his professional legal experience in the area of ADA/accessibility. Therefore, the Court finds that, in light of Peters' representations, and the Court's own experience with ADA/accessibility cases,

^{2/}Attorney Lynn Hubbard's Objections to Fee Requests, Doc. No. 239, at p. 8, fn. 4.

1 Peters' hourly billing rate of \$300.00 is reasonable and appropriate
2 in the practice of law in the ADA/accessibility area.

3 B. Peters Represented Defendant Hot Topic
4 For A Limited Period of Time

5 Hubbard objects to the Court's consideration of Peters'
6 billing statements to Defendant Hot Topic because he argues that
7 Peters did not represent Hot Topic.

8 When Peters made his first appearance in this case on August
9 26, 2009, he represented Flava. (Doc. No. 52). However, on July 19,
10 2010, Peters filed, on behalf of Hot Topic, a Notice of Association
11 of Counsel (Doc. No. 193) and a Preliminary Notice of Opposition To
12 Plaintiff's *Ex Parte* Motion to Dismiss. (Doc. No. 192). The Notice
13 of Association of Counsel on behalf of Hot Topic states in pertinent
14 part: Peters "has been recently appointed in the above captioned
15 matter for certain limited purposes, including, without limitation,
16 filing opposition papers to Plaintiff's *ex parte* motion to dismiss
17 this lawsuit... and taking other appropriate action."

18 Peters' Declaration (noted in Section II.A. of this Order)
19 states that he represented Hot Topic until January 26, 2011. On that
20 date, he was instructed by Hot Topic not to take action on Hot
21 Topic's behalf at a scheduled hearing to be held on the next day,
22 January 27, 2011. Since January 26, 2011, Hot Topic has not
23 instructed him to act or refrain from acting on its behalf, so he
24 has not billed Hot Topic for work done after January 26, 2011.
25 Instead, work done after that date was exclusively billed to Flava.

26 On June 14, 2012, Jonathan Block, the Vice President and
27 General Counsel for Hot Topic ("Block") filed his own Declaration
28 (Doc. No. 249). In the Declaration, Block states in pertinent part:

1 1. "(H)e select(s) all legal counsel representing Hot
2 Topic... including with respect to the instant lawsuit and has
3 primary responsibility for managing legal fees to such counsel."

4 2. "(H)e understand(s) that (Peters) has made representations
5 to the Court regarding his current relationship with Hot Topic that
6 may be untrue..."

7 3. "(Peters) is not authorized to represent Hot Topic or take
8 any action on the company's behalf." (emphasis in original).

9 4. "(Peters) does not represent Hot Topic and any claim
10 otherwise is untrue. Although at one time (Peters) was retained by
11 Hot Topic to represent the company with respect to certain lawsuits
12 in California, because (Block) was dissatisfied with his representa-
13 tion of the company and the handling of the cases, on or about
14 October 19, 2010, (Block) terminated Hot Topic's relationship with
15 (Peters). Such termination, and the basis for it, was communicated
16 to (Peters) at that time." (emphasis in original).

17 5. "(T)he last substantive communication (Block) received
18 from (Peters), on January 26, 2011, tacitly acknowledged he did not
19 represent the company by asking if he could appear for Hot Topic at
20 a hearing in this action."

21 On August 3, 2012, the Court ordered Peters to file "further
22 briefing and any and all documents that have a bearing on the issues
23 raised in Mr. Block's Declaration." (Doc. No. 250).

24 On August 6, 2012, the Court amended the August 3, 2012 Order
25 to state that Peters and Hot Topic shall file shall file "further
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1 briefing, declarations, and any and all documents that have bearing
2 on the issues raised in Mr. Block's Declaration." (Doc. No. 251).^{3/}

3 On August 29, 2012, Peters and Hot Topic's counsel filed a
4 Joint Response To The August 8 and 23 Orders For Further Briefing
5 (Doc. No. 254), which states in pertinent part:

6 1. "Hot Topic believes that (Peters) has not been authorized
7 to perform work or appear on the company's behalf since 2010."

8 2. "Hot Topic did not formally engage (Peters) to represent
9 it in this Action since... Hot Topic was dismissed... from this
10 Action on January 8, 2010." (emphasis in original).

11 3. "Hot Topic did agree... to allow (Peters) to make a
12 special appearance in this Action on Hot Topic's behalf on July 19,
13 2010 to address Plaintiff's ex parte application to dismiss."

14 4. "Hot Topic does not believe that it authorized (Peters) to
15 represent it in this matter to pursue claims against the Hubbard
16 firm for reimbursement of amounts incurred in prosecuting the
17 Barbara Hubbard signature (falsification) issue. Hot Topic never
18 instructed (Peters) to take such actions."^{4/}

19 5. Hot Topic first learned that (Peters) was further pursuing
20 the matter on its behalf in May 2012, when Mr. Hubbard's office
21 contacted Hot Topic's legal department to verify statements (Peters)
22 had made."

24 ^{3/}On August 23, 2012, the Court issued a Second Amended Order For Further
25 Briefing that extended the time for counsel to respond to the August 8, 2012
Order.

26 ^{4/}Hot Topic mischaracterizes Peters' actions in this matter. Peters is not
27 pursuing "claims against the Hubbard firm for reimbursement of amounts incurred
28 in prosecuting the Barbara Hubbard signature (falsification) issue." The reason
Peters submitted his billings statement to Hot Topic (as well as to Flava) is that
he was ordered to do so by the Court. The billing statements were not submitted
in pursuit of claims against the Hubbard firm for reimbursement of amounts
incurred in prosecuting the Barbara Hubbard signature falsification issue.

1 6. "Hot Topic has not paid (Peters) any amount in this case
2 to litigate claims against the Hubbard office to recover any fees
3 that Hot Topic paid to (him). (Peters) has not invoiced Hot Topic
4 for any such work."^{5/}

5 As a result of Hot Topic's statements made in the August 29,
6 2012 Joint Response, Peters sought to file under seal his poten-
7 tially attorney-client privileged written communications with Hot
8 Topic's counsel and paralegal. (Doc. Nos. 255, 257). On September 7,
9 2012, the Court granted Peters' request to file the above-noted
10 documents under seal. (Doc. No. 258).

11 The Court has reviewed the documents filed under seal by
12 Peters and makes the following findings:

13 1. None of the correspondence from Block to Peters suggests
14 that Hot Topic was dissatisfied with Peters' representation of Hot
15 Topic.

16 2. In fact, Peters expressly communicated to Block that due
17 to the size of his (Peters') firm, (Peters') workload, and the work
18 required on Hot Topic's cases, Peters requested that Hot Topic seek
19 new counsel for its cases.

20 3. Peters did not formally substitute himself as counsel of
21 record for Hot Topic.

22 4. On October 4 or 5, 2010, Peters participated in a
23 telephone conference call with Block and his paralegal (Lulu
24 Williams) in which Peters was instructed to "stay on Plaza Bonita
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26 ^{5/}The Court is suspicious that Hubbard, or someone in Hubbard's office,
27 misinformed Block and Hot Topic of the nature of the Court's inquiry. Block and
28 Hot Topic's mischaracterization of the nature of the Court's inquiry appears to
reflect that Block and Hot Topic were under the impression that Peters was
pursuing a claim for attorneys fees. Similarly and tellingly, Hubbard
mischaracterized Peters's actions in this regard. See fn. 8, infra.

1 (this case).” While no document was presented to substantiate that
2 the above-noted communication was actually made, Hot Topic did not
3 oppose that the statement was made, nor that it was untruthful.

4 5. Hot Topic did not clearly terminate Peters’ employment,
5 even though it had an opportunity to do so.

6 6. The documents filed under seal (emails and correspondence
7 dated after the telephone conference call noted above) show that
8 there was an ongoing relationship between Peters and Hot Topic.

9 7. In fact, as late as July 2011, Peters informed Hot Topic
10 via email regarding his successful effort in exposing the Barbara
11 Hubbard signature falsification issue. Block responded to Peters via
12 email his congratulations for Peters’ efforts.

13 8. The documents filed under seal show that from July 17,
14 2010 to January 26, 2011, there was an ambiguous attorney-client
15 relationship between Peters and Hot Topic regarding the Barbara
16 Hubbard signature falsification issue. As a result, the Court will
17 not consider Peters’ billings to Hot Topic from July 17, 2010 to
18 January 26, 2011, with respect to any monetary sanctions imposed
19 upon Hubbard based on Peters’ billing statements to Hot Topic.
20 Nevertheless, as discussed in the next paragraph, although ambigu-
21 ous, Peters did not act inappropriately in submitting his bills for
22 Hot Topic.

23 9. The documents filed under seal show that Block’s June 14,
24 2012 Declaration is, in substantial respects, untrue. For example,
25 there was no evidence presented to the Court that suggests that
26 Block was dissatisfied with Peters’ representation of Hot Topic.
27 Actually, Peters asked Block to find new counsel in light of his
28 workload and the work required on all of Hot Topic’s cases in which

1 he represented Hot Topic. Further, Block misconstrued the reason why
2 Peters submitted to the Court his billings to Hot Topic. Peters was
3 ordered by the Court to submit his billings for all work done in
4 connection with the Barbara Hubbard signature falsification issue.
5 These billings included work for which he billed Hot Topic.^{6/} The
6 Court is now aware that Peters did not send an invoice for his work
7 to Hot Topic, nor did Hot Topic pay Peters for his work. Whether
8 Peters represented Hot Topic misses the point. It is clear from the
9 Court's Orders that Peters was ordered to submit his billings for
10 all work done in connection with the Barbara Hubbard signature
11 falsification issue. This would include work billed to Hot Topic,
12 whether or not Peters represented Hot Topic, or was paid by Hot
13 Topic. The Court expresses no opinion regarding whether Block's
14 Declaration was filed recklessly, negligently, and/or at the request
15 of Hubbard.

16 Therefore, Hubbard's objections in this regard are SUSTAINED.

17 C. The Court Will Not Consider Peters' Billing
18 Statements or Claims for Work Done In Other Cases

Peters' Declaration (as noted in Section II.A. of this Order)

19 asserts that within a few months of apprising the Court of the
20 falsification of Barbara Hubbard's signature in this case, Hubbard
21 filed several retaliatory lawsuits against Flava and Hot Topic.

22 These cases are:

23 (1) Kohler v. Chelsea, Southern District of California Case
24 No. 09-2780, filed December 14, 2009;

27 ^{6/}Many of Peters' tasks performed in exposing the Barbara Hubbard signature
28 falsification issue were split-billed to Hot Topic and Flava, one half of certain
billing entries was billed to Flava, one half of certain billing entries was
billed to Hot Topic.

1 (2) Strong v. Horton Plaza, Southern District of California
2 Case No. 09-2901, filed December 24, 2009;

3 (3) Kohler v. Flava Enterprises, Southern District of
4 California Case No. 10-0730, filed April 7, 2010 (alleging ADA
5 violations at the same retail location as in this case);

6 (4) O'Campo v. Chico Mall, Eastern District of California
7 Case No. 10-1105, filed May 5, 2010;

8 (6) Feezor v. Sears, Eastern District of California Case No.
9 10-0908, filed April 15, 2010; and

10 (7) Oliver v. Hot Topic, Southern District of California Case
11 No. 10-1111, filed May 21, 2010 (alleging ADA violations at the same
12 retail location as in this case).

13 Peters argues that the cases noted above have or had no, or
14 virtually no, merit and were brought to discourage "whistle blowers"
15 from apprising the Court of Hubbard's conduct in this case. As to
16 the cases noted above, Peters personally visited each of the
17 locations sued as soon as possible after the cases were filed,
18 documented the conditions in question, arranged for independent
19 inspectors to document each of the conditions in question, and filed
20 motions for summary judgment in each case, which were successful or
21 partially successful.

22 Hubbard argues that in every case noted above, Peters
23 requested attorney's fees as sanctions for Hubbard's filing the
24 lawsuit in retaliation for apprising the Court of Hubbard's conduct
25 in this case, and that every court in each of those cases denied
26 Defendants' counsel's request for sanctions.^{2/} Hubbard also informs

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28 ^{2/}Hubbard did not provide the Court with the orders of the courts which
denied Peters's request for sanctions or attorneys fees.

1 the Court that in Kohler v. Flava Enterprises, Judge Gonzalez
2 refused to award Flava its attorney's fees as a sanction for
3 Hubbard's pursuit of claims that did not have merit in that case.
4 Kohler v. Flava Enterprises, 2012 WL 460455 at *2 (S.D. Cal. 2012).

5 Since this Court was not involved in the other lawsuits noted
6 above, is not aware of the allegations in the lawsuits, nor the
7 bases for Peters' requests for attorney's fees as sanctions for
8 Hubbard's conduct in those cases, it is not in a position to decide
9 if the lawsuits were filed in retaliation for apprising the Court of
10 Hubbard's conduct in this case. Moreover, Peters does not provide
11 sufficient evidence that the other lawsuits were filed in retali-
12 ation for his apprising the Court of Hubbard's conduct in this case.
13 At best, Peters simply surmises that due to the nature of the
14 allegations in the other lawsuits, and the timing of the filing of
15 the other lawsuits, that the other lawsuits were filed in retali-
16 ation. Without more, the Court cannot conclude that the other
17 lawsuits were filed in retaliation for Peters' apprising the Court
18 of Hubbard's conduct in this case. Therefore, the Court will not
19 impose sanctions upon Hubbard for work done on the other cases. As
20 a result, Hubbard's objections to the Court's consideration of
21 Peters' billings in the other cases noted above are SUSTAINED.

22 D. Peters' Billing Statements

23 As noted previously in this Order, after Peters submitted to
24 the Court his billing statements for all work done in connection
25 with the Barbara Hubbard signature falsification issue, Hubbard
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1 filed "Attorney Lynn Hubbard's Objection to Fee Requests ("Objec-
2 tions"). (Doc. No. 239).^{8/}

3 Aside from the other issues previously addressed in this
4 Order, Hubbard states that Peters' "demand for fees,"^{9/} should be
5 denied because Peters' billing statement contain double-, triple-,
6 and quadruple-billed entries. Attached to Hubbard's Objections is
7 Appendix A, which contains all of Peters' billing statements.
8 Hubbard affixed a number to each billing entry in the billing
9 statements. The Court used the numbers affixed to the billing
10 entries to determine the merits of all of Hubbard's objections.
11 Attached to Hubbard's Objections is Appendix B, which specifies the
12 double-, triple-, and quadruple-billed entries.

13 Also, attached to Hubbard's Objections is Appendix C, which
14 specifies Peters' expenses lacking bills, receipts, or invoices,
15 Appendix D, which specifies the work done by Peters that Hubbard
16 believes was not related to the Barbara Hubbard signature falsifica-
17 tion issue, Appendix E, which specifies that certain billing entries
18 reflect secretarial work billed at Peters' hourly rate, and Appendix
19 F, which specifies that Peters' review of certain case law was over-
20 billed.

21 Peters submitted a Response to Hubbard's Objections ("Re-
22 sponse"). (Doc. No. 246). The Response admits that some of his
23 billing entries were, in some instances, double-, triple-, and
24 quadruple-billed. Also, Peters submitted invoices for the expenses

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26 ^{8/}The Court notes that the title of Hubbard's Objections and statements made
27 therein mischaracterize the reason for Peters' submission of his billing
28 statements. Peters' billing statements were submitted pursuant to a Court order.
The billing statements were not submitted in connection with any request for
attorneys fees.

^{9/}See footnote 8.

1 challenged by Hubbard (Exhs. A-D), and explained the billing entries
2 challenged by Hubbard (Response to Appendices B, C, D, D-4, F).

3 The Court has reviewed Peters' billing statements, Hubbard's
4 Objections to them, Peters' Response to the Objections, and all the
5 documents attached to those documents, and finds as follows:

6 1. Many entries in Peters' billing statements were double-,
7 triple-, and quadruple-billed. The Court has considered those
8 billing entries only once. Therefore, in most respects Hubbard's
9 Objections in this regard are SUSTAINED.

10 2. The billing entries challenged by Hubbard in Appendices C
11 through F reflect the usual and customary charges for the work done
12 in connection with the Barbara Hubbard signature falsification
13 issue. The Court does not agree with Hubbard regarding the asser-
14 tions made in Appendices C through F. However, there are some
15 entries in the billing statements which the Court believes reflect
16 too much time spent on particular tasks.^{10/} Therefore, Hubbard's
17 Objections in these regards are SUSTAINED in part and OVERRULED in
18 part.

19 3. Taking into account all of Hubbard's Objections to Peters'
20 billing statements and the Responses thereto, the Court finds that
21 the total amount that Peters billed Flava for all work done in
22 connection with the Barbara Hubbard signature falsification issue is
23 \$55,224.05

24 Therefore, IT IS HEREBY ORDERED that on or before January 15,
25 2013, Hubbard shall pay Peters the sum of \$55,224.05 as sanctions

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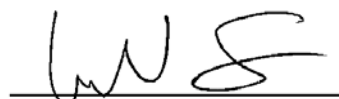
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28 ^{10/}Billing entry no. 70 has been reduced from .6 to .4. Billing entry no. 76
has been reduced from 7.6 to 3.0.

1 for all of Peters' work done in connection with the Barbara Hubbard
2 signature falsification issue.

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DATED: November 27, 2012


Hon. William V. Gallo
U.S. Magistrate Judge