

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

THE ARMENIAN ASSEMBLY OF
AMERICA, *et al.*,

Plaintiffs/Counter-Defendants,

v.

GERARD L. CAFESJIAN, *et al.*,

Defendants/Counter-Plaintiffs.

Civil Action No. 07-1259 (CKK) (AK)

REPORT AND RECOMMENDATION

This case was referred to the undersigned for a determination of attorney fees. Defendants/Counter-Plaintiffs Gerard L. Cafesjian, *et al.*, (“Defendants”) have filed a Supplemental Motion for Attorney Fees [275] (“Motion for Attorney Fees”), a Reply to the Motion for Attorney Fees [286] and two Supplemental Replies to the Motion for Attorney Fees [348] (“First Supplemental Reply”) and [351] (“Second Supplemental Reply”).¹ Plaintiffs/Counter-Defendants The Armenian Assembly of America, *et al.*, (“Plaintiffs”) have filed an Opposition to the Motion for Attorney Fees [283] (“Opposition”) and a Supplemental Opposition to the Motion for Attorney Fees [347] (“Supplemental Opposition”). The undersigned held a hearing on March 27, 2012, at which the parties made arguments relevant to the dispute over attorney fees.

¹This report and recommendation will use the Docket Entry numbers for the lead case, No. 07-cv-1259.

I. BACKGROUND

The facts of the underlying case were set out in great detail in two Memorandum Opinions of the trial court, Hon. Colleen Kollar-Kotelly, dated January 26, 2011 and May 9, 2011. *Armenian Assembly of Am., Inc., v. Cafesjian*, 772 F. Supp. 2d 20 (D.D.C. 2011) (“January 26, 2011 Opinion”); *Armenian Assembly of Am., Inc., v. Cafesjian*, 772 F. Supp. 2d 129 (D.D.C. 2011) (“May 9, 2011 Opinion”). The basis of the parties’ dispute is the construction of a museum and memorial in downtown Washington, D.C. to be dedicated to the Armenian Genocide. The parties engaged in a twelve day bench trial before Judge Kollar-Kotelly in November 2010. *Armenian Assembly of Am., Inc.*, 772 F. Supp. 2d at 27.

At the conclusion of the trial, Judge Kollar-Kotelly made rulings on Plaintiffs’ claims and Defendants’ counterclaims, including Defendants’ counterclaim for legal fees and expenses pursuant to the bylaws of the Armenian Genocide Museum and Memorial Inc. (“AGM&M”). *Id.* at 126-27. Judge Kollar-Kotelly found that pursuant to provisions of the bylaws, Plaintiffs are required to indemnify Waters and Cafesjian “for expenses related to the claims brought by Plaintiffs,” but not including any affirmative claims brought by Waters and Cafesjian against the Armenian Assembly of America (“the Assembly”) or AGM&M. *Id.* Judge Kollar-Kotelly also found that District of Columbia law did not limit the amount of indemnification. *Id.*

II. ANALYSIS

A. The By-laws Provide for Indemnification

Section 4.1 of the AGM&M bylaws provides that AGM&M will indemnify any current or former trustee “against all expenses and liabilities actually and necessarily incurred by him or her

in connection with any claim, action, suit or proceeding” related to work as a trustee. *See* 772 F. Supp. 2d at 142. Plaintiffs argue that Defendants are not entitled to any indemnification for two reasons: (1) AGM&M is a private foundation, which precludes indemnification; and (2) Defendants’ costs were not “necessarily incurred” as required by the bylaws. (Pls.’ Supplemental Opp. at 10-20.)

Plaintiffs’ first argument, that Defendants’ are not entitled to indemnification because AGM&M is a private foundation, was considered and rejected by Judge Kollar-Kotelly in her May 9, 2011 Opinion. 772 F. Supp. 2d at 151-52. The undersigned will not revisit a matter already determined by the trial court, and therefore rejects Plaintiffs’ argument.

Plaintiffs’ second argument, that Defendants are not entitled to indemnification in any amount because their costs were not “necessarily incurred,” also fails.² Plaintiffs brought a claim for breach of fiduciary duty as to AGM&M against Defendants, which Defendants opposed, incurring legal fees. (*See* Pls.’ Supplemental Opp. at 1.) Plaintiffs assert that because Defendants initiated a lawsuit against Plaintiffs and Plaintiffs originally brought the breach of fiduciary duty as to AGM&M as a counterclaim, Defendants fees were not necessarily incurred. (*Id.* at 15.) Plaintiffs cite no case law or bylaws provision that would preclude indemnification based on the claim being brought as a counterclaim. That Defendants were the first to initiate a suit against Plaintiffs in the web of litigation surrounding AGM&M is irrelevant. Defendants had to oppose the claim for breach of fiduciary duty as to AGM&M or default as to that claim, and hiring legal representation was necessary to oppose the claim. Accordingly, the

²Plaintiffs’ argument that specific time entries are not “necessary” will be discussed in Part III of this Report and Recommendation.

undersigned recommends that Defendants' fees were "necessarily incurred" as provided by the bylaws.

B. Hourly Rates

Plaintiffs argue that the Court should award Defendants hourly rates consistent with the *Laffey* Matrix.³ *Laffey* rates are generally lower than those charged by Defendants' Counsel, who bill at \$125 - \$225 for project associates (paralegals in the *Laffey* Matrix), \$275 - \$400 for associates, and \$675 - \$850 for partners. (See Supplemental Decl. of William G. Laxton, Jr. [348-5] at 38-40.) The *Laffey* matrix was created to set hourly rates for attorneys receiving fee awards pursuant to fee shifting statutes for their work in complex federal litigation. *Laffey v. Northwest Airlines, Inc.* 572 F. Supp. 354, 359, 374 (D.D.C. 1983) *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984); *Covington v. Dist. of Columbia*, 57 F.3d 1101, 1107 (D.C. Cir. 1995). Attorneys who receive fee awards pursuant to fee shifting statutes generally do not bill clients for their time on the case, so the hourly rates are intended to reflect the reasonable hourly rate prevailing in the community for similar work. *Laffey*, 572 F. Supp. at 371.

Here, Defendants seek attorneys fees based on an indemnification provision in AGM&M's bylaws, rather than a fee-shifting statute. The indemnification provision does not cap hourly rates at which a trustee will be indemnified for legal representation. The provision also does not use language that would signal a desire to follow the *Laffey* Matrix, for example, that AGM&M would indemnify counsel for trustees at a "reasonable hourly rate." Furthermore, the Plaintiff, AGM&M, was represented by attorneys from K&L Gates, a firm that bills at rates

³ See U.S. Attorney's Office - District of Columbia, *Laffey Matrix – 2003-2012*, http://www.justice.gov/usao/dc/divisions/civil_Laffey_Matrix_2003-2012.pdf.

above the *Laffey* Matrix, suggesting that a trustee's indemnification pursuant to the bylaws would not be limited to *Laffey* rates. (See Defs.' First Supplemental Reply at 30.) Accordingly, the Court recommends accepting Defendants' hourly rates.

C. Categorizing Defendants' Time Entries

Judge Kollar-Kotelly held that Defendants' indemnification is limited to claims brought against Cafesjian and Waters in their capacity as trustees of AGM&M, which includes the breach of fiduciary duty claim. *Armenian Assembly of Am., Inc.*, 772 F. Supp. 2d 127. Expenses incurred pursuing or defending against other claims are not subject to indemnification. *Id.* Most of Defendants' time entries, however, occurred in the context of the litigation generally, such as at trial or in the writing of briefs to the Court. These entries cannot be attributed to one specific claim with any degree of certainty, and therefore cannot be classified as indemnified or not indemnified. (Defs.' Mot. for Attorney Fees at 2.) *See also Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) (cases may have many claims or theories based on the same facts such that "much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis."). These time entries are called "blended expenses" for purposes of this litigation. *See Armenian Assembly of Am., Inc.*, 772 F. Supp. 2d at 153.

Defendants mark each time entry for the litigation as "indemnified," "not indemnified" or "blended," with the majority of the entries going into the blended category. (See Defs.' Mot. for Attorney Fees, Ex. B [275-3].) Plaintiffs do not object to Defendants' notations regarding which time entries go into which category. The question then becomes what percentage of the blended time should be indemnified. *See Alpo Pet Foods Inc., v. Ralston Purina Co.*, No. 86-cv-2728

1991 WL 1292963 (D.D.C. Dec. 4, 1991) (where fees were not clearly related or unrelated to the successful claim, defendant estimated the percentage of time that could be attributed to the successful result); *Navigant Consulting Inc. v. Wilkerson*, 508 F.3d 277, 298 (5th Cir., 2007) (district court did not abuse its discretion in awarding plaintiff 60 percent of its fees where recoverable and nonrecoverable fees were intertwined and separation was impossible); *DeAngelo Bros., Inc. v. Estate of Horne*, No. 05-cv-0919, 2007 WL 1501126, *6 (W.D. Mo., May 21, 2007) (court awarded plaintiff 80 percent of time entries from mediation sessions that discussed settlement of both indemnified and unindemnified claims).

1. Defendants' proposed percentage

Defendants propose that 67 percent of the blended time be indemnified, which is the average of three different formulae. In the first formula, Defendants note that 31 out of 50, or 62 percent of the allegations in the parties' Streamlined Complaints dealt with the breach of fiduciary duty claim as to AGM&M. (Defs.' Mot. for Attorney Fees at 10-11.) Second, Defendants looked at the percentage of each party's two-hour closing argument that addressed the breach of fiduciary duty claim and determined that 72 percent of the closing arguments dealt with the indemnifiable issue. (*Id.* at 11.) Third, Defendants analyzed Judge Kollar-Kotelly's January 26, 2011 Opinion and determined that 67 percent of the "Conclusions of Law" section addressed the breach of fiduciary duty claim. (*Id.*)

2. Plaintiffs' proposed percentage

Plaintiffs average two formulae to arrive at their proposed percentage of 19 percent. First, they argue that Plaintiffs' Consolidated Complaint contained four claims, one of which was

for breach of fiduciary duty, which is 25 percent.⁴ (Pls.' Opp. at 19-20.) Second, Plaintiffs take the percentage of pages in Judge Kollar-Kotelly's January 26, 2011 Opinion devoted to the breach of fiduciary duty claim (26) divided by the total number of pages (190), not just the number of pages in the "Conclusions of Law" section. This percentage is 13 percent, which gives an average of 19 percent. (*Id.*)

3. The undersigned's recommendation

The undersigned does not recommend any of the above formulae proffered by the parties as reasonable. In litigation with multiple claims, not all claims are equal in terms of their consumption of time and energy, so to set a percentage based solely on the percentage of the number of overall claims may not be per se reasonable. *See, e.g. DeAngelo Bros., Inc.*, 2007 WL 1501126 at *6 ("[the indemnifiable] claim in the mediation predominated over all others"). Therefore, whether one looks at the number of allegations in the Streamlined Complaint, like Defendants, or the number of claims in Plaintiffs' Consolidated Complaint, like Plaintiffs, measuring the time spent on a claim by its proportion of the overall number of claims does not, by itself, present a workable formula.

Defendants argue that in this litigation, the AGM&M breach of fiduciary duty claim consumed the bulk of Defendants' time. But analyzing time spent in a closing argument or number of pages in a memorandum opinion does not accurately measure the overall time spent on that claim. Some claims are more difficult to explain to a jury, or lend themselves to findings

⁴The other three claims were breach of fiduciary duty to the Assembly, breach of good faith and fair dealing to the Assembly and misappropriation of trade secrets of the Assembly.

supported by an extensive discussion of case law but do not take up the same proportion of an attorney's time overall.

Although the undersigned does not recommend any of the formulae propounded by the parties, it is difficult to create a better formula using the data identified by the parties. The AGM&M breach of fiduciary duty claim did receive significant attention in Judge Kollar-Kotelly's opinion. *Armenian Assembly of Am., Inc.*, 772 F. Supp. 2d at 103-18; (Defs.' Mot. for Attorney Fees at 10-12.) But given that three other claims regarding the Assembly were also at issue, Defendants' proposed 67 percentage overstates the importance of the AGM&M breach of fiduciary duty claim and Plaintiffs' proposed 19 percentage understates the importance of the AGM&M breach of fiduciary duty claim. Recognizing that precision is not achievable, the undersigned is of the opinion that 50 percent is closer to an optimum and reasonable percentage. 50 percent reflects the complexity and importance of the AGM&M breach of fiduciary duty claim while acknowledging that the other three claims regarding the Assembly were also litigated.

The reduction to 50 percent from Defendants' proposal of 67 percent also reflects that in the context of years of litigation, with thousands of hours of fees billed by Defendants' counsel, not every time entry is reasonable. In some instances, Defendants may have billed too many hours for writing briefs,⁵ billed for summer associates to conduct research that may have been unnecessary,⁶ spent extra time running errands to the federal courthouse,⁷ and hired an Minnesota

⁵For instance, 49.75 hours on a Sur-Reply that is six pages in length and includes no exhibits. (Defs.' Sur-Reply to Pls.' Mot. for Partial Summary Judgment [132].)

⁶Ms. Compton, a summer associate, billed 15.5 hours for research on "legal standards for damages for summary judgment motion." (Pls.' Supplemental Opp. at 16.) Mr. Nada, also a

law firm, resulting in increased expenses.⁸ In some instances, such as Defendants staffing a trial with three to four lawyers and an additional paralegal, Plaintiffs engaged in similar practices. (See Defs.' First Supplemental Reply at 24.) Rather than review Defendants' specific time entries and analyze them in light of the overall litigation, the recommendation of a 50 percent rate for blended entries encompasses some of Defendants practices that may have been unreasonable and thus, not subject to indemnification.

D. Calculation of Fees and Costs

Defendants logged \$178,681.25 in fully indemnified fees and \$53,537.00 in fully indemnified costs for a total of \$232,218.25.

Defendants logged \$3,408,030.04 in blended fees for Jones Day, \$279,050.22 in blended costs for Jones Day and \$258,949.56 in blended fees for Kelly & Berens. At a 50% indemnification rate for blended fees, the total indemnification amount for blended fees is \$1,973,014.80.

Adding fees from the indemnified and blended categories results in a total of \$2,205,233.05.

summer associate, billed 2 hours for observing a deposition.

⁷Ms. Gurskis and Mr. Clair, both project assistants, had entries ranging from 0.75 hours to 2.0 hours to deliver or pick up documents from the federal courthouse, three blocks away from Jones Day's Washington, D.C. office. (Pls.' Supplemental Opp. at 33-34.)

⁸Defendants hired Kelly & Berens, a Minnesota firm, to do pre-trial work that Defendants state Jones Day attorneys otherwise would have handled. (Def's. Supplemental Reply at 26.) Kelly & Berens billed \$3,483.64 in travel expenses to Washington, D.C. and long distance phone calls, and may have spent time becoming familiar with the litigation that Jones Day attorneys would not have needed. (See Defs.' Mot. for Attorney Fees, Ex. C [275-4].)

1. Deductions Regarding the Cafesjian Family Foundation (“CFF”)

Judge Kollar Kotelly’s January 26, 2011 Opinion orders indemnification for fees incurred defending Cafesjian and Waters, but the opinion does not grant indemnification for CFF.

Armenian Assembly of Am., Inc., 772 F. Supp. 2d at 127. In his Supplemental Declaration, Mr. Laxton notes that CFF, and not Gerard L. Cafesjian personally, paid some of the legal bills for which indemnification was initially sought. (Supplemental Decl. of William G. Laxton, Jr. [348-5] at 1.) Since CFF is not entitled to indemnification, Defendants agree to drop their request for indemnification where the fees were paid by CFF. (*Id.* at 2.)

CFF paid part or all of five of Jones Day’s legal bills and part or all of seven of Kelly & Berens’ legal bills. (*Id.* at 4.) For those five bills, Mr. Laxton determined how much of the each legal bill Defendants sought to be indemnified and what percentage of the bill was paid by CFF. (*Id.* at 3-4.) Mr. Laxton’s figures reflect a 67 percent rate of indemnification for blended time entries. (*Id.*) The figures are modified below to reflect the undersigned’s recommendation of a 50 percent indemnification rate.

The first chart is for Jones Day’s attorney fees paid by CFF:

Date	Bill Total	Indemnified	Blended	Blended x 50%	Total Indemnified	CFF % of Bill Paid	Total Reduction
4/30/2010	\$838,432.75	\$19,368.75	\$819,064	\$409,532	\$428,900.75	100%	\$428,900.75
5/17/2010	\$26,668.75	\$5,162.50	\$21,506.25	\$10,753.13	\$15,915.63	100%	\$15,915.63
6/28/2010	\$103,393.75	\$14,150	\$89,243.75	\$44,621.88	\$58,771.88	89.66%	\$52,694.86
7/30/2010	\$102,593.75	\$33,456.25	\$69,137.50	\$34,568.75	\$68,025	86.72%	\$58,991.28
12/23/2010	\$527,419.00	\$0.00	\$527,419.00	\$253,709.50	\$253,539.03	10.50%	\$25,353.90
						Total	\$581,856.42

The second chart is for Jones Day's legal expenses paid by CFF:

Date	Bill Total (all blended)	Bill Total x 50%	CFF % of Bill Paid	Total Reduction
4/30/2010	\$41,547.06	\$20,773.53	100%	\$20,773.53
5/17/2010	\$3,807.08	\$1,903.54	100%	\$1,903.54
6/28/2010	\$3,534.11	\$1,767.06	100%	\$1,767.06
7/30/2010	\$33,691.39	\$16,845.70	100%	\$16,845.70
12/23/2010	\$26,408.67	\$13,204.34	0%	\$0.00
			Total Reduction	\$41,289.83

The third chart is for Kelly & Berens' attorney fees and expenses paid by CFF:

Date	Bill Total (all blended)	Blended x 50%	CFF % of Bill Paid	Total Reduction
4/30/2010	\$22,800.00	\$11,400.00	90%	\$10,260.00
5/31/2010	\$31,063.63	\$15,531.81	100%	\$15,531.81
6/30/2010	\$50,918.36	\$2,959.18	90%	\$2,663.26
7/31/2010	\$29,945.03	\$14,972.52	95%	\$14,223.40
8/31/2010	\$32,972.67	\$16,486.34	95%	\$14,837.40
9/30/2010	\$19,346.06	\$9,673.03	95%	\$18,378.76
10/31/2010	\$552.13	\$276.07	100%	\$276.07
			Total Reduction	\$76,170.07

Adding the total reduction from the three charts, the reduction for bills paid by CFF is \$699,316.32, bringing the total indemnified amount down to \$1,505,916.73.

2. Deductions regarding Plaintiffs' objections

In Defendants' First Supplemental Reply, Defendants accept a number of Plaintiffs' objections to time entries included in the "indemnified" and "blended" categories. This results in a deduction of \$2,631.25 from the "indemnified" category and \$30,388.69 from the "blended" category. The reductions were from time entries in 2008, 2009 and 2011, so none of the entries were paid for by CFF and all would otherwise be entitled to indemnification. (Defs.' First Supplemental Reply, Ex. F [348-6] at 3.) These reductions bring the overall total to \$1,472,896.79.

In Defendants' Second Supplemental Reply, Defendants agree not to request indemnification for fees where the description of the time entry refers to "the Cafesjian Family Foundation" instead of "Cafesjian." (Defs.' Second Supplemental Reply at 1.) All of these time entries were from 2008, so none of the entries were paid by CFF and all the entries would otherwise be entitled to indemnification. This results in a reduction of \$11,239.25 from the "blended" category. (*Id.* at 4.) This reduction brings the overall total to \$1,461,658.54.

Accordingly, the undersigned recommends that Defendants' indemnification be set at \$1,461,658.54.

DATE: April 24, 2012

/s/

ALAN KAY
UNITED STATES MAGISTRATE JUDGE