UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

TOSHIBA AMERICA INFORMATION SYSTEMS, INC., **Plaintiff,** **vs.** **NEW ENGLAND TECHNOLOGY, INC., et al.** **Defendant.**	**Case No.: SACV 05-00955-CJC(MGLx)** **ORDER DENYING PLAINTIFF'S MOTION FOR ATTORNEYS' FEES [filed 10/11/07]**

INTRODUCTION

On September 26, 2007, this Court entered a judgment in favor of Plaintiff Toshiba America Information Systems, Inc. ("TAIS") in the amount of $482,430.00, plus interest, costs and attorneys' fees to be resolved by way of motion filed with the Court. TAIS

filed a motion for attorneys' fees on October 11, 2007, seeking to recover $996,865.83 in attorneys' fees. Defendant New England Technology, Inc. ("NETI") asserts that the motion for fees should be denied because it was not timely filed, it improperly seeks fees in relation to the litigation of NETI's counterclaim, and because TAIS has not submitted sufficient evidence to justify such a large award of fees. Because the Court agrees that the motion was not timely filed and that TAIS has not submitted sufficient evidence to justify an award of fees, TAIS' motion is DENIED.

ANALYSIS

NETI argues that TAIS' motion must be denied because it was not filed within fourteen days of the entry of judgment, in violation of FED. R. CIV. P. 54(D)(2)(B) and Central District L.R. 54-12. The Court finds that TAIS' motion was untimely because the Court entered judgment on September 26, 2007, and TAIS' motion was not filed until October 11, 2007, 15 days later. The 14 day deadline under Rule 54(d)(2)(B) includes Saturdays, Sundays, and legal holidays. Failure to file a motion for attorneys' fees within the prescribed time period waives a party's right to request fees. *Port of Stockton v. Western Bulk Carrier KS*, 371 F.3d 1119, 1121-1122 (9th Cir. 2004). FED. R. CIV. P. 6(B), however, permits a court to enlarge the period of time within which a party must file a motion for attorneys' fees "where the failure to act was the result of excusable neglect..." Unfortunately for TAIS, its one-day delay in filing its motion was not the result of "excusable neglect."

In *Pioneer Inv. Serv. Co. v. Brunswick Assocs. P'ship*, 507 U.S. 380 (1993), the Supreme Court articulated the test for determining when a party's delay in filing qualifies as "excusable neglect." In *Pioneer*, the party seeking excusal of a late filing in a bankruptcy case alleged that the delay was the result of upheaval in his law practice and due to the fact that the notice of the bar date was inconspicuous and outside the ordinary

course in a bankruptcy proceeding. *Id.* at 398. In considering whether these circumstances qualified as "excusable neglect," the Court first noted that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect". *Id.* at 392. The court held "the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include...the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." 507 U.S. at 395. Based on this understanding of "excusable neglect," the Court rejected the argument that upheaval in a law practice excused a late filing. The Court did find, however, that the notice of the filing date was so inadequate that it did qualify as an excuse for the untimely filing. The Court stated, "the peculiar and inconspicuous placement of the bar date in a notice regarding a creditors meeting, without any indication of the significance of the bar date, left a dramatic ambiguity in the notification." *Id.* at 398. The Court also found it significant that the delay had not caused prejudice to the other side and it was not the result of bad faith. *Id.*[1]

Although *Pioneer* made it clear that a finding of "excusable neglect" is an equitable determination, the Ninth Circuit subsequently held that the party seeking a reprieve still has a high threshold to meet. *See Kyle v. Campbell Soup Co.*, 28 F.3d 928 (9th Cir. 1994); *Committee for Idaho's High Desert v. Yost*, 92 F.3d 814 (9th Cir. 1996). In *Kyle*, the party who had filed an untimely motion for attorneys' fees argued that she should receive an enlargement of time because she mistakenly believed that a local rule permitted her to add three days to the time period after entry of judgment. 28 F.3d at 930. While the Ninth Circuit considered the *Pioneer* factors in making its ruling, the

[1] While *Pioneer* addressed a delay in filing under with Bankruptcy rule 9006(b)(1), the Ninth Circuit has held that the *Pioneer* test is applicable to cases involving a motion for attorney's fees and a request for an enlargement, under Fed. R. Civ. P. 54(d) and 6(b), respectively. *See Committee for Idaho's High Desert v. Yost*, 92 F.3d 814, 825 n. 4 (9th Cir. 1996).

court noted that *Pioneer* did not change "the general rule that a mistake of law does not constitute excusable neglect." *Id.* at 932. While the party seeking fees in *Pioneer* failed to meet the deadline because of a "dramatic ambiguity," Kyle delayed because she misconstrued rules which were unambiguous. *Id.* at 931. Therefore, even though Kyle's attorney had acted in good faith and Campbell Soup did not suffer prejudice from the delay, a misunderstanding of local rules did not qualify as "excusable neglect." *Id.* at 931. The court held that in the absence of "a persuasive justification for . . . misconstruction of nonambiguous rules" there was "no basis for deviating from the general rule." *Id.* at 931-32.

In *Yost,* the Ninth Circuit reaffirmed its ruling in *Kyle,* concluding that if misconstruction of a non-ambiguous rule cannot justify an extension of time for seeking attorneys' fees, a party's ignorance of an amendment to a rule likewise cannot qualify as "excusable neglect." 92 F.3d at 825. Although the Ninth Circuit did not provide an exhaustive list of situations that would qualify as "excusable neglect," in affirming the district court's ruling, it indicated its approval of the following examples: "compelling circumstances....such as illness, injury or death of counsel, or members of his family, or fire, flood, vandalism or destruction of counsel's law office or word processing equipment." *Id.* at 824. *Kyle* and *Yost* thus stand for the proposition that even a good faith mistake that does not result in prejudice to the other side is not a sufficient reason to enlarge the time period for requesting fees, absent some other evidence of "compelling circumstances."

Here, TAIS' purported reason for its delay is that its courier was caught in traffic at 3:30 in the afternoon in Santa Ana, California. Mr. Mersel, attorney for TAIS, asserts that he waited until 3:14 p.m. on the last day of the filing period to deliver the motion to Morrison & Foerster's regular courier service. (Mersel Decl., ¶ 2.) Mr. Mersel asserts that although he was aware that the filing deadline was 4:00 p.m., he had "never had a

problem with getting papers filed by 4:00 p.m. when delivering them to the attorney service" forty-five minutes in advance. (*Id.*) The courier, Mr. Moskus, swiftly responded to Mr. Mersel's request, leaving on his motorcycle for the courthouse at approximately 3:30 p.m. (Moskus Decl., ¶ 3.) Unfortunately, Mr. Moskus encountered "unusually heavy traffic" and had to "wait at the railroad crossing on Grand Avenue for a long train to pass." (Moskus Delc., ¶ 3.) Consequently, Mr. Moskus arrived at the Courthouse after the office had closed and Mr. Mersel was unable to file the motion until the following day, on October 11, 2007. (Mersel Decl., ¶ 7.)

These circumstances, however regrettable, do not meet the standard for "excusable neglect." Although the delay was not lengthy and it does not appear that NETI was prejudiced by it, the reason for the delay was entirely within TAIS' control and TAIS has not offered a good faith reason for the delay. Given that the Ninth Circuit has held that a good faith misunderstanding of local rules is not sufficient to rise to the standard of "excusable neglect," the entirely foreseeable obstacle of traffic in Southern California in the late afternoon also cannot justify an enlargement of time. Unlike the parties in *Yost* and *Kyle,* Mr. Mersel is not even arguing that he had a good faith reason to believe that he had extra time to file the motion for fees. Instead, Mr. Mersel asserts that he has a practice of waiting until 45 minutes prior to the filing deadline before passing off a motion to his courier, and because that plan has worked in the past, it should have been sufficient on this occasion. Although this pattern of conduct may have previously worked for Mr. Mersel, it is not a good faith reason for the delay. Unlike the circumstances discussed in *Yost* that would constitute legitimate reasons for delay, such as the illness of counsel or destruction of his law office, the reason for delay in this case was entirely foreseeable and avoidable. Mr. Mersel knew since at least September 10, 2007, the date of this Court's Tentative Order Granting TAIS' Motions for Summary Judgment, that he would need to prepare a motion for attorneys' fees. He waited a month later, until 3:14 p.m. on October 10, to attempt to file the motion. Because Mr. Mersel

made a conscious decision to wait until the final hour to file his motion, he assumed the risk that on October 10, his luck would run out.

This case is distinguishable from *Pioneer* because encountering traffic in Orange County is in no way analogous to being misled by the "dramatic ambiguity" of a faulty notice of a bar date in a bankruptcy proceeding. When Mr. Moskus set out at 3:30 p.m. to travel to the Courthouse, it was entirely predictable that he might not arrive by 4:00 p.m. Even if Mr. Moskus assured Mr. Mersel that forty-five minutes would be sufficient time to file the papers, Mr. Mersel was not the victim of any "dramatic ambiguity" in circumstances. Considering all of the circumstances and keeping in mind that the *Pioneer* test is an equitable one, the Court finds that TAIS' proffered reason for delay does not justify an enlargement of the time period for filing its motion.[2]

The Court also finds that TAIS' motion for attorneys' fees is inadequate because it is not supported by sufficient evidence. When a party files a motion for attorneys' fees, the burden is on the fee applicant to substantiate the hours worked and the rate claimed. *Strange v. Monogram Credit Card Bank of Georgia*, 129 F.3d 943, 945 (7th Cir. 1997); *Saizan v. Delta Concrete Products Co., Inc.*, 448 F.3d 795, 799 (5th Cir. 2006). To meet this burden, the fee applicant must produce evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Sorenson v. Mink*, 239 F.3d 1140, 1145

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[2] This case is also distinguishable from *Bateman v. United States Postal Serv.*, 231 F.3d 1220 (9th Cir. 2000), another case in which the Ninth Circuit held that the moving party had established "excusable neglect." In *Bateman*, the plaintiff's attorney missed the deadline to file a responsive pleading because he was in Nigeria handling a family emergency. *Id.* at 1222. The Ninth Circuit reversed the district court's ruling against the plaintiff because the lower court failed to conduct the equitable analysis laid out in *Pioneer* and because the plaintiff's attorney had not acted in bad faith. *Id.* at 1224-25. Unlike the district court in *Bateman*, this Court properly considered the *Pioneer* factors and determined that TAIS had not provided a good faith reason for the delay. A family emergency that requires an attorney to travel to a foreign country provides considerably more justification for a finding of good faith than a decision to wait until the final hour to file a motion for fees.

(9th Cir. 2001). "Where the documentation of hours is inadequate, the district court may reduce the award accordingly. The district court also should exclude from this initial fee calculation hours that were not 'reasonably expended.'" *Id.* at 1146. While a district court has wide latitude to determine the number of hours that were "reasonably expended," it must provide enough of an explanation to provide for meaningful review of the fee award. *Id.*

A district court's award of fees may be set aside if the court is unable to make any findings that the hours expended were reasonable, because the fee applicant only provided general summaries of attorney work and time spent. *See Intel Corp. v. Terabyte Intern., Inc.*, 6 F.3d 614 (9th Cir. 1993). In *Intel*, the court explained that although summaries of work can be used to determine reasonable hours, these summaries must be supported by the underlying material so that the party paying the fees can see what was charged and why. The court stated:

> While the district court did have evidence of Intel's hours expended and its customary fees, the court made no findings that the hours expended were reasonable and that the hourly rates were customary. The order merely awarded the fees without elaboration. Such a procedure is inadequate. That is particularly true where, as here, the requesting party submits mere summaries of hours worked...those summaries alone made it very difficult to ascertain whether the time devoted to particular tasks was reasonable and whether there was improper overlapping of hours. Terabyte was not required to take Intel's word that every hour was needed and all overlap had been eliminated. While summaries can be used in proper circumstances, the underlying material must be made available. Fed. R. Evid. 1006. Under our adversary system, Terabyte was entitled to see just what was charged and why. What may seem obvious to Intel and to the district court is not obvious to us. That, among other reasons, explains our long-standing insistence upon a proper explanation of any fee award. It also explains Terabyte's need and right to peruse and parse Intel's fee demand.

Id. at 622-23.

Here, the declarations submitted by TAIS are inadequate because they are also mere summaries of attorney work and time spent, without any connection between the listed hours and a particular task. As a result, this Court cannot properly determine whether the hours expended were reasonable, whether the rates were customary, or if there was improper overlapping of hours among TAIS' various attorneys. For example, the declaration submitted by TAIS' in-house counsel, Mr. Wafel, fails to provide any detailed evidence of alleged time spent on TAIS' complaint. Mr. Wafel declares "[m]y average work week is forty to fifty hours. Over the course of this approximately twenty five months since the commencement of this litigation, I have dedicated on average ten to fifteen percent of my work time to activities directly related to this litigation. This has amounted to approximately 520 hours of time." (Wafel Decl., ¶ 8.) Not only has Mr. Wafel failed to keep an exact record of his hours, he failed to link this vague estimate to any specific activities. While Mr. Wafel vaguely described various activities performed in connection with the case (reviewing all pleadings, attending all depositions), he did not state how long any of these tasks took him to complete. The Court therefore has no way of knowing if 520 hours is a reasonable amount of time to have spent on these activities. Because the descriptions are so vague, the Court also cannot determine if Mr. Wafel's work was duplicative of TAIS' other attorneys efforts or if the work was necessary to properly litigate this case.

The declaration of Mr. Irby, another attorney for TAIS, provides a more specific estimate of total hours, breaking them down into tenths of an hour, but it does not itemize a single task performed in conjunction with the case. (*See* Irby Decl., ¶¶ 1-2.) The declaration of Mr. Duffy provides a more detailed list of the activities that he and Mr. Irby performed on the case, along with a billing summary that lists the total hours worked. (Duffy Decl., ¶ 3, Exh. A-1 thereto.) Yet the declaration was only signed by Mr. Duffy, not Mr. Irby, and it does not state how long any of the activities took to complete.

The declaration submitted by Mr. Mersel of Morrison & Foerster suffers from the same deficits. The declaration summarily describes the work performed by Morrison & Foerster ("prepared for and defended the depositions of key TAIS officers," "began and led the trial preparation efforts") and it provides a billing summary that lists the hourly rates, hours billed, and total fees for each attorney at Morrison & Foerster that worked on the case. (Mersel Decl., ¶ 8, Exh. A thereto.) Yet like all of the other declarations submitted by TAIS, it does not link any of the hours billed to the activities performed on the case. Without further elaboration, the Court cannot determine if the hours expended by TAIS' various attorneys were reasonable because the Court has no idea how much of the total time was spent on any one activity. The Court also cannot determine if the various attorneys engaged in duplicative efforts. While an claimant seeking fees "is not required to record in great detail how each minute of his time was expended" (*see Trs. Of the Dirs. Guild of Am. –Producer Pension Benefits Plans v. Tise*, 234 F.3d 414, 427 (9th Cir. 2000)), he must do more than submit a general summary of tasks along with a separate summary of hours.

With respect to NETI's argument that TAIS is not entitled to fee reimbursement for the work performed in defending against NETI's counterclaim, the Court finds that TAIS would be entitled to attorneys' fees for activities that were necessary to *both* defend against NETI's counterclaim and to litigate TAIS' complaint. However, TAIS is not entitled to fees for those activities that were only undertaken to defend against the counterclaim. Yet the Court cannot determine the amount of fees that TAIS' attorneys would be entitled to for those overlapping activities because the hours listed are not linked to the work performed and because the activities are vaguely described in many of the declarations. NETI is not required to take TAIS' word that every hour was needed and all overlap had been eliminated. *Intel Corp., supra,* 6 F.3d at 623. Because NETI is "entitled to see just what was charged and why," the Court finds that TAIS' evidence in

support of its motion is inadequate. *Id.* For all of the foregoing reasons, TAIS' motion for fees is DENIED.

DATED: November 14, 2007

CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE