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**\*E-FILED 03-30-2011\***

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

ROKY ERICKSON, individually and doing  
business as ROKY ERICKSON MUSIC;  
CRAIG LUCKIN, individually and doing  
business as ORB PRODUCTIONS and ORB  
MUSIC, CO.,

Plaintiffs,

v.

SYMPATHY FOR THE RECORD INDUSTRY,  
a doing business as designation for JOHN  
MERMIS, a/k/a LONG GONE JOHN, an  
individual; INDEPENDENT LABEL  
COLLECTIVE LLC, a limited liability  
company,

Defendants.

No. C10-00636 HRL

**ORDER (1) DENYING AS MOOT  
JUDGMENT CREDITORS' MOTION  
FOR AN ASSIGNMENT ORDER; AND  
(2) GRANTING IN PART AND DENYING  
IN PART JUDGMENT CREDITORS'  
MOTION FOR ATTORNEYS' FEES AND  
COSTS**

[Re: Docket Nos. 21 and 33]

BACKGROUND

Roky Erickson and Craig Luckin ("judgment creditors") filed this action for alleged breach of contract, fraud and copyright infringement. In sum, they claimed that defendants exploited their musical compositions and recordings for profit and then refused to account for or pay the royalties owed.

Shortly after the complaint was filed, Erickson and Luckin accepted an offer of judgment from defendant John Mermis (aka Long Gone John, dba Sympathy for the Record Industry). Pursuant to Fed. R. Civ. P. 68, judgment was entered on May 17, 2010 in the amount

1 of \$8,001.00 in favor of Erickson and \$73,001.00 in favor of Luckin, inclusive of pre-judgment  
2 interest and costs to April 30, 2010. Post-judgment interest was to accrue at the rate provided  
3 by law. (See Docket No. 19, hereafter "Rule 68 Judgment").<sup>1</sup>

4 Claiming that Mermis refused to pay the judgment, plaintiffs moved for an assignment  
5 order, seeking payment of the judgment against Mermis through a Distribution Agreement  
6 between Sympathy for the Record Industry and ILC. The court directed the parties to submit  
7 further briefing on that motion. They did so,<sup>2</sup> and the matter was deemed submitted.

8 The court is told that Mermis has since paid the majority of the judgment. And,  
9 Erickson and Luckin say that, as of October 28, 2010, the judgment has been satisfied after they  
10 levied the remaining sums due from one of Mermis' bank accounts.

11 Erickson and Luckin now move for an award of \$39,706.72 for their attorney's fees and  
12 costs incurred in their post-judgment enforcement efforts. Mermis opposes the motion. At the  
13 motion hearing, Erickson and Luckin renewed their request for an assignment order in order to  
14 satisfy payment of their requested post-judgment attorney's fees. Upon consideration of the  
15 moving and responding papers, as well as the arguments of counsel, this court (1) denies as  
16 moot judgment creditors' motion for an assignment order; and (2) grants in part and denies in  
17 part their motion for attorneys' fees and costs.

18 DISCUSSION

19 A. Motion for Assignment Order

20 As noted above, in conjunction with their request for payment of fees and costs,  
21 judgment creditors have renewed their request for an assignment order. Pursuant to Rule 69 of  
22 the Federal Rules of Civil Procedure, a court may enforce a money judgment in accordance with  
23 the practice and procedure of the state in which it sits. FED. R. CIV. P. 69(a)(1); Cigna Property

24  
25 <sup>1</sup> At around the same time, Erickson and Luckin also reached a settlement with  
26 the only other defendant, Independent Label Collective, LLC (ILC), and dismissed their  
27 claims against ILC with prejudice. (See Docket Nos. 18 and 20). The terms of that  
28 settlement are not at issue on the instant motion.

<sup>2</sup> Both sides requested that their supplemental filings be sealed. The court  
granted both motions. (Docket No. 30). However, it appears that neither side has actually  
electronically filed their papers under seal as required by General Order No. 62. They are  
directed to do so promptly.

1 and Casualty Ins. Co. v. Polaris Pictures Corp., 159 F.3d 412, 421 (9th Cir. 1998). Under  
2 California law, all property of the judgment debtor is subject to enforcement of a money  
3 judgment. CAL. CODE CIV. PROC. § 708.510(a). Nevertheless, the statute on its face provides  
4 that a right to payment may be assigned only to the extent necessary to satisfy the money  
5 judgment. Id., § 708.510(d). As noted above, the judgment in question has already been  
6 satisfied. Accordingly, judgment creditors' motion for an assignment order is denied as moot.

7 B. Motion for Attorneys' Fees and Costs

8 A motion for fees incurred in obtaining a judgment is considered a supplemental  
9 proceeding to which Federal Rule of Civil Procedure 69 applies. Carnes v. Zamani, 488 F.3d  
10 1057, 1060 (9th Cir. 2007). That rule, in turn, "requires the court to apply state law to  
11 'proceedings supplementary to and in aid of a judgment' unless there is a federal statute that  
12 would apply." Id. (quoting Fed. R. Civ. P. 69(a)). Neither side has identified an applicable  
13 federal statute; and, this court therefore applies California law here. Id.

14 "California's Enforcement of Judgments Law ('EJL') provides that a 'judgment creditor  
15 is entitled to the reasonable and necessary costs of enforcing a judgment.'" Id. (quoting CAL.  
16 CIV. PROC. CODE § 685.040). Recoverable costs may include attorneys' fees otherwise allowed  
17 by law. CAL. CIV. PROC. CODE § 685.040; see also Carnes 488 F.3d at 1060 (stating that  
18 recoverable costs may include attorney fees incurred in enforcing the judgment when the  
19 prevailing party was entitled to attorney's fees in the underlying action); Berti v. Santa Barbara  
20 Beach Properties, 145 Cal. App.4th 70, 77, 51 Cal. Rptr.3d 364, 368 (2007) (stating that "Code  
21 of Civil Procedure section 685.040 authorizes postjudgment fees provided by law."). Here,  
22 Erickson and Luckin asserted a claim for violation of the Copyright Act. The Copyright Act  
23 provides that the court may, in its discretion, allow full recovery of costs by or against any party  
24 and may also award reasonable attorney's fees to a prevailing party as part of the costs. 17  
25 U.S.C. § 505.

26 1. Whether Factors Support an Award of Attorney's Fees

27 Mermis contends that this court has no authority to award fees and costs to Erickson and  
28 Luckin because the Rule 68 Judgment is silent about fees and states that it is inclusive of costs.

1 However, the costs included in the judgment were only to April 30, 2010. (Docket No. 19).  
2 And, as noted above, this court finds that post-judgment fees and costs are otherwise allowable  
3 under the law.

4 Mermis next argues that Erickson and Luckin are not “prevailing parties” entitled to an  
5 award of fees. Here, he points out that this court made no determination as to the merits of the  
6 underlying claims for relief, and he did not admit any fault in the Rule 68 Judgment. Mermis  
7 fails to persuade. “[A] ‘prevailing party’ is one who has been awarded some relief by the  
8 court.’ The key inquiry is whether some court action has created a ‘material alteration of the  
9 legal relationship of the parties.’” Cadkin v. Loose, 569 F.3d 1142, 1148 (9th Cir. 2009)  
10 (quoting Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health & Human  
11 Resources, 532 U.S. 598, 603-04 (2001)). Thus, in addition to judgments on the merits,  
12 settlement agreements enforced through a consent decree may serve as the basis for an award of  
13 attorney’s fees. Buckhannon Bd. & Care Home, Inc., 532 U.S. at 604; see also Pure Love  
14 Music v. JMC Entertainment, Inc., No. 09CV1980, 2010 WL 1269776 (E.D.N.Y., Apr. 2, 2010)  
15 (awarding attorney’s fees under Copyright Act § 505 for plaintiff’s fees and costs incurred in  
16 enforcing the parties’ settlement); Feezor v. Otoy Lakes Road, L.P., No. 07cv0335, 2008 WL  
17 2705392 \*1 (S.D. Cal., July 9, 2008) (concluding in an action under the Americans With  
18 Disabilities Act that plaintiff was a “prevailing party” for purposes of obtaining attorney’s fees  
19 where a Fed. R. Civ. P. 68 judgment had been entered in his favor).

20 Mermis nonetheless maintains that the instant motion for fees and costs is untimely  
21 because he paid most of the judgment and Erickson and Luckin levied the rest by September 3,  
22 2010—i.e., ten days before the instant motion was filed. Plaintiffs do not dispute that a  
23 judgment creditor must request post-judgment attorney fees before the underlying judgment is  
24 fully satisfied. Here, however, plaintiffs say that the judgment was not fully satisfied until  
25 October 28, 2010 when they actually received funds from Mermis’ account for the outstanding  
26 balance. (Cohorn Decl. ¶ 9). Cf. Carnes, 488 F.3d at 1059-61 (concluding that a motion for  
27 post-judgment fees was untimely because it was filed after funds were wired to the judgment  
28 creditors’ account). Accordingly, judgment creditors’ motion is timely.

1 Finally, Mermis contends that, rather than negotiate a reasonable settlement or payment  
2 schedule, Erickson and Luckin deliberately undertook extensive efforts to enforce the judgment  
3 in order to increase their attorney's fees. Mermis acknowledges that he has substantial assets  
4 and claims that he simply needed time to make a payment plan because of liquidity issues. In  
5 sum, he believes that judgment creditors' enforcement efforts were overkill. It is not apparent  
6 to this court that Mermis outright refused to pay the judgment offered. Nevertheless, it seems  
7 that Mermis was less than forthcoming with judgment creditors and this court about the true  
8 state of his financial affairs. Having reviewed the record, this court finds that judgment  
9 creditors reasonably sought to enforce payment of the judgment Mermis offered.

10 On balance, this court finds that the circumstances presented here weigh in favor of an  
11 award of attorney's fees and costs.

12 2. Reasonableness of Fees and Costs

13 Judgment creditors assert that the Ninth Circuit has not mandated use of the lodestar  
14 method in calculating attorney's fees under the Copyright Act. Nevertheless, "[t]he most useful  
15 starting point for determining the amount of a reasonable fee is the number of hours reasonably  
16 expended on the litigation multiplied by a reasonable hourly rate." Hensley v. Eckerhart, 461  
17 U.S. 424, 433 (1983). The party seeking an award of fees must submit evidence supporting the  
18 hours worked and rates claimed. Id. "Where the documentation of hours is inadequate, the  
19 district court may reduce the award accordingly." Id. "The court necessarily has discretion in  
20 making this equitable judgment." Id. at 437.

21 The fee applicant bears the burden of presenting satisfactory evidence, in addition to the  
22 affidavits of its counsel, that the requested rates are commensurate with those prevailing in the  
23 community for similar services of lawyers of reasonably comparable skill, experience, and  
24 reputation. Camacho v. Bridgeport Financial, Inc., 523 F.3d 973, 980 (9th Cir. 2008);  
25 Experexchange, Inc. v. Doculex, Inc., No. C08-03875 JCS, 2010 WL 1881484 \*6 (N.D. Cal.,  
26 May 10, 2010). For example, fee applicants may present affidavits of attorneys other than their  
27 own counsel as to the reasonableness of the rates charged. Camacho, 523 F.3d at 980;  
28 Experexchange, Inc., 2010 WL 1881484 at \*6. "Courts may also rely on decisions by other

1 courts awarding similar rates for work in the same geographical area by attorneys with  
2 comparable levels of experience.” Experexchange, Inc., 2010 WL 1881484 at \*6 (citing  
3 Nadarajah v. Holder, 569 F.3d 906, 917 (9th Cir. 2009)). The party opposing the fee  
4 application bears the burden of presenting evidence rebutting the accuracy and reasonableness  
5 of facts asserted by the fee applicant in its submitted affidavits. Camacho, 523 F.3d at 980.

6 Here, judgment creditors seek a total of \$39,706.72 in fees and costs incurred by their  
7 California and Washington state counsel in enforcing the judgment. The hourly rates charged  
8 by plaintiffs’ California law firm range from \$150 per hour to \$450 per hour. (Given Decl., Ex.  
9 C). This court is well familiar with the range of rates customarily charged by attorneys  
10 practicing before it, and the stated hourly rates are within the range for cases of this magnitude  
11 and complexity. See Io Group, Inc. v. Jordan, No. C09-0884MEJ, 2010 WL 2231793 \*5 (N.D.  
12 Cal., June 1, 2010) (presenting, in a copyright case, a matrix of reasonable rates for attorneys  
13 practicing in the Northern District of California). However, it is not entirely clear what tasks  
14 were performed by whom. (Given Decl., Ex. B). Moreover, it seems that some of the tasks  
15 performed by David Given, a partner at plaintiffs’ counsel’s firm—such as drafting pleadings,  
16 conducting legal research and administrative tasks (Given Decl. ¶ 12)—could perhaps have  
17 been performed by an attorney at a lower billing rate or by others. And, as for the rates charged  
18 by their Washington state counsel, judgment creditors have presented nothing other than their  
19 attorney’s declaration to support the reasonableness of the rates charged. Accordingly, the  
20 court finds that a moderate reduction of \$5,000.00 is warranted.

21 ORDER

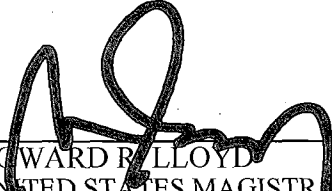
22 Based on the foregoing, IT IS ORDERED THAT:

- 23 1. Judgment creditors’ motion for an assignment order is denied as moot.
- 24 2. Judgment creditors’ motion for attorney’s fees and costs is granted in part and  
25 denied in part. Judgment debtor Mermis shall pay judgment creditors \$34,706.72 within 60 days  
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1 from the date of this order.

2 SO ORDERED.

3 Dated: March 30, 2011

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6 HOWARD R. LLOYD  
7 UNITED STATES MAGISTRATE JUDGE  
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5:10-cv-00636-HRL Notice has been electronically mailed to:

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