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8	State of California, Kamala D. Harris, Department of Justice		
9	SUPERIOR COURT OF THE STATE OF CALIFORNIA		
10	COUNTY OF FRESNO		
11			
12			
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14	SHERIFF CLAY PARKER, et al.,		
15		Case No. 10CECG02116	
16 17	Plaintiffs and Petitioners, v.	THE STATE'S NOTICE OF LODGING FEDERAL AUTHORITIES AND NON- CALIFORNIA AUTHORITIES CITED IN THE STATE'S OPPOSITION TO PLAINTIES' MOTION FOR	
18	THE STATE OF CALIFORNIA, et al.,	PLAINTIFFS' MOTION FOR ATTORNEYS' FEES	
19	Defendants and Respondents.	[BY FAX]	
20		Date: July 26, 2011 Time: 3:30 p.m.	
21 22		Dept: Dept. 402 Judge: The Honorable Jeff Hamilton Action Filed: June 17, 2010	
23		112000111100. 0011017, 2010	
24	Defendants State of California, the California Department of Justice, and Attorney General		
25	(collectively, the "State") respectfully lodge with the Court, copies of the federal authorities and		
26	non-California authorities cited in the State's Opposition to Plaintiffs' Motion for Attorneys' Fees.		
27			
28	,	1	
	Defendants' Notice Of Lodging Federal Authorities And Non-California Authorities Cited In Defendants'		
	Opposition To Plaintiffs' Motion For Attorneys' Fees (10CECG02116)		

.1	Exhibit A: Gates v. Gomez (9th Cir. 1995) 60 F.3d 525.		
2	Exhibit B: Missouri v. Jenkins (1989) 491 U.S. 274.		
3	Exhibit C: Hammons v. Table Mountain Ranches Owners Assn. (Wy. 2003) 72 P.3d 1153.		
4	Exhibit D: Altsman v. Kelly (PA. 1939) 9 A.2d 423.		
5	Exhibit E: Jadwin v. County of Kern (E.D. Cal., Jan. 24, 2011) 2011 WL 240695.		
6	Exhibit F: Luna v. Hoa Trung Vo (E.D. Cal., May 25, 2011) 2011 WL 2078004.		
7	Dated: July 13, 2011	Respectfully Submitted,	
8		KAMALA D. HARRIS Attorney General of California	
9			
10		Relah	
11		Peter A. Krause	
12		Supervising Deputy Attorney General Attorneys for Defendants and Respondents	
13		State of Čalifornia, Kamala D. Harris, Department of Justice	
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EXHIBIT

A

Westlaw.

60 F.3d 525 (Cite as: 60 F.3d 525)

>

United States Court of Appeals, Ninth Circuit. Jay Lee GATES, John Ronald Bertram, Plaintiffs-Appellees,

v.

James GOMEZ; FN* Nadim Khoury, M.D., Assistant Deputy Director-CDC Health Services; Kenneth Shepard, Chief Deputy Warden for CMF Clinical; Nicholas Poulos, M.D.; Thor Daniel, Chief Physician and Surgeon, CMF; Paul Morentz, Chief Psychiatrist-CMF Outpatient Program, H MD; Bruce Baker, A R MD, Chief Psychiatrist Northern Reception Center; D. Michael O'Connor; Douglas G. Arnold, Acting Director of the California Department of Mental Health; Clyde Murrey, Acting Deputy Director for State Hospitals; Sylvia RN, Executive Director DMH Vacaville Psychiatric Program; Eddie Yslt, Defendants-Appellants,

FN* James Gomez is substituted for his predecessor, James Rowland, as Director of the California Department of Corrections. Fed.R.App. P. 43(c)(1).

and George Deukmejian, Defendant. Jay Lee GATES, Plaintiff-Appellee,

James GOMEZ,* et al., Defendants-Appellants, and George Deukmejian, Governor, Defendant.

Nos. 94-15259, 94-15884. Argued and Submitted April 12, 1995. Decided June 9, 1995. As Amended Aug. 3, 1995.

Plaintiffs confined in medical facility brought civil rights class action against defendants associated with facility under § 1983 and disability nondiscrimination statute challenging medical care, psychiatric care, and conditions of confinement.

Page 1

The United States District Court for the Eastern District of California, Lawrence K. Karlton, J., approved settlement consent decree, and defendants brought two appeals. Appeals were consolidated. The Court of Appeals, Hug, Circuit Judge, held that: (1) district court had jurisdiction to issue enforcement order incident to consent decree regarding use of 37mm grenade launcher gun on inmates; (2) district court did not abuse its discretion in entering order to enforce consent decree to reform policies of medical facility personnel regarding their use of gun against inmates by shifting decision of whether to use gun from custody officials to physician; (3) order to enforce consent decree was abuse of discretion to extent that it rejected use of gun to prevent imminent substantial property damage; (4) plaintiff provided sufficiently detailed record to support award of attorney fees; but (5) attorney fees awarded pursuant to federal civil rights statute were not warranted for counsel's attendance at mental health conference and contact with media.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] United States Magistrates 394 27

394 United States Magistrates 394k24 Review and Supervision by District Court 394k27 k. De Novo Hearing or Review. Most Cited Cases

Federal district court reviews de novo magistrate judge's conclusions of law in findings and recommendations based on mediator's report on dispute arising from consent decree.

[2] Federal Courts 170B € 776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General

Page 2

60 F.3d 525 (Cite as: 60 F.3d 525)

170Bk776 k. Trial De Novo. Most

Cited Cases

Court of Appeals reviews de novo district court's interpretation of consent decree.

[3] Federal Courts 170B € 850.1

170B Federal Courts

170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent

170BVIII(K)5 Questions of Fact, Verdicts and Findings

170Bk850 Clearly Erroneous Findings of Court or Jury in General

170Bk850.1 k. In General Most Cited Cases

Court of Appeals reviews district court's findings of fact for clear error.

[4] Federal Courts 170B \$\infty\$ 814.1

170B Federal Courts

170BVIII Courts of Appeals 170BVIII(K) Scope, Standards, and Extent 170BVIII(K)4 Discretion of Lower Court 170Bk814 Injunction

170Bk814.1 k. In General. Most

Cited Cases

Federal Courts 170B € 862

170B Federal Courts

170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent

170BVIII(K)5 Questions of Fact, Verdicts and Findings

170Bk855 Particular Actions and Proceedings, Verdicts and Findings

170Bk862 k. Equity in General and Injunction. Most Cited Cases

District court order requiring medical facility personnel to modify their policies regarding use of 37mm grenade launcher on mentally ill inmates was effectively an injunction that Court of Appeals would reverse only where district court abused its discretion or based its decision on erroneous legal

standard or clearly erroneous findings of fact.

[5] Contracts 95 € 147(1)

95 Contracts

95II Construction and Operation 95II(A) General Rules of Construction 95k147 Intention of Parties 95k147(1) k. In General. Most Cited

Cases

Under California law, contracts are interpreted using objective test to give effect to mutual intention of parties as it existed at time contract was made.

[6] Federal Civil Procedure 170A 2397.6

170A Federal Civil Procedure 170AXVII Judgment 170AXVII(A) In General

> 170Ak2397 On Consent 170Ak2397.6 k. Compliance; Enforce-

ment. Most Cited Cases

Consent decree entered in civil rights class action arising from treatment of inmates in medical facility encompassed use of 37mm grenade launcher on inmates under provision that stated that defendants would use appropriate psychiatric treatment on patients, and so district court had jurisdiction to issue enforcement order regarding use of 37mm gun; use of such weapon might have been contraindicated for particular patient's medical or mental health.

[7] Federal Civil Procedure 170A € 2397.6

170A Federal Civil Procedure 170AXVII Judgment 170AXVII(A) In General 170Ak2397 On Consent

170Ak2397.6 k. Compliance; Enforce-

ment. Most Cited Cases

Consent decree entered in civil rights class action arising from treatment of inmates in medical facility provided standard for judging parties' compliance as appropriate psychiatric treatment as med-

ically indicated, rather than using deliberate indifference standard, which was minimum standard required by Eighth Amendment. U.S.C.A. Const.Amend. 8.

[8] Injunction 212 € 130

212 Injunction

212III Actions for Injunctions

212k130 k. Trial or Hearing. Most Cited Specific finding of past violation of consent decree is not prerequisite to injunction preventing future violation.

[9] Federal Civil Procedure 170A 2397.6

170A Federal Civil Procedure 170AXVII Judgment 170AXVII(A) In General 170Ak2397 On Consent

170Ak2397.6 k. Compliance; Enforcement. Most Cited Cases

District court's order to enforce consent decree to reform policies of medical facility personnel regarding their use of 37mm grenade launcher gun against inmates was based on findings that personnel violated decree in policy that allowed custody officials to determine when to utilize gun, rather than professional judgment of physician.

[10] Federal Civil Procedure 170A 2397.6

170A Federal Civil Procedure 170AXVII Judgment 170AXVII(A) In General 170Ak2397 On Consent

170Ak2397.6 k. Compliance; Enforcement. Most Cited Cases

District court's order to enforce consent decree to reform policies of medical facility personnel regarding their use of 37mm grenade launcher gun against inmates did not entirely ban gun's use, but shifted decision of whether to use gun to physician, which comported with requirements of consent decree that use of gun be medically appropriate, and

so court did not abuse its discretion.

[11] Federal Civil Procedure 170A 2397.6

170A Federal Civil Procedure 170AXVII Judgment 170AXVII(A) In General 170Ak2397 On Consent

170Ak2397.6 k. Compliance; Enforce-

ment. Most Cited Cases

District court's order to enforce consent decree to reform policies of medical facility personnel regarding their use of 37mm grenade launcher gun against inmates was abuse of discretion to extent that it rejected use of gun to prevent imminent substantial property damage as allowable use, where decree limited use of gun only to cases where it was medically contraindicated.

[12] Federal Courts 170B € 830

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court

170Bk830 k. Costs, Attorney Fees and Other Allowances. Most Cited Cases

Court of Appeals reviews district court's award of attorney's fees and costs under federal civil rights statute for abuse of discretion. 42 U.S.C.A. § 1988.

[13] Civil Rights 78 2 1490

78 Civil Rights

78III Federal Remedies in General
78k1477 Attorney Fees
78k1490 k. Taxation. Most Cited Cases
(Formerly 78k305)

In determining amount of attorney fees and costs under federal civil rights statute, district court must articulate its reasons for fee award. 42 U.S.C.A. § 1988.

[14] Civil Rights 78 € 1490

78 Civil Rights

78III Federal Remedies in General 78k1477 Attorney Fees 78k1490 k. Taxation. Most Cited Cases (Formerly 78k305)

Inmate that prevailed in civil rights action against medical facility provided sufficiently detailed record to support award of attorney fees, even though billings for client communications did not always include names of inmates with whom counsel communicated or issue discussed in communications, where cumulative effect of record allowed conclusion that time spent communicating with clients was reasonable. 42 U.S.C.A. § 1988.

[15] Civil Rights 78 € 1486

78 Civil Rights

78III Federal Remedies in General 78k1477 Attorney Fees

78k1486 k. Services or Activities for Which Fees May Be Awarded. Most Cited Cases (Formerly 78k301)

Filing amicus brief to district court in case that challenged medical and living conditions for AIDS and HIV-infected inmates at medical facility that was subject of civil rights consent decree was reasonably related to compliance and monitoring work under decree so as to support award of attorney fees, where both class and some of issues raised in case were identical to subclass and issues raised in civil rights case. 42 U.S.C.A. § 1988.

[16] Civil Rights 78 € 1486

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees

78k1486 k. Services or Activities for Which Fees May Be Awarded. Most Cited Cases (Formerly 78k301)

Attorney fees awarded pursuant to federal civil rights statute were not warranted for counsel's attendance at mental health conference and contact with media incident to civil rights case, since they were kinds of activities that attorneys generally did at their own expense. 42 U.S.C.A. § 1988.

*527 James E. Flynn, Deputy Atty. Gen., Sacramento, CA, and Allen R. Crown, Deputy Atty. Gen., San Francisco, CA, for defendants-appellants.

Sanford Jay Rosen and Michael W. Bien, Rosen, Bien & Asaro, San Francisco, CA, for plaintiffs-appellees.

Appeals from the United States District Court for the Eastern District of California.

Before: GIBSON, FN**GOODWIN, and HUG, Circuit Judges.

FN** Honorable Floyd R. Gibson, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

HUG, Circuit Judge:

This case originated as a civil rights class action under 42 U.S.C. § 1983 and 29 U.S.C. § 794 challenging medical care, psychiatric care, and conditions of confinement at the California Medical Facility and Main Northern Reception Center ("CMF") in Vacaville, California. FN1 The suit also challenged the care and confinement of a subclass of HIV-infected inmates. The case went to trial in September, 1989. After plaintiffs rested their case, settlement negotiations culminated in a consent decree which was approved March 8, 1990. The operation of the consent decree has thus far given rise to two published appellate opinions: Gates v. Rowland, 39 F.3d 1439 (9th Cir.1994), and Gates v. Deukmejian, 987 F.2d 1392 (9th Cir.1993). This opinion is the third.

FN1. CMF is California Department of Correction's primary health care facility for the medical and psychiatric treatment of inmates with serious acute or chronic illness.

*528 This opinion consolidates two appeals

from enforcement orders under the consent decree. One appeal, No. 94-15884, is from an injunction modifying defendants' policy on the use of 37mm riot-control guns to control mentally ill inmates locked in their cells. The other appeal, No. 94-15259, is from a district court order awarding plaintiffs disputed attorneys' fees for compliance and monitoring work under the consent decree during 1991. We have jurisdiction to hear these two appeals pursuant to 28 U.S.C. § 1291, and as to both, we affirm in part and reverse in part.

I. No. 94-15884: 37mm GUN

In this appeal, defendants challenge a district court order modifying their use of the 37mm gun to control mentally ill inmates locked in their cells. The district court ordered this modification pursuant to § V.F.1 of the Consent Decree. Defendants argue that the consent decree does not cover their use of the 37mm gun. They also argue that even if the decree does cover such use, the district court erred by not applying an Eighth Amendment standard to judge compliance with the decree. Finally, defendants argue that the district court abused its discretion by ordering the modifications because the district court order was not supported by the record and defendants were, in fact, in compliance with the decree.

We affirm the district court order in all respects except one. We hold that the district court abused its discretion by ordering the modification of defendants' 37mm gun policies to preclude the gun's use to protect property. Such a modification was not adequately supported by the record.

A. Facts

Beginning in March 1992, two years after the decree was approved, defendants began using a 37mm grenade launcher shooting multiple rubber baton rounds (hereinafter "37mm gun") to control mentally ill inmates, Each discharge of the 37mm gun shoots four hard rubber projectiles against mentally ill patients in closed cells. The gun makes a sound like a firecracker or cherry bomb when

fired. The practice at issue in this appeal is defendants' use of the gun to extract violent or agitated mentally ill inmates from their cells. Before the gun is fired, the inmate is warned that the gun will be used. If he remains uncooperative, a warning shot is fired away from the inmate. If the inmate is still uncooperative, a second shot is ricocheted in his direction.

Plaintiffs objected to this practice on the ground that it violates § V.F.1 of the Consent Decree. They contend that use of the 37mm gun on mentally ill inmates poses unreasonable risks of serious psychological harm and physical trauma, that defendants use the gun to extract mentally ill prisoners from their cells when there is no important reason to remove them, that defendants fail to exhaust non-physical alternatives before using the gun, and that they fail to meaningfully consult with clinical staff before using the gun. Instead of the 37mm gun, plaintiffs advocate use of Management of Aggressive Behavior ("MAB") techniques,FN2 which are used by all other psychiatric prison facilities in the country to manage aggressive behavior and are approved by the American Psychiatric Association. In contrast, only defendants use the 37mm gun to control mentally ill inmates, and such use has not been approved by the American Psychiatric Association, the American Medical Association, or any correctional standard setting body.

FN2. Under MAB techniques, a number of staff, usually 4-6, use personal physical restraint to subdue the patient.

The parties engaged in informal mediation of this issue. After two evidentiary hearings, no agreement was reached and the mediator entered his findings and recommendations on June 18, 1993. Both parties filed objections. The magistrate judge adopted the mediator's findings and a modified version of his recommendations on February 23, 1994. Defendants filed objections to the magistrate judge's findings and recommendations. The district court ruled on March 22, 1994, adopting the magistrate judge's findings and recommendations, *529

and entered its order on July 20, 1994. The district court denied defendants' request for a stay pending appeal of this order.

Defendants' Policy

After plaintiffs objected to the gun's use but before the evidentiary hearings, defendants implemented written policies on their use of the 37mm gun, which are set out in the California Department of Corrections Operations Manual at 55050.30 (March 19, 1993). Under these policies, the final decision to utilize the 37mm gun is made by custody personnel, although the inmate's file is reviewed by clinical staff.

Specifically, only the warden or chief deputy warden, or during nonbusiness hours the administrative officer-of-the-day, can authorize the gun's use. In a life-threatening or extensive propertythreatening emergency, when time does not permit prior approval, the watch commander may authorize the gun's use. The gun can only be used: (1) in self-defense or defense of others; (2) to prevent escape or serious injury to persons or damage of a substantial amount of property; (3) to contain a violent situation or prevent serious injury threatened by a group of inmates; (4) to prevent suicide or self-inflicted injury by an inmate barricaded within a cell or other enclosed area; or (5) to accomplish a necessary change in location after the inmate has been given reasonable opportunity to cooperate in the relocation process. In this last situation, the inmate must be given notice that the gun will be used if he does not cooperate, and lesser alternatives must be explored. A medical technical assistant must be present during the gun's use. The gun cannot be fired directly at the inmate; it must be ricocheted in the direction of the inmate. And if the inmate has a psychiatric classification, then either a psychiatrist, psychologist, licensed clinical social worker, or psychiatric nurse must review the inmate's file to identify any contraindications to the use of the gun. But the policy does not prevent the warden from ordering the gun's use over a clinician's objection.

District Court Order

The district court ordered the following revisions to defendants' policy on the use of the 37mm gun:

- A. The 37mm gun will be used on immates in psychiatric classification in cells or other confined areas only as a last resort after custodial and clinical staff have determined that the situation cannot be controlled by non-physical intervention or lower levels of force.
- B. The Warden or the Administrative Officer acting in the Warden's place will certify in writing that the 37mm gun may be used on a specific inmate to:
 - 1. prevent or stop serious assaultive behavior;
 - 2. prevent an ongoing escape;
 - 3. prevent suicide or imminent serious self-inflicted injury; or
 - 4. accomplish a necessary change in location required for serious medical or health reasons after the inmate has been given a reasonable opportunity to cooperate and has refused.
- C. A psychiatrist will review the medical file of the patient on whom use of the 37mm gun is being considered and personally evaluate the inmate to determine whether there are any medical or psychiatric reasons why the gun should not be used. The psychiatrist will approve or disapprove use of the 37mm gun in writing for the record.
- D. If the psychiatrist approves the use of the 37mm gun, he or she will remain and observe the use of the gun on the inmate through completion of the cell extraction.
- E. If the psychiatrist does not approve the use of the 37mm gun on the inmate, the Warden or Administrative Officer acting in the Warden's place will order alternative methods of restraint approved by CDC policy.

F. In emergency cases constituting actual life threatening situations wherein time does not permit prior approval, the Watch Commander may authorize the use of the 37mm gun. However, immediately following the emergency situation, notification*530 of such use will be made to the Warden and the Psychiatric Officer of the day who will be responsible to review the appropriateness of such action and document their findings for the record.

B. Standard of Review

[1] Pursuant to § IX.6 of the Consent Decree, if a party objects, the district court reviews the mediator's report *de novo*. It also reviews *de novo* the magistrate judge's findings of fact to which a party has objected. 28 U.S.C. § 636(b)(1). It reviews the magistrate judge's conclusions of law *de novo*, as well. *Britt v. Simi Valley Unified School Dist.*, 708 F.2d 452, 454 (9th Cir.1983).

[2][3][4] We review de novo the district court's interpretation of the consent decree. Officers for Justice v. Civil Serv. Comm'n, 934 F.2d 1092, 1094 (9th Cir.1991). "However, we give deference to the district court's interpretation based on the court's extensive oversight of the decree from the commencement of the litigation to the current appeal." Id.; accord Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc., 689 F.2d 885, 893 (9th Cir.1982). Deference is appropriate in this case, as it has been under the supervision of District Judge Karlton and Magistrate Judge Moulds since its inception. We review for clear error the district court's findings of fact. United States v. Gila Valley Irrigation Dist., 31 F.3d 1428, 1432 (9th Cir.1994). The district court order requiring defendants to modify their policies is effectively an injunction and will be reversed "only where the district court abused its discretion or based its decision on an erroneous legal standard or clearly erroneous findings of fact." Id. at 1442 (interpreting a consent decree enforcement order as a preliminary injunction and applying the above standard of review).

C. Scope of the Consent Decree

Defendants claim that the district court had no jurisdiction to issue an enforcement order regarding their use of the 37mm gun because the gun's use was not covered by the consent decree. The district court order is based on § V.F.1 of the Consent Decree; which states, "Defendants will provide appropriate psychiatric screening for each incoming inmate at CMF and will provide appropriate psychiatric evaluation and treatment for all inmates at CMF as medically indicated." Defendants maintain that shooting a mentally ill prisoner in his cell with rubber bullets is not "psychiatric treatment," and thus not regulable under the decree. Plaintiffs maintain that shooting a mentally ill prisoner in his cell with rubber bullets can have an adverse effect on "appropriate psychiatric treatment," and thus, falls within the requirements of section F.1. We agree with the district court and conclude that defendants' use of the 37mm gun is covered by the consent de-

[5] A consent decree is construed with reference to ordinary contract principles of the state in which the decree is signed. Gates v. Rowland, 39 F.3d at 1444. In California, contracts are interpreted using an objective test to give effect to the mutual intention of the parties as it existed at the time the contract was made. Id. "The language of the contract governs if it is clear and explicit. Words in a contract are generally understood in their ordinary and popular sense, and technical words are interpreted as usually understood by persons in the profession or business to which they relate." Id. (citations omitted). Pursuant to § IX.6 of the Consent Decree, "[t]he burden of persuasion is on the party who has objected to the Mediator's findings and recommendations." In this case, the burden of persuasion is on defendants.

[6] The defendants maintain that the type of restraint to be used is purely custodial and thus not covered by the decree. The district court, following the mediator's recommendations, held that while generally the decision to use force on mentally ill prisoners and the type of force to be used is a cus-

todial decision, the type of force not to be used is a clinical decision. It framed the issue thus: "The issue is not whether the use of the weapon is a 'treatment' within the meaning of the Decree. The issue is whether prison officials may make and implement custody decisions which are medically contraindicated. Breach of such a duty is clearly encompassed by the Consent Decree." And as the *531 mediator pointed out, "If the use of a 37mm gun in a given case is contraindicated medically, and the weapon is still used, the patient would not be receiving appropriate psychiatric treatment as required by the Consent Decree." The mediator found that the use of force to control a mentally ill inmate

is not treatment which is "medically indicated" in the sense that term is commonly used and understood in mental health circles. The decision to use force is not part of the inmate's treatment plan. The question is more properly phrased as to whether the particular force used to restrain or remove a patient is contraindicated. That is, has a physician made a professional judgment that the means to be used poses a substantial risk of harm to the patient's medical or mental health which outweighs the need for control and the possible risk of harm to staff and the patient from the use of other means?

We agree with the mediator, the magistrate judge, and the district court that § V.F.1 of the Consent Decree encompasses defendants' use of the 37mm gun.

The decree has a specific section imposing a restriction on the use of taser guns. FN3 The defendants contend that the specific regulation of the use of taser guns in § V.D of the Consent Decree precludes the district court's interpretation of § V.F.1 of the Consent Decree to include a general medical limitation on the use of weapons to restrain mentally ill inmates. The two provisions are not inconsistent. Section V.D, covering tasers, is a specific application of the general standard set forth in section V.F.1; the district court's order is another specific application of section V.F.1 covering 37mm

guns, which were not in use when the decree was entered. There is no reason the taser policy need be identical to the 37mm gun policy; they are different weapons with different risks. The district court's application of these sections is a reasonable interpretation of the decree.

FN3. Section V.D of the decree covers "Tasers, Restraints and Involuntary Medications." Sections 1-3 cover the use of the taser, and section 4 covers administration of involuntary medication. Under this section, tasers cannot be used to restrain a prisoner to administer involuntary medication, and the use of tasers on prisoners with psychiatric classifications or taking antipsychotic medications must be limited to the greatest extent possible. Specifically, custodial staff must confer with a psychiatrist before using a taser and such a conference must be documented except in emergencies; alternative means must be considered and the reasons for their rejection stated in writing before a taser can be used; and periodically, incident reports on the use of tasers on prisoners with psychiatric classifications must be provided to the mediator.

D. Standard for Compliance

[7] Defendants argue that even if the consent decree covers the use of the 37mm gun, the district court applied the wrong standard in judging compliance. Without citing any law, defendants argue that compliance is to be judged under the "deliberate indifference" standard of the Eighth Amendment. We rejected this argument in *Gates v. Rowland*, and we reject it again here.

Section I.21 of the Consent Decree states, "The parties agree that in entering into this Consent Decree they waive specific findings of fact and conclusions of law and any determination whether the remedies provided are legally required." And section I.25 states, "The parties agree that it is not the intent of this Consent Decree to prescribe the min-

imum standards required by the United States Constitution." On the basis of these provisions, we concluded in *Gates v. Rowland*, "Where the parties negotiated use of a constitutional standard, they specified so in the language of the consent decree. Otherwise, the consent decree is not limited to constitutional standards." 39 F.3d at 1444.

Section V.F.1 of the Consent Decree provides the governing standard in this case, that of appropriate psychiatric treatment as medically indicated. This is a sufficiently specific standard with which to judge defendants' compliance.

E. Enforcement Order

Defendants' last argument is that even if the consent decree covers use of the 37mm gun, and even if the district court applied the correct standard in evaluating defendants' compliance with the consent decree, the district court abused its discretion in ordering reform of defendants' 37mm gun policies. *532 Defendants argue that the district court made no specific finding that defendants had violated the decree; therefore, the court had no authority to modify defendants' policies. Defendants also argue that, irrespective of whether a finding was made, defendants' policies do not actually violate the consent decree; therefore, the district court abused its discretion in modifying defendants' policies. Finally, defendants argue that the district court abused its discretion by modifying the mediator's recommendation and prohibiting use of the gun to prevent property damage because this modification was not supported by the record.

[8][9] First, a specific finding of a past violation of a consent decree is not prerequisite to an injunction preventing a future violation. See, e.g., Vertex, 689 F.2d at 892 ("the district court could properly clarify that ambiguous language [of the consent decree], and this it did, requiring defendants to change their future advertising to comply with the consent judgment, as clarified."). Moreover, in adopting the mediator's report, the district court did find that defendants' policies violate the consent decree. The mediator found, "The

final decision to utilize the 37mm gun [at CMF] is made by custody personnel." This was in contrast to its finding that "[t]he type of restraint procedures used with mentally ill patients should normally be a clinical decision. If an emergency arises which requires custody officials to make the decision regarding restraint procedures with mentally ill patients, such a decision should not be medically contraindicated." The mediator similarly found, "since CMF is a prison health care facility, no custody decision should be made that is medically contraindicated." The mediator specified that this decision should be made by the professional judgment of a physician. The mediator found that "CMF policy allows a social worker or psychiatric nurse to make the determination whether the use of a 37mm gun is medically contraindicated." Thus, the district court, in adopting the findings of the mediator, did find that defendants violated the consent decree.

Defendants also argue that the district court's interpretation of the decree to require a psychiatrist's approval before the gun is used was not supported by the record because the evidence did not conclusively establish that the gun is more dangerous than MAB techniques. The mediator found,

- 6. Medical experts testified that the use of the 37mm gun on mentally ill patients could be traumatizing and result in psychological injury to the patient, but there were no studies presented to support this opinion.
- 7. No evidence based on studies was presented which demonstrated that the use of a 37mm gun in cell extractions reduced or increased the risk of injury to staff or to patients.

The mediator further explained,

There was extensive testimony of experts as to whether the use of a 37mm gun produced any long term effect on the course of a patient's mental illness or his relationship with the treating staff. This testimony was totally based on opinion with no studies or tangible evidence to support the diametrically opposed positions.... At best, []

one can only declare a draw-with plaintiffs' experts testifying that the use of any weapon may have a traumatic and lasting impact on a patient, and defendants' experts testifying that there was no evidence of such damage in the cases at CMF.

There was also disagreement amongst the experts as to whether more "force" is used with a 37mm gun or when a MAB approach is used... It should be noted, however, that when the 37mm gun is used at CMF it is still often necessary for staff to enter the cell and physically restrain the inmate

[10] But the district court did not abuse its discretion in requiring the modification of defendants' policies because its order accommodated the mediator's findings. The court did not entirely ban the gun's use. Instead, the district court took a case-by-case approach, shifting the decision of whether to use the gun to a physician. The district court adopted the mediator's conclusion that,

The decision to control, and the method of control, properly belongs to custody officials.*533 However, since CMF is a prison health care facility, no custody decision should be made that is medically contraindicated. If the use of a 37mm gun in a given case is contraindicated medically, and the weapon is still used, the patient would not be receiving appropriate psychiatric treatment as required by the Consent Decree.

To allow the use of a 37mm gun with mentally ill patients, then, there must first be an approval that such a use of force is not medically contraindicated.

In this way, the district court comported with the requirements of the consent decree-that use of the gun be medically appropriate. Instead of imposing its own judgment, the district court relied on the judgment of defendants' own physicians that the gun's use on a particular prisoner would not be medically contraindicated. [11] But the district court order veered from this sound position when it limited the purposes for which the 37mm gun can be used by defendants. The mediator's recommendations allowed defendants to use the gun to "prevent imminent substantial property damage." But the magistrate judge and district court rejected this recommendation and did not include the prevention of imminent substantial property damage as one of the allowable uses of the gun.

The touchstone of section V.F.1 as applied to this case is whether the restraint at issue is medically contraindicated. Where it has been found that an individual use of the gun is not medically contraindicated, there is no basis in section V.F.1 for a court order prohibiting the gun's use for that particular purpose. We hold that the district court abused its discretion by prohibiting the gun from being used to prevent "imminent substantial property damages" when there is no medical contraindication for the use of the gun.

CONCLUSION

Defendants' use of the 37mm gun falls under § V.F.1 of the Consent Decree. The standard for measuring compliance with this section is whether the defendants' use of the 37mm gun corresponds with providing appropriate psychiatric treatment. With one exception, the district court did not abuse its discretion by requiring the defendants to modify their policies concerning the use of the 37mm gun. This one exception is the district court's failure to include the prevention of imminent substantial property damage as a permissible use of the gun. We affirm in part and reverse in part the order of the district court.

II. No. 94-15259: ATTORNEYS' FEES

The district court awarded plaintiffs a portion of their disputed attorneys' fees for 1991 compliance and monitoring work under the consent decree. Defendants appeal this order, contending that the district court abused its discretion in making this award because plaintiffs' billing statements

were not sufficiently detailed, and some of the hours paid represent work in which plaintiffs did not prevail, work that was not reasonably related to compliance and monitoring of the consent decree, or inefficient work. We affirm the district court order in part and reverse in part.

A. Facts

Section XI.1 of the Consent Decree sets forth the parties' agreement as to attorneys' fees. It states,

Plaintiffs may seek to recover reasonable costs and attorneys' fees and other expenses that may be sought pursuant to 42 U.S.C. section 1988 and 29 U.S.C. section 794(b) for work performed in this matter prior to entry of this Consent Decree and reasonably performed during the pendency of this Consent Decree. Reasonable costs and expenses shall be awarded in amounts agreed to by the parties or, absent agreement, as determined by the Court upon plaintiffs' noticed motions.

Pursuant to procedures established by the district court and agreed to by the parties, plaintiffs submit to defendants quarterly statements of their attorneys' fees and costs. If defendants dispute the amount of the request, plaintiffs may file with the district *534 court a periodic motion to compel payment. The resolution of the parties' first fee dispute is published in Gates v. Deukmejian, 987 F.2d at 1396. The resolution of a second fee dispute is published in Gates v. Rowland, 39 F.3d at 1448. Gates v. Deukmejian involved fees incurred prior to entry of the consent decree, while Gates v. Rowland, like the present appeal, involved postjudgment monitoring fees.

This appeal concerns the disputed portion of plaintiffs' 1991 fees requests. Defendants paid parts of the 1991 requests without contest. During negotiations, plaintiffs reduced the disputed portion of their bill by \$8,743.75; during the motion to compel disputed fees, plaintiffs reduced their bill by an additional \$5,148. The magistrate judge issued his findings and recommendations on the disputed 1991 fees on September 15, 1993, further reducing

plaintiffs' fees by \$18,533.18. On January 4, 1994, the district court adopted the magistrate judge's findings and recommendations with one clerical correction, awarding plaintiffs \$203,908.65 in attorneys' fees and costs.

B. Standard of Review

[12][13] We review for abuse of discretion a district court's award of attorneys' fees and costs under section 1988. Gates v. Rowland, 39 F.3d at 1448. Legal conclusions involved in the determination are reviewed de novo. Holland v. Roeser, 37 F.3d 501, 503 (9th Cir.1994). "The district court has a great deal of discretion in determining the reasonableness of the fee and, as a general rule, we defer to its determination." Gates v. Deukmejian, 987 F.2d at 1398; see also Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983) ("We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters."). But the district court must nonetheless articulate its reasons for the fee award. Id.

C. Discussion

Defendants offer four challenges to the district court's award of attorneys' fees. First, they claim that the district court erred because it did not reduce plaintiffs' fees based on the outcome of their work. They urge us to apply a prevailing party standard under 42 U.S.C. § 1988 to post-judgment monitoring and compliance work under the consent decree. But plaintiffs have already met the section 1988 prevailing party standard with the entry of the consent decree. See Keith v. Volpe, 833 F.2d 850, 857 (9th Cir.1987) (holding that post-judgment monitoring of the consent decree was a necessary aspect of plaintiffs' prevailing in the case, thus plaintiffs satisfied the § 1988 prevailing party requirement). We already decided, in Gates v. Rowland, 39 F.3d at 1450, that the standard to be applied to disputed billing items for compliance and monitoring work

under this consent decree is "whether the services were reasonably performed during the pendency of the consent decree." As the magistrate judge noted, under this standard, outcome is relevant to whether the work performed was reasonable, but it is not the touchstone for a fee award. This "reasonable performance" standard was set out in the consent decree and confirmed by the district court in its Order Establishing Procedure for Collecting Attorneys' Fees and Costs During the Pendency of the Consent Decree, which order defendants did not appeal.

Defendants further claim that the district court abused its discretion in awarding plaintiffs fees because plaintiffs' billing statement 1) was not sufficiently detailed, 2) represented duplicative and inefficient work, and 3) represented work not reasonably related to compliance and monitoring of the consent decree. As we stated in Gates v. Deukmejian, and again in Gates v. Rowland:

The fee applicant bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked. The party opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of *535 the hours charged or the facts asserted by the prevailing party in its submitted affidavits.

Gates v. Rowland, 39 F.3d at 1449 (quoting Gates v. Deulanejian, 987 F.2d at 1397-98).

[14] Defendants contend that plaintiffs' statement was not sufficiently detailed because it did not identify the subject matter and party to "hundreds of hours of 'client communications.' " As the Supreme Court held, "The applicant should ... maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." Hensley, 461 U.S. at 437, 103 S.Ct. at 1941. Plaintiffs' billings for client communication included the date of the communication, the person who performed it, and in some cases the issue addressed. As plaintiffs explained before the district

court and on appeal, they did not reveal the names of inmates with whom they communicated to protect the confidentiality of their communications and because their clients fear retaliation, and they did not always reveal the issue discussed to preserve attorney-client and attorney work product privileges. The magistrate judge found the detail of plaintiffs' billing statements "more than sufficient," and the district court adopted this finding. The magistrate judge found, "It is axiomatic that counsel's monitoring activities will include communication with members of the class," and even though the issue discussed in the communication was not always provided, "the cumulative effect of the records" allowed him to conclude that time spent communicating with clients was reasonable. The district court did not abuse its discretion in adopting this finding. Cf. Davis v. City and County of San Francisco, 976 F.2d 1536, 1542 (9th Cir.1992) (warning against imposing too high a standard of documentation on fee claimants), vacated in part, 984 F.2d 345 (9th Cir.1993).

As to the third claim-that plaintiffs' hours were duplicative and inefficient-defendants did not meet their rebuttal burden of submitting evidence challenging the accuracy and reasonableness of the hours charged or the facts asserted. The magistrate judge pointed out,

Defendants filed a separate appendix of annotated billing statements reflecting their disagreements with the joint annotations. Defendants' appendix has provided remarkably little assistance to the court in the resolution of these issues: These annotations do not indicate, in some cases, the amount of time objected to or, in other instances, the ground on which defendants object; the document is approximately 300 pages long and is not paginated; defendants do not provide a key or index to the coded objections to the billings; defendants themselves do not rely on the appendix or reference it in support of their objections to plaintiffs' billings; and the annotations reflect only a portion of defendants' objections to

plaintiffs' billings, thereby requiring the court to engage in time-consuming comparison of the parties' appendices.

On appeal, we are restricted to the evidence produced in the district court.

[15] Finally, defendants claim that the district court erred in awarding plaintiffs fees for work not reasonably related to compliance and monitoring of the consent decree. Plaintiffs' counsel were awarded fees for filing an amicus brief to the district court in Camarillo v. McCarthy, 998 F.2d 638 (9th Cir.1993), which challenged medical and living conditions for AIDS and HIV-infected inmates at CMF. They filed the brief to protect the interests of the class, since both the class and some of the issues raised in Camarillo were identical to the subclass and issues raised in the present action. The district court did not abuse its discretion in finding that plaintiffs' work on the Camarillo amicus brief was reasonably related to compliance and monitoring work under the consent decree.

[16] But the district court did abuse its discretion in awarding plaintiffs attorneys' fees for attending the Forensic Mental Health Association Annual Conference and for media contact. These are the kinds of activities that attorneys generally do at their own expense.

CONCLUSION

Defendants did not meet their rebuttal burden of providing specific evidence that *536 plaintiffs' hours were duplicative or inefficient. Plaintiffs' billing statements were sufficiently detailed and the hours compensated for work on the Camarillo amicus brief were reasonably related to compliance and monitoring work under the consent decree. In these respects, we affirm the district court's award of attorneys' fees. But we reverse the district court's award of attorneys' fees for attendance at the Forensic Mental Health Association Annual Conference and for media contact.

AFFIRMED in part, REVERSED in part,

and REMANDED for recalculation of the attorneys' fees.

C.A.9 (Cal.),1995. Gates v. Gomez 60 F.3d 525

END OF DOCUMENT

EXHIBIT

B

Westlaw.

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Supreme Court of the United States MISSOURI, et al., Petitioners

v.

Kalima JENKINS, by her friend, Kamau AGYEI, et

No. 88-64. Argued Feb. 21, 1989. Decided June 19, 1989.

Prevailing plaintiffs in school desegregation case sought recovery of attorney fees. The United States District Court for the Western District of Missouri, Russell G. Clark, J., awarded attorney fees, and appeal was taken. The Court of Appeals for the Eighth Circuit, 838 F.2d 260, affirmed. On grant of certiorari, the Supreme Court, Justice Brennan, held that: (1) Eleventh Amendment did not prohibit enhancement of fee award under Civil Rights Attorney's Fees Awards Act against state to compensate for delay in payment, and (2) separate compensation award under Civil Rights Attorney's Fees Awards Act for paralegals, law clerks, and recent law school graduates at prevailing rates was fully in accord with Act.

Affirmed.

Justice O'Connor concurred in part and dissented in part and filed opinion in which Justice Scalia joined and Chief Justice Rehnquist joined in part.

Justice Rehnquist filed dissenting opinion.

Justice Marshall did not participate.

West Headnotes

[1] Federal Courts 170B 265

170B Federal Courts 170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on 170BIV(A) In General
170Bk264 Suits Against States
170Bk265 k. Eleventh Amendment in
General; Immunity. Most Cited Cases

Award of attorney fees ancillary to prospective relief in civil rights action is not subject to strictures of Eleventh Amendment. U.S.C.A. Const.Amend. 11; 42 U.S.C.A. § 1988.

[2] Federal Courts 170B € 265

170B Federal Courts

170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on

170BIV(A) In General

170Bk264 Suits Against States

170Bk265 k. Eleventh Amendment in General; Immunity. Most Cited Cases

Not only is award of attorney fees in civil rights action beyond reach of Eleventh Amendment, so also is question of how reasonable attorney fee is to be calculated. U.S.C.A. Const.Amend. 11; 42 U.S.C.A. § 1988.

[3] Federal Courts 170B € 265

170B Federal Courts

170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on

170BIV(A) In General

170Bk264 Suits Against States

170Bk265 k. Eleventh Amendment in General; Immunity. Most Cited Cases

Eleventh Amendment does not prohibit enhancement of fee award under Civil Rights Attorney's Fees Awards Act against state to compensate for delay in payment. 42 U.S.C.A. § 1988; U.S.C.A. Const.Amend. 11.

[4] Civil Rights 78 € 1488

78 Civil Rights

78III Federal Remedies in General
78k1477 Attorney Fees
78k1488 k. Time Expended; Hourly

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491 U.S. 274, 109 S.Ct. 2463, 50 Fair Empl.Prac.Cas. (BNA) 17, 50 Empl. Prac. Dec. P 39,069, 105 L.Ed.2d 229,
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Rates. Most Cited Cases

(Formerly 78k303, 78k13.17(20))

Attorney fees under Civil Rights Attorney's Fees Awards Act are to be based on market rates for services rendered. 42 U.S.C.A. § 1988.

[5] Civil Rights 78 € 1487

78 Civil Rights

78III Federal Remedies in General

78k1477 Attorney Fees

78k1487 k. Amount and Computation.

Most Cited Cases

(Formerly 78k302, 78k13.17(19))

Appropriate adjustment for delay in payment-whether by application of current rather than historic hourly rates or otherwise-is within contemplation of Civil Rights Attorney's Fees Awards Act. 42 U.S.C.A. § 1988.

[6] Civil Rights 78 🖘 1487

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees

78k1487 k. Amount and Computation.

Most Cited Cases

(Formerly 78k302, 78k13.17(19))

Federal Courts 170B € 265

170B Federal Courts

170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on

170BIV(A) In General

170Bk264 Suits Against States

170Bk265 k. Eleventh Amendment in

General; Immunity. Most Cited Cases

Eleventh Amendment has no application to award of attorney fees, ancillary to grant of prospective relief, against state; thus, it follows that same is true for calculation of amount of fee, and adjustment for delay in payment is appropriate factor in determination of what is reasonable attorney fee under Civil Rights Attorney's Fees Awards Act. 42 U.S.C.A. § 1988; U.S.C.A. Const.Amend.

11.

[7] Civil Rights 78 € 1486

78 Civil Rights

78III Federal Remedies in General

78k1477 Attorney Fees

78k1486 k. Services or Activities for Which Fees May Be Awarded. Most Cited Cases

(Formerly 78k301, 78k13.17(18))

Phrase "reasonable attorney's fee" in civil rights attorney fees statute does not refer only to work performed personally by members of bar; rather, term refers to reasonable fee for work product of attorney, and thus, to work of paralegals as well as that of attorneys. 42 U.S.C.A. § 1988.

[8] Civil Rights 78 € 1488

78 Civil Rights

78III Federal Remedies in General

78k1477 Attorney Fees

78k1488 k. Time Expended; Hourly

Rates. Most Cited Cases

(Formerly 78k303, 78k13.17(20))

Reasonable attorney fee under Civil Rights Attorney's Fees Awards Act is one calculated on basis of rates and practices prevailing in relevant market, and one that grants successful civil rights plaintiff fully compensatory fee, comparable to what is traditional with attorneys compensated by fee-paying client. 42 U.S.C.A. § 1988.

[9] Civil Rights 78 € 1488

78 Civil Rights

78III Federal Remedies in General

78k1477 Attorney Fees

78k1488 k. Time Expended; Hourly

Rates. Most Cited Cases

(Formerly 78k303, 78k13.17(20))

Separate compensation award under Civil Rights Attorney's Fees Awards Act for paralegals, law clerks, and recent law school graduates at prevailing rates was fully in accord with Act, where prevailing practice in area was to bill paralegal

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491 U.S. 274, 109 S.Ct. 2463, 50 Fair Empl.Prac.Cas. (BNA) 17, 50 Empl. Prac. Dec. P 39,069, 105 L.Ed.2d 229,
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work at market rates. 42 U.S.C.A. § 1988.

**2464 Syllabus FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 237, 50 L.Ed. 499.

*274 In this major school desegregation litigation in Kansas City, Missouri, in which various desegregation remedies were granted against the State of Missouri and other defendants, the plaintiff class was represented by a Kansas City lawyer (Benson) and by the NAACP Legal Defense and Educational Fund, Inc. (LDF). Benson and the LDF requested attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988), which provides with respect to such litigation that the court, in its discretion, may allow the prevailing party, other than the United States, "a reasonable attorney's fee as part of the costs." In calculating the hourly rates for Benson's, his associates', and the LDF attorneys' fees, the District Court took account of delay in payment by using current market rates rather than those applicable at the time the services were rendered. Both Benson and the LDF employed numerous paralegals, law clerks, and recent law graduates, and the court awarded fees for their work based on market rates, again using current rather than historic rates in order to compensate for the delay in payment. The Court of Appeals affirmed.

Held:

1. The Eleventh Amendment does not prohibit enhancement of a fee award under § 1988 against a State to compensate for delay in payment. That Amendment has no application to an award of attorney's fees, ancillary to a grant of prospective relief, against a State, *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522, and it follows that the same is true for the calculation of the *amount* of the

fee. An adjustment for delay in payment is an appropriate factor in determining what constitutes a reasonable attorney's fee under § 1988. Pp. 2466-2469.

2. The District Court correctly compensated the work of paralegals, law clerks, and recent law graduates at the market rates for their services, rather than at their cost to the attorneys. Clearly, "a reasonable attorney's fee" as used in § 1988 cannot have been meant to compensate only work performed personally by members of the bar. Rather, that term must refer to a reasonable fee for an attorney's work product, and thus must take into account the work not only of attorneys, but also the work of paralegals and the like. A reasonable attorney's fee under *275 § 1988 is one calculated on the basis of rates and practices prevailing in the relevant market and one that grants the successful civil rights plaintiff a "fully compensatory fee," comparable to what "is traditional with attorneys compensated by a fee-paying client." In this case, where the practice in the relevant market is to bill the work of paralegals separately, the District Court's decision to award separate compensation for paralegals, law clerks, and recent law graduates at prevailing market rates was fully in accord with § 1988. Pp. 2469-2472.

838 F.2d 260 (CA8 1988), affirmed.

**2465 BRENNAN, J., delivered the opinion of the Court, in which WHITE, BLACKMUN, STEVENS, and KENNEDY, JJ., joined, and in Parts I and III of which O'CONNOR and SCALIA, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, in which SCALIA, J., joined, and in which REHNQUIST, C.J., joined in part, post, p. 2472. REHNQUIST, C.J., filed a dissenting opinion, post, p. 2475. MARSHALL, J., took no part in the consideration or decision of the case.

Bruce Farmer, Assistant Attorney General of Missouri, argued the cause for petitioners. With him on the brief were William L. Webster, Attorney General, Terry Allen, Deputy Attorney General, and Mi-

Page 4 491 U.S. 274, 109 S.Ct. 2463, 50 Fair Empl.Prac.Cas. (BNA) 17, 50 Empl. Prac. Dec. P 39,069, 105 L.Ed.2d 229, 57 USLW 4735, 54 Ed. Law Rep. 16 (Cite as: 491 U.S. 274, 109 S.Ct. 2463)

chael L. Boicourt and Bart A. Matanic, Assistant Attorneys General.

Jay Topkis argued the cause for respondents. With him on the brief were Julius LeVonne Chambers, Charles Stephen Ralston, Arthur A. Benson II, Russell E. Lovell II, and Theodore M. Shaw.*

* John A. DeVault III filed a brief for the National Association of Legal Assistants, Inc., as amicus curiae urging affirmance.

Justice BRENNAN delivered the opinion of the Court.

This is the attorney's fee aftermath of major school desegregation litigation in Kansas City, Missouri. We granted certiorari, 488 U.S. 888, 109 S.Ct. 218, 102 L.Ed.2d 209 (1988), to resolve two questions relating to fees litigation under 90 Stat. 2641, as amended, 42 U.S.C. § 1988. First, does the Eleventh Amendment prohibit enhancement of a fee award against a State to compensate for delay in payment? Second, should the fee award compensate the work of paralegals and law clerks by applying the market rate for their work?

*276 I

This litigation began in 1977 as a suit by the Kansas City Missouri School District (KCMSD), the school board, and the children of two school board members, against the State of Missouri and other defendants. The plaintiffs alleged that the State, surrounding school districts, and various federal agencies had caused and perpetuated a system of racial segregation in the schools of the Kansas City metropolitan area. They sought various desegregation remedies. KCMSD was subsequently realigned as a nominal defendant, and a class of present and future KCMSD students was certified as plaintiffs. After lengthy proceedings, including a trial that lasted 7 1/2 months during 1983 and 1984, the District Court found the State of Missouri and KCMSD liable, while dismissing the suburban school districts and the federal defendants. It ordered various intradistrict remedies, to be paid for by the State and KCMSD, including \$260 million in capital improvements and a magnet-school plan costing over \$200 million. See *Jenkins v. Missouri*, 807 F.2d 657 (CA8 1986) (en banc), cert. denied, 484 U.S. 816 (1987); *Jenkins v. Missouri*, 855 F.2d 1295 (CA8 1988), cert. granted, 490 U.S. 1034, 109 S.Ct. 1930, 104 L.Ed.2d 402 (1989).

The plaintiff class has been represented, since 1979, by Kansas City lawyer Arthur Benson and, since 1982, by the NAACP Legal Defense and Educational Fund, Inc. (LDF). Benson and the LDF requested attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. FNI Benson and his associates had devoted 10,875 attorney hours to the litigation, as well as 8,108 hours of paralegal and law clerk time. For the LDF the corresponding *277 figures were 10,854 hours for attorneys and 15,517 hours for paralegals and law clerks. Their fee applications deleted from these totals 3,628 attorney hours and 7,046 paralegal hours allocable to unsuccessful claims against the suburban school districts. With additions for postjudgment monitoring and for preparation of the fee application, the District Court awarded Benson a total of approximately \$1.7 million and the LDF \$2.3 million. App. to Pet. for Cert. A22-A43.

FN1. Section 1988 provides in relevant part: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. § 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

**2466 In calculating the hourly rate for Benson's fees the court noted that the market rate in Kansas City for attorneys of Benson's qualifications was in the range of \$125 to \$175 per hour, and found that "Mr. Benson's rate would fall at the

Page 5 491 U.S. 274, 109 S.Ct. 2463, 50 Fair Empl.Prac.Cas. (BNA) 17, 50 Empl. Prac. Dec. P 39,069, 105 L.Ed.2d 229, 57 USLW 4735, 54 Ed. Law Rep. 16 (Cite as: 491 U.S. 274, 109 S.Ct. 2463)

higher end of this range based upon his expertise in the area of civil rights." Id., at A26. It calculated his fees on the basis of an even higher hourly rate of \$200, however, because of three additional factors: the preclusion of other employment, the undesirability of the case, and the delay in payment for Benson's services. Id., at A26-A27. The court also took account of the delay in payment in setting the rates for several of Benson's associates by using current market rates rather than those applicable at the time the services were rendered. Id., at A28-A30. For the same reason, it calculated the fees for the LDF attorneys at current market rates. Id., at A33.

Both Benson and the LDF employed numerous paralegals, law clerks (generally law students working part time), and recent law graduates in this litigation. The court awarded fees for their work based on Kansas City market rates for those categories. As in the case of the attorneys, it used current rather than historic market rates in order to compensate for the delay in payment. It therefore awarded fees based on hourly rates of \$35 for law clerks, \$40 for paralegals, and \$50 for recent law graduates. *Id.*, at A29-A31, A34. The Court of Appeals affirmed in all respects. 838 F.2d 260 (CA8 1988).

*278 II

Our grant of certiorari extends to two issues raised by the State of Missouri. Missouri first contends that a State cannot, consistent with the principle of sovereign immunity this Court has found embodied in the Eleventh Amendment, be compelled to pay an attorney's fee enhanced to compensate for delay in payment. This question requires us to examine the intersection of two of our precedents, *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), and *Library of Congress v. Shaw*, 478 U.S. 310, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986).^{FN2}

FN2. The holding of the Court of Appeals on this point, 838 F.2d, at 265-266, is in conflict with the resolution of the same

question in Rogers v. Okin, 821 F.2d 22, 26-28 (CA1 1987), cert. denied sub nom. Commissioner, Massachusetts Dept. of Mental Health v. Rogers, 484 U.S. 1010, 108 S.Ct. 709, 98 L.Ed.2d 660 (1988).

In Hutto v. Finney, the lower courts had awarded attorney's fees against the State of Arkansas, in part pursuant to § 1988, in connection with litigation over the conditions of confinement in that State's prisons. The State contended that any such award was subject to the Eleventh Amendment's constraints on actions for damages payable from a State's treasury. We relied, in rejecting that contention, on the distinction drawn in our earlier cases "retroactive monetary relief" "prospective injunctive relief." See Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Attorney's fees, we held, belonged to the latter category, because they constituted reimbursement of "expenses incurred in litigation seeking only prospective relief," rather than "retroactive liability for prelitigation conduct." Hutto, 437 U.S., at 695, 98 S.Ct., at 2576; see also id., at 690, 98 S.Ct., at 2573. We explained: "Unlike ordinary 'retroactive' relief such as damages or restitution, an award of costs does not compensate the plaintiff for the injury that first brought him into court. Instead, the award reimburses him for a portion of the expenses he incurred in seeking prospective relief." Id., at 695, n. 24, 98 S.Ct., at 2576, n. 24. Section 1988, we noted, fit easily into the *279 longstanding practice of awarding "costs" against States, for the statute imposed the award of attorney's fees "as part of the costs." Id., at 695-696, 98 S.Ct., at 2576, citing Fairmont Creamery Co. v. Minnesota, 275 U.S. 70, 48 S.Ct. 97, 72 L.Ed. 168 (1927).

**2467 [1][2] After Hutto, therefore, it must be accepted as settled that an award of attorney's fees ancillary to prospective relief is not subject to the strictures of the Eleventh Amendment. And if the principle of making such an award is beyond the

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491 U.S. 274, 109 S.Ct. 2463, 50 Fair Empl.Prac.Cas. (BNA) 17, 50 Empl. Prac. Dec. P 39,069, 105 L.Ed.2d 229,
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reach of the Eleventh Amendment, the same must also be true for the question of how a "reasonable attorney's fee" is to be calculated. See *Hutto, supra*, 437 U.S., at 696-697, 98 S.Ct., at 2576-2577.

Missouri contends, however, that the principle enunciated in Hutto has been undermined by subsequent decisions of this Court that require Congress to "express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243, 105 S.Ct. 3142, 3148, 87 L.Ed.2d 171 (1985); Welch v. Texas Dept. of Highways and Public Transportation, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987). See also Dellmuth v. Muth, 491 U.S. 223, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989); Pennsylvania v. Union Gas Co., 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989). The flaw in this argument lies in its misreading of the holding of Hutto. It is true that in Hutto we noted that Congress could, in the exercise of its enforcement power under § 5 of the Fourteenth Amendment, set aside the States' immunity from retroactive damages, 437 U.S., at 693, 98 S.Ct., at 2574-75, citing Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), and that Congress intended to do so in enacting § 1988, 437 U.S., at 693-694, 98 S.Ct., at 2574-2575. But we also made clear that the application of § 1988 to the States did not depend on congressional abrogation of the States' immunity. We did so in rejecting precisely the "clear statement" argument that Missouri now suggests has undermined Hutto. Arkansas had argued that § 1988 did not plainly abrogate the States' immunity; citing Employees v. Missouri Dept. of Public Health and Welfare, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973), and Edelman v. Jordan, supra, the State contended that "retroactive liability" could not be imposed on the States "in the absence of an extraordinarily explicit*280 statutory mandate." Hutto, 437 U.S., at 695, 98 S.Ct., at 2576. We responded as follows: "[T]hese cases [Employees and Edelman] concern retroactive liability for prelitigation conduct rather than expenses incurred in litigation seeking only

prospective relief. The Act imposes attorney's fees 'as part of the costs.' Costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity." *Ibid*.

The holding of *Hutto*, therefore, was not just that Congress had spoken sufficiently clearly to overcome Eleventh Amendment immunity in enacting § 1988, but rather that the Eleventh Amendment did not apply to an award of attorney's fees ancillary to a grant of prospective relief. See *Maine v. Thiboutot*, 448 U.S. 1, 9, n. 7, 100 S.Ct. 2502, 2507, n. 7, 65 L.Ed.2d 555 (1980). That holding is unaffected by our subsequent jurisprudence concerning the degree of clarity with which Congress must speak in order to override Eleventh Amendment immunity, and we reaffirm it today.

[3] Missouri's other line of argument is based on our decision in Library of Congress v. Shaw, supra. Shaw involved an application of the longstanding "no-interest rule," under which interest cannot be awarded against the United States unless it has expressly waived its sovereign immunity. We held that while Congress, in making the Federal Government a potential defendant under Title VII of the Civil Rights Act of 1964, had waived the United States' immunity from suit and from costs including reasonable attorney's fees, it had not waived the Federal Government's traditional immunity from any award of interest. We thus held impermissible a 30 percent increase in the "lodestar" fee to compensate for delay in payment. Because we refused to find in the language of § 1988 a waiver of the United States' immunity from interest, Missouri argues, we should likewise conclude that Title VII is not sufficiently explicit to constitute an abrogation **2468 of the States' immunity under the Eleventh Amendment in regard to any award of interest.

*281 The answer to this contention is already clear from what we have said about *Hutto v. Finney*. Since, as we held in *Hutto*, the Eleventh Amendment does not bar an award of attorney's fees ancillary to a grant of prospective relief, our

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holding in Shaw has no application, even by analogy. FN3 There is no need in this case to determine whether Congress has spoken sufficiently clearly to meet a "clear statement" requirement, and it is therefore irrelevant whether the Eleventh Amendment standard should be, as Missouri contends, as stringent as the one we applied for purposes of the no-interest rule in Shaw. Rather, the issue here-whether the "reasonable attorney's fee" provided for in § 1988 should be calculated in such a manner as to include an enhancement, where appropriate, for delay in payment-is a straightforward *282 matter of statutory interpretation. For this question, it is of no relevance whether the party against which fees are awarded is a State. The question is what Congress intended-not whether it manifested "the clear affirmative intent ... to waive the sovereign's immunity." Shaw, 478 U.S., at 321, 106 S.Ct. at 2965.FN4

> FN3. Our opinion in Shaw does, to be sure, contain some language that, if read in isolation, might suggest a different result in this case. Most significantly, we equated compensation for delay with prejudgment interest, and observed that "[p]rejudgment interest ... is considered as damages, not a component of 'costs.' ... Indeed, the term 'costs' has never been understood to include any interest component." Library of Congress v. Shaw, 478 U.S. 310, 321, 106 S.Ct. 2957, 2965, 92 L.Ed.2d 250 (1986). These observations, however, cannot be divorced from the context of the special "no-interest rule" that was at issue in Shaw. That rule, which is applicable to the immunity of the United States and is therefore not at issue here, provides an "added gloss of strictness," id., at 318, 106 S.Ct., at 2963, only where the United States' liability for interest is at issue. Our inclusion of compensation for delay within the definition of prejudgment interest in Shaw must be understood in light of this broad proscription of interest awards against the

United States. Shaw thus does not represent a general-purpose definition of compensation for delay that governs here. Outside the context of the "no-interest rule" of federal immunity, we see no reason why compensation for delay cannot be included within § 1988 attorney's fee awards, which Hutto held to be "costs" not subject to Eleventh Amendment strictures.

We cannot share Justice O'CONNOR's view that the two cases she cites, post, at 2474, demonstrate the existence of an equivalent rule relating to state immunity that embodies the same ultrastrict rule of construction for interest awards that has grown up around the federal no-interest rule. Cf. Shaw, supra, at 314-317, 106 S.Ct., at 2961-2963 (discussing historical development of the federal no-interest rule).

FN4. In Shaw, which dealt with the sovereign immunity of the Federal Government, there was of course no prospective-retrospective distinction as there is when, as in Hutto and the present case, it is the Eleventh Amendment immunity of a State that is at issue.

This question is not a difficult one. We have previously explained, albeit in dicta, why an enhancement for delay in payment is, where appropriate, part of a "reasonable attorney's fee." In *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987), we rejected an argument that a prevailing party was entitled to a fee augmentation to compensate for the risk of nonpayment. But we took care to distinguish that risk from the factor of delay:

"First is the matter of delay. When plaintiffs' entitlement to attorney's fees depends on success, their lawyers are not paid until a favorable decision finally eventuates, which may be years later....

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Meanwhile, their expenses of doing business continue and must be met. In setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value. See, e.g., Sierra Club v. EPA, 248 U.S.App.D.C. 107, 120-121, 769 F.2d 796, 809-810 (1985); Louisville Black Police Officers Organization, Inc. v. Louisville, 700 F.2d 268, 276, 281 (CA6 1983). Although delay and the risk of nonpayment are often mentioned**2469 in the same breath, adjusting for the former is a distinct issue.... We do not suggest ... that adjustments for delay are *283 inconsistent with the typical feeshifting statute." Id., at 716, 107 S.Ct., at 3082.

[4][5] The same conclusion is appropriate under § 1988.FN5 Our cases have repeatedly stressed that attorney's fees awarded under this statute are to be based on market rates for the services rendered. See, e.g., Blanchard v. Bergeron, 489 U.S. 87, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989); Riverside v. Rivera, 477 U.S. 561, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986); Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). Clearly, compensation received several years after the services were rendered-as it frequently is in complex civil rights litigation-is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, as would normally be the case with private billings. FN6 We agree, therefore, *284 that an appropriate adjustment for delay in payment-whether by the application of current rather than historic hourly rates or otherwise-is within the contemplation of the statute.

FN5. Delaware Valley was decided under § 304(d) of the Clean Air Act, 42 U.S.C. § 7604(d). We looked for guidance, however, to § 1988 and our cases construing it. Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. 711, 713, n. 1, 107 S.Ct. 3078, 3080, n. 1, 97 L.Ed.2d 585 (1987).

FN6. This delay, coupled with the fact

that, as we recognized in Delaware Valley, the attorney's expenses are not deferred pending completion of the litigation, can cause considerable hardship. The present case provides an illustration. During a period of nearly three years, the demands of this case precluded attorney Benson from accepting other employment. In order to pay his staff and meet other operating expenses, he was obliged to borrow \$633,000. As of January 1987, he had paid over \$113,000 in interest on this debt, and was continuing to borrow to meet interest payments. Record 2336-2339; Tr. 130-131. The LDF, for its part, incurred deficits of \$700,000 in 1983 and over \$1 million in 1984, largely because of this case. Tr. 46. If no compensation were provided for the delay in payment, the prospect of such hardship could well deter otherwise willing attorneys from accepting complex civil rights cases that might offer great benefit to society at large; this result would work to defeat Congress' purpose in enacting § 1988 of "encourag[ing] the enforcement of federal law through lawsuits filed by private persons." Delaware Valley, supra, at 737, 107 S.Ct., at 3093 (BLACKMUN, J., dissenting).

We note also that we have recognized the availability of interim fee awards under § 1988 when a litigant becomes a prevailing party on one issue in the course of the litigation. Texas State Teachers Assn. v. Garland Independent School Dist., 489 U.S. 782, 791-792, 109 S.Ct. 1486, 1492-1493, 103 L.Ed.2d 866 (1989). In economic terms, such an interim award does not differ from an enhancement for delay in payment.

[6] To summarize: We reaffirm our holding in *Hutto v. Finney* that the Eleventh Amendment has no application to an award of attorney's fees, ancil-

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lary to a grant of prospective relief, against a State. It follows that the same is true for the calculation of the amount of the fee. An adjustment for delay in payment is, we hold, an appropriate factor in the determination of what constitutes a reasonable attorney's fee under § 1988. An award against a State of a fee that includes such an enhancement for delay is not, therefore, barred by the Eleventh Amendment.

Ш

Missouri's second contention is that the District Court erred in compensating the work of law clerks paralegals (hereinafter collectively "paralegals") at the market rates for their services, rather than at their cost to the attorney. While Missouri agrees that compensation for the cost of these personnel should be included in the fee award, it suggests that an hourly rate of \$15-which it argued below corresponded to their salaries, benefits, and overhead-would be appropriate, rather than the market rates of \$35 to \$50. According to Missouri, § 1988 does not authorize billing paralegals' hours at market rates, and doing so produces a "windfall" for the attorney.**2470 FN7]

> FN7. The Courts of Appeals have taken a variety of positions on this issue. Most permit separate billing of paralegal time. See, e.g., Save Our Cumberland Mountains, Inc. v. Hodel, 263 U.S.App.D.C. 409, 420, n. 7, 826 F.2d 43, 54, n. 7 (1987), vacated part on other grounds, U.S.App.D.C. 78, 857 F.2d 1516 (1988) (en banc); Jacobs v. Mancuso, 825 F.2d 559, 563, and n. 6 (CA1 1987) (collecting cases); Spanish Action Committee of Chicago v. Chicago, 811 F.2d 1129, 1138 (CA7 1987); Ramos v. Lamm, 713 F.2d 546, 558-559 (CA10 1983); Richardson v. Byrd, 709 F.2d 1016, 1023 (CA5), cert. denied sub nom. Dallas County Commissioners Court v. Richardson, 464 U.S. 1009, 104 S.Ct. 527, 78 L.Ed.2d 710 (1983). See also Riverside v. Rivera, 477

U.S. 561, 566, n. 2, 106 S.Ct. 2686, 2690, n, 2, 91 L.Ed.2d 466 (1986) (noting lower court approval of hourly rate for law clerks). Some courts, on the other hand, paralegal considered "out-of-pocket expense," recoverable only at cost to the attorney. See, e.g., Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624, 639 (CA6 1979), cert. denied, 447 U.S. 911, 100 S.Ct. 3000, 64 L.Ed.2d 862 (1980); Thornberry v. Delta Air Lines, Inc., 676 F.2d 1240, 1244 (CA9 1982), vacated, 461 U.S. 952, 103 S.Ct. 2421, 77 L.Ed.2d 1311 (1983). At least one Court of Appeals has refused to permit any recovery of paralegal expense apart from the attorney's hourly fee. Abrams v. Baylor College of Medicine, 805 F.2d 528, 535 (CA5 1986).

*285 [7] We begin with the statutory language, which provides simply for "a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988. Clearly, a "reasonable attorney's fee" cannot have been meant to compensate only work performed personally by members of the bar. Rather, the term must refer to a reasonable fee for the work product of an attorney. Thus, the fee must take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit. The parties have suggested no reason why the work of paralegals should not be similarly compensated, nor can we think of any. We thus take as our starting point the self-evident proposition that the "reasonable attorney's fee" provided for by statute should compensate the work of paralegals, as well as that of attorneys. The more difficult question is how the work of paralegals is to be valuated in calculating the overall attorney's fee.

[8] The statute specifies a "reasonable" fee for the attorney's work product. In determining how Page 10 491 U.S. 274, 109 S.Ct. 2463, 50 Fair Empl.Prac.Cas. (BNA) 17, 50 Empl. Prac. Dec. P 39,069, 105 L.Ed.2d 229, 57 USLW 4735, 54 Ed. Law Rep. 16 (Cite as: 491 U.S. 274, 109 S.Ct. 2463)

other elements of the attorney's fee are to be calculated, we have consistently looked to the marketplace as our guide to what is "reasonable." In Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984), for example, we rejected an argument that attorney's fees for nonprofit legal *286 service organizations should be based on cost. We said: "The statute and legislative history establish that 'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community...." Id., at 895, 104 S.Ct., at 1547. See also, e.g., Delaware Valley, 483 U.S., at 732, 107 S.Ct., at 3090 (O'CONNOR, J., concurring) (controlling question concerning contingency enhancements is "how the market in a community compensates for contingency"); Rivera, 477 U.S., at 591, 106 S.Ct. at 2703 (REHNQUIST, J., dissenting) (reasonableness of fee must be determined "in light of both the traditional billing practices in the profession, and the fundamental principle that the award of a 'reasonable' attorney's fee under § 1988 means a fee that would have been deemed reasonable if billed to affluent plaintiffs by their own attorneys"). A reasonable attorney's fee under § 1988 is one calculated on the basis of rates and practices prevailing in the relevant market, i.e., "in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation," Blum, supra, 465 U.S., at 896, n. 11, 104 S.Ct., at 1547, n. 11, and one that grants the successful civil rights plaintiff a "fully compensatory fee," Hensley v. Eckerhart, 461 U.S. 424, 435, 103 S.Ct. 1933, 1940, 76 L.Ed.2d 40 (1983), comparable to what "is traditional with attorneys compensated by a feepaying client." S.Rep. No. **2471 94-1011, p. 6 (1976), U.S.Code Cong. & Admin.News 1976, pp. 5908, 5913.

If an attorney's fee awarded under § 1988 is to yield the same level of compensation that would be available from the market, the "increasingly wide-spread custom of separately billing for the services of paralegals and law students who serve as clerks," Ramos v. Lamm, 713 F.2d 546, 558 (CA10 1983),

must be taken into account. All else being equal, the hourly fee charged by an attorney whose rates include paralegal work in her hourly fee, or who bills separately for the work of paralegals at cost, will be higher than the hourly fee charged by an attorney competing in the same market who bills separately for the work of paralegals at "market rates." In other words, the prevailing "market rate" for attorney time is not independent of the manner in which paralegal *287 time is accounted for. FN8 Thus, if the prevailing practice in a given community were to bill paralegal time separately at market rates, fees awarded the attorney at market rates for attorney time would not be fully compensatory if the court refused to compensate hours billed by paralegals or did so only at "cost." Similarly, the fee awarded would be too high if the court accepted separate billing for paralegal hours in a market where that was not the custom.

FN8. The attorney who bills separately for paralegal time is merely distributing her costs and profit margin among the hourly fees of other members of her staff, rather than concentrating them in the fee she sets for her own time.

We reject the argument that compensation for paralegals at rates above "cost" would yield a 'windfall" for the prevailing attorney. Neither petitioners nor anyone else, to our knowledge, has ever suggested that the hourly rate applied to the work of an associate attorney in a law firm creates a windfall for the firm's partners or is otherwise improper under § 1988, merely because it exceeds the cost of the attorney's services. If the fees are consistent with market rates and practices, the "windfall" argument has no more force with regard to paralegals than it does for associates. And it would hardly accord with Congress' intent to provide a "fully compensatory fee" if the prevailing plaintiff's attorney in a civil rights lawsuit were not permitted to bill separately for paralegals, while the defense attorney in the same litigation was able to take advantage of the prevailing practice and obtain

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market rates for such work. Yet that is precisely the result sought in this case by the State of Missouri, which appears to have paid its own outside counsel for the work of paralegals at the hourly rate of \$35. Record 2696, 2699. FN9

FN9. A variant of Missouri's "windfall" argument is the following: "If paralegal expense is reimbursed at a rate many times the actual cost, will attorneys next try to bill separately-and at a profit-for such items as secretarial time, paper clips, electricity, and other expenses?" Reply Brief for Petitioners 15-16. The answer to this question is, of course, that attorneys seeking fees under § 1988 would have no basis for requesting separate compensation of such expenses unless this were the prevailing practice in the local community. The safeguard against the billing at a profit of secretarial services and paper clips is the discipline of the market.

*288 [9] Nothing in § 1988 requires that the work of paralegals invariably be billed separately. If it is the practice in the relevant market not to do so, or to bill the work of paralegals only at cost, that is all that § 1988 requires. Where, however, the prevailing practice is to bill paralegal work at market rates, treating civil rights lawyers' fee requests in the same way is not only permitted by § 1988, but also makes economic sense. By encouraging the use of lower cost paralegals rather than attorneys wherever possible, permitting market-rate billing of paralegal hours "encourages cost-effective delivery of legal services and, by reducing the spiraling cost of civil rights litigation, furthers the policies underlying civil rights statutes." Cameo Convalescent Center, Inc. v. Senn, 738 F.2d 836, 846 (CA7 1984) , cert. denied, **2472469 U.S. 1106, 105 S.Ct. 780, 83 L.Ed.2d 775 (1985).FN10

> FN10. It has frequently been recognized in the lower courts that paralegals are capable of carrying out many tasks, under the supervision of an attorney, that might other-

wise be performed by a lawyer and billed at a higher rate. Such work might include, for example, factual investigation, including locating and interviewing witnesses; assistance with depositions, interrogatories, and document production; compilation of statistical and financial data; checking legal citations; and drafting correspondence. Much such work lies in a gray area of tasks that might appropriately be performed either by an attorney or a paralegal. To the extent that fee applicants under § 1988 are not permitted to bill for the work of paralegals at market rates, it would not be surprising to see a greater amount of such work performed by attorneys themselves, thus increasing the overall cost of litigation.

Of course, purely clerical or secretarial tasks should not be billed at a paralegal rate, regardless of who performs them. What the court in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717 (CA5 1974), said in regard to the work of attorneys is applicable by analogy to paralegals: "It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it."

*289 Such separate billing appears to be the practice in most communities today. FNII In the present case, Missouri concedes that "the local market typically bills separately for paralegal services," Tr. of Oral Arg. 14, and the District Court found that the requested hourly rates of \$35 for law clerks, \$40 for paralegals, and \$50 for recent law

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graduates were the prevailing rates for such services in the Kansas City area. App. to Pet. for Cert. A29, A31, A34. Under these circumstances, the court's decision to award separate compensation at these rates was fully in accord with § 1988.

FN11. Amicus National Association of Legal Assistants reports that 77 percent of 1,800 legal assistants responding to a survey of the association's membership stated that their law firms charged clients for paralegal work on an hourly billing basis. Brief for National Association of Legal Assistants as Amicus Curiae 11.

ΙV

The courts below correctly granted a fee enhancement to compensate for delay in payment and approved compensation of paralegals and law clerks at market rates. The judgment of the Court of Appeals is therefore

Affirmed.

Justice MARSHALL took no part in the consideration or decision of this case.

Justice O'CONNOR, with whom Justice SCALIA joins, and with whom THE CHIEF JUSTICE joins in part, concurring in part and dissenting in part.

I agree with the Court that 42 U.S.C. § 1988 allows compensation for the work of paralegals and law clerks at market rates, and therefore join Parts I and III of its opinion. I do not join Part II, however, for in my view the Eleventh Amendment does not permit enhancement of attorney's *290 fees assessed against a State as compensation for delay in payment.

The Eleventh Amendment does not, of course, provide a State with across-the-board immunity from all monetary relief. Relief that "serves directly to bring an end to a violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect" on a State's treasury. *Papasan v. Allain*, 478 U.S. 265, 278, 106 S.Ct. 2932, 2940, 92 L.Ed.2d 209 (1986).

Thus, in Milliken v. Bradley, 433 U.S. 267, 289-290, 97 S.Ct. 2749, 2761-2762, 53 L.Ed.2d 745 (1977), the Court unanimously upheld a decision ordering a State to pay over \$5 million to eliminate the effects of de jure segregation in certain school systems. On the other hand, "[r]elief that in essence serves to compensate a party injured in the past," such as relief "expressly denominated as damages," or "relief [that] is tantamount to an award of damages for a past violation of federal law, even though styled as something else," is prohibited by the Eleventh Amendment. **2473Papasan, supra, 478 U.S., at 278, 106 S.Ct., at 2940. The crucial question in this case is whether that portion of respondents' attorney's fees based on current hourly rates is properly characterized as retroactive monetary re-

In Library of Congress v. Shaw, 478 U.S. 310, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986), the Court addressed whether the attorney's fees provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), permits an award of attorney's fees against the United States to be enhanced in order to compensate for delay in payment. In relevant part, § 2000e-5(k) provides:

"In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity Commission (EEOC)] or the United States, a reasonable attorney's fees as part of the costs, and the [EEOC] and the United States shall be liable for costs the same as a private person."

The Court began its analysis in Shaw by holding that "interest is an element of damages separate from damages on the *291 substantive claim." 478 U.S., at 314, 106 S.Ct., at 2961 (citing C. McCormick, Law of Damages § 50, p. 205 (1935)). Given the "no-interest" rule of federal sovereign immunity, under which the United States is not liable for interest absent an express statutory waiver to the contrary, the Court was unwilling to conclude that, by equating the United States' liability to that

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of private persons in § 2000e-5(k), Congress had waived the United States' immunity from interest. 478 U.S., at 314-319, 106 S.Ct., at 2961-2964. The fact that § 2000e-5(k) used the word "reasonable" to modify "attorney's fees" did not alter this result, for the Court explained that it had "consistently ... refused to impute an intent to waive immunity from interest into the ambiguous use of a particular word or phrase in a statute." Id., at 320, 106 S.Ct., at 2964. The description of attorney's fees as costs in § 2000e-5(k) also did not mandate a contrary conclusion because "[p]rejudgment interest ... is considered as damages, not a component of 'costs,' " and the "term 'costs' has never been understood to include any interest component." Id., at 321, 106 S.Ct. at 2965 (emphasis added) (citing 10 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §§ 2664, 2666, 2670 (2d ed. 1983); 2 A. Sedgwick & G. Van Nest, Sedgwick on Damages 157-158 (7th ed. 1880)). Finally, the Court rejected the argument that the enhancement was proper because the "no-interest" rule did not prohibit compensation for delay in payment: "Interest and a delay factor share an identical function. They are designed to compensate for the belated receipt of money." 478 U.S., at 322, 106 S.Ct., at 2965.

As the Court notes, ante, at 2468, n. 3, the "no-interest" rule of federal sovereign immunity at issue in Shaw provided an "added gloss of strictness," 478 U.S., at 318, 106 S.Ct., at 2963, and may have explained the result reached by the Court in that case, i.e., that § 2000e-5(k) did not waive the United States' immunity against awards of interest. But there is not so much as a hint anywhere in Shaw that the Court's discussions and definitions of interest and compensation for delay were dictated by, or limited to, the federal "no-interest" rule. As the *292 quotations above illustrate, the Court's opinion in Shaw is filled with broad, unqualified language. The dissenters in Shaw did not disagree with the Court's sweeping characterization of interest and compensation for delay as damages. Rather, they argued only that § 2000e-5(k) had waived the immunity of the United States with respect to awards of interest. See *id.*, at 323-327, 106 S.Ct., at 2966-2968 (BRENNAN, J., dissenting). I therefore emphatically disagree with the Court's statement that "*Shaw* ... does not represent a general-purpose definition of compensation for delay that governs here." *Ante*, at 2468, n. 3.

Two general propositions that are relevant here emerge from Shaw. First, interest is considered damages and not costs. **2474 Second, compensation for delay, which serves the same function as interest, is also the equivalent of damages. These two propositions make clear that enhancement for delay constitutes retroactive monetary relief barred by the Eleventh Amendment. Given my reading of Shaw, I do not think the Court's reliance on the cost rationale of § 1988 set forth in Hutto v. Finney, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), is persuasive. Because Shaw teaches that compensation for delay constitutes damages and cannot be considered costs, see 478 U.S., at 321-322, 106 S.Ct., at 2965-2966, Hutto is not controlling. See Hutto, supra, at 697, n. 27, 98 S.Ct., at 2577, n. 27 ("[W]e do not suggest that our analysis would be the same if Congress were to expand the concept of costs beyond the traditional category of litigation expenses"). Furthermore, Hutto does not mean that inclusion of attorney's fees as costs in a statute forecloses a challenge to the enhancement of fees as compensation for delay in payment. If it did, then Shaw would have been resolved differently, for § 2000e-5(k) lists attorney's fees as costs.

Even if I accepted the narrow interpretation of Shaw proffered by the Court, I would disagree with the result reached by the Court in Part II of its opinion. On its own terms, the Court's analysis fails. The Court suggests that the definitions of interest and compensation for delay set forth in Shaw *293 would be triggered only by a rule of sovereign immunity barring awards of interest against the States: "Outside the context of the 'no-interest rule' of federal immunity, we see no reason why compensation for delay cannot be included within § 1988 attorney's fee awards." Ante, at 2468, n. 3. But the Court

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does not inquire about whether such a rule exists. In fact, there is a federal rule barring awards of interest against States. See Virginia v. West Virginia, 238 U.S. 202, 234, 35 S.Ct. 795, 808, 59 L.Ed. 1272 (1915) ("Nor can it be deemed in derogation of the sovereignty of the State that she should be charged with interest if her agreement properly construed so provides") (emphasis added); United States v. North Carolina, 136 U.S. 211, 221, 10 S.Ct. 920, 924, 34 L.Ed. 336 (1890) ("general principle" is that "an obligation of the State to pay interest, whether as interest or as damages, on any debt overdue, cannot arise except by the consent and contract of the State, manifested by statute, or in a form authorized by statute") (emphasis added). The Court has recently held that the rule of immunity set forth in Virginia and North Carolina is inapplicable in situations where the State does not retain any immunity, see West Virginia v. United States, 479 U.S. 305, 310-312, 107 S.Ct. 702, 706-707, 93 L.Ed.2d 639 (1987) (State can be held liable for interest to the United States, against whom it has no sovereign immunity), but the rule has not otherwise been limited, and there is no reason why it should not be relevant in the Eleventh Amendment context presented in this case.

As Virginia and North Carolina indicate, a State can waive its immunity against awards of interest. See also Clark v. Barnard, 108 U.S. 436, 447, 2 S.Ct. 878, 882-83, 27 L.Ed. 780 (1883). The Missouri courts have interpreted Mo.Rev.Stat. § 408.020 (1979 and Supp.1989), providing for prejudgment interest on money that becomes due and payable, and § 408.040, providing for prejudgment interest on court judgments and orders, as making the State liable for interest. See Denton Construction Co. v. Missouri State Highway Comm'n, 454 S.W.2d 44, 59-60 (Mo.1970) (§ 408.020); *294 Steppelman v. State Highway Comm'n of Missouri, 650 S.W.2d 343, 345 (Mo.App.1983) (§ 408.040). There can be no argument, however, that these Missouri statutes and cases allow interest to be awarded against the State here. A "State's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts." Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99, n. 9, 104 S.Ct. 900, 907, n. 9, 79 L.Ed.2d 67 (1984).

**2475 The fact that a State has immunity from awards of interest is not the end of the matter. In a case such as this one involving school desegregation, interest or compensation for delay (in the guise of current hourly rates) can theoretically be awarded against a State despite the Eleventh Amendment's bar against retroactive monetary liability. The Court has held that Congress can set aside the States' Eleventh Amendment immunity in order to enforce the provisions of the Fourteenth Amendment. See City of Rome v. United States, 446 U.S. 156, 179, 100 S.Ct. 1548, 1562-63, 64 L.Ed.2d 119 (1980); Fitzpatrick v. Bitzer, 427 U.S. 445, 456, 96 S.Ct. 2666, 2671, 49 L.Ed.2d 614 (1976). Congress must, however, be unequivocal in expressing its intent to abrogate that immunity. See generally Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243, 105 S.Ct. 3142, 3148, 87 L.Ed.2d 171 (1985) ("Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself").

In Hutto the Court was able to avoid deciding whether § 1988 met the "clear statement" rule only because attorney's fees (without any enhancement) are not considered retroactive in nature. See 437 U.S., at 695-697, 98 S.Ct., at 2575-2577. The Court cannot do the same here, where the attorney's fees were enhanced to compensate for delay in payment. Cf. Osterneck v. Ernst & Whinney, 489 U.S. 169, 175, 109 S.Ct. 987, 991, 103 L.Ed.2d 146 (1989) ("[U]nlike attorney's fees, which at common law were regarded as an element of costs, ... prejudgment interest traditionally has been considered part of the compensation due [the] plaintiff").

In relevant part, § 1988 provides:

"In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, *295 title IX of Public Law 92-318, or

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title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

In my view, § 1988 does not meet the "clear statement" rule set forth in Atascadero. It does not mention damages, interest, compensation for delay, or current hourly rates. As one federal court has correctly noted, "Congress has not yet made any statement suggesting that a § 1988 attorney's fee award should include prejudgment interest." Rogers v. Okin, 821 F.2d 22, 27 (CA1 1987). A comparison of the statute at issue in Shaw also indicates that § 1988, as currently written, is insufficient to allow attorney's fees assessed against a State to be enhanced to compensate for delay in payment. The language of § 1988 is undoubtedly less expansive than that of § 2000e-5(k), for § 1988 does not equate the liability of States with that of private persons. Since § 2000e-5(k) does not allow enhancement of an award of attorney's fees to compensate for delay, it is logical to conclude that § 1988, a more narrowly worded statute, likewise does not allow interest (through the use of current hourly rates) to be tacked on to an award of attorney's fees against a State.

Compensation for delay in payment was one of the reasons the District Court used current hourly rates in calculating respondents' attorney's fees. See App. to Pet. for Cert. A26-A27; 838 F.2d 260, 263, 265 (CA8 1988). I would reverse the award of attorney's fees to respondents and remand so that the fees can be calculated without taking compensation for delay into account.

Chief Justice REHNQUIST, dissenting.

I agree with Justice O'CONNOR that the Eleventh Amendment does not permit an award of attorney's fees against a State which includes compensation for delay in payment. Unlike Justice O'CONNOR, however, I do not agree with the *296 Court's approval of the award of law clerk and paralegal fees made here.

Title 42 U.S.C. § 1988 gives the district courts discretion to allow the prevailing party in an action under 42 U.S.C. § 1983 "a reasonable attorney's fee as part of the **2476 costs." The Court reads this language as authorizing recovery of "a 'reasonable' fee for the attorney's work product," ante, at 2470, which, the Court concludes, may include separate compensation for the services of law clerks and paralegals. But the statute itself simply uses the very familiar term "a reasonable attorney's fee," which to those untutored in the Court's linguistic juggling means a fee charged for services rendered by an individual who has been licensed to practice law. Because law clerks and paralegals have not been licensed to practice law in Missouri, it is difficult to see how charges for their services may be separately billed as part of "attorney's fees." And since a prudent attorney customarily includes compensation for the cost of law clerk and paralegal services, like any other sort of office overhead-from secretarial staff, janitors, and librarians, to telephone service, stationery, and paper clips-in his own hourly billing rate, allowing the prevailing party to recover separate compensation for law clerk and paralegal services may result in "double recovery."

The Court finds justification for its ruling in the fact that the prevailing practice among attorneys in Kansas City is to bill clients separately for the services of law clerks and paralegals. But I do not think Congress intended the meaning of the statutory term "attorney's fee" to expand and contract with each and every vagary of local billing practice. Under the Court's logic, prevailing parties could recover at market rates for the cost of secretaries, private investigators, and other types of lay personnel who assist the attorney in preparing his case, so long as they could show that the prevailing practice in the local market was to bill separately for these services. Such a result would be a sufficiently drastic departure from the traditional concept of "attorney's fees" that I *297 believe new statutory authorization should be required for it. That permitting separate billing of law clerk and paralegal

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hours at market rates might "'reduc[e] the spiraling cost of civil rights litigation'" by encouraging attorneys to delegate to these individuals tasks which they would otherwise perform themselves at higher cost, ante, at 2471, and n. 10, may be a persuasive reason for Congress to enact such additional legislation. It is not, however, a persuasive reason for us to rewrite the legislation which Congress has in fact enacted. See Badaracco v. Commissioner, 464 U.S. 386, 398, 104 S.Ct. 756, 764, 78 L.Ed.2d 549 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement").

I also disagree with the State's suggestion that law clerk and paralegal expenses incurred by a prevailing party, if not recoverable at market rates as "attorney's fees" under § 1988, are nonetheless recoverable at actual cost under that statute. The language of § 1988 expands the traditional definition of "costs" to include "a reasonable attorney's fee," but it cannot fairly be read to authorize the recovery of all other out-of-pocket expenses actually incurred by the prevailing party in the course of litigation. Absent specific statutory authorization for the recovery of such expenses, the prevailing party remains subject to the limitations on cost recovery imposed by Federal Rule of Civil Procedure 54(d) and 28 U.S.C. § 1920, which govern the taxation of costs in federal litigation where a cost-shifting statute is not applicable. Section 1920 gives the district court discretion to tax certain types of costs against the losing party in any federal litigation. The statute specifically enumerates six categories of expenses which may be taxed as costs: fees of the court clerk and marshal; fees of the court reporter; printing fees and witness fees; copying fees; certain docket fees; and fees of court-appointed experts and interpreters. We have held that this list is exclusive. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987). Since none of these categories can possibly be construed to include the fees of law clerks and paralegals, **2477 *298 I would also hold that reimbursement for these expenses may not be separately awarded at actual cost.

I would therefore reverse the award of reimbursement for law clerk and paralegal expenses.

U.S.Mo.,1989.
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Supreme Court of Wyoming.

Joseph R. HAMMONS and Darlene S. Hammons,
Appellants (Plaintiffs),

TABLE MOUNTAIN RANCHES OWNERS AS-SOCIATION, INC., a Wyoming Corporation, Appellee (Defendant).

No. 01–151. July 15, 2003.

After lot owners application to place modular home in subdivision was denied by subdivision's architectural control committee, lot owners brought declaratory judgment action seeking determination that covenants were invalid and they were entitled to have plans approved. The District Court, Laramie County, Nicholas G. Kalokathis, J., invalidated covenants, but ruled that committee acted reasonably in denying plans. Lot owners appealed. The Supreme Court, Kautz, District Judge, held that: (1) committee did not abandon covenants by allowing other prefabricated homes, and (2) architectural control committee acted reasonably when it denied lot owners' application to build modular home.

Affirmed.

West Headnotes

[1] Common Interest Communities 83T € 96(2)

83T Common Interest Communities

83TV Unit Ownership and Exclusive Right of Possession

83Tk93 Use and Control of Unit 83Tk96 Construction and Alteration of

Units
83Tk96(2) k. Restrictions on unit owners. Most Cited Cases

(Formerly 108k103(3), 108k72.1)

Homeowners association did not abandon, or

lose right to enforce, aesthetic provision in covenants prohibiting prefabricated homes because other prefabricated homes were built in subdivision, where purpose of protecting and enhancing value of property in subdivision by excluding certain prefabricated homes remained viable; a number of lots remained undeveloped, and manner in which those remaining lots were developed could have significant impact on value of existing homes.

[2] Appeal and Error 30 € 170(1)

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(A) Issues and Questions in Lower Court 30k170 Nature or Subject-Matter of Issues or Questions

30k170(1) k. In general. Most Cited Cases

Issue of composition of subdivision's architectural control committee was not jurisdictional, and thus appellate court would not consider issue raised for first time on appeal.

[3] Appeal and Error 30 € 169

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(A) Issues and Questions in Lower Court 30k169 k. Necessity of presentation in general. Most Cited Cases

The Supreme Court will ordinarily entertain only arguments raised in the court below.

[4] Appeal and Error 30 € 169

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(A) Issues and Questions in Lower Court 30k169 k. Necessity of presentation in general. Most Cited Cases

Exceptions to the rule that the Supreme Court

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will ordinarily entertain only arguments raised in the court below exist if the argument is jurisdictional, or if it is of such a fundamental nature that it must be considered.

[5] Motions 267 @= 34

267 Motions

267k34 k. Countermanding, withdrawal, or abandonment. Most Cited Cases

A motion withdrawn leaves the record as it stood prior to the filing of the motion, i.e., as though it had not been made.

[6] Covenants 108 51(2)

108 Covenants

108II Construction and Operation

108 II(C) Covenants as to Use of Real Property

108k51 Buildings or Other Structures or Improvements

 $108k51(2) \quad k. \quad Buildings \quad in \quad general.$ Most Cited Cases

Trial court's finding that architectural control committee of subdivision acted reasonably when it denied lot owners' application to build modular home on lot was not clearly erroneous, in light of evidence that vast majority of other homes in subdivision were not modulars, witnesses established that additional modulars would negatively impact value of existing homes and would change nature of subdivision, and committee did not single out lot owners for rejection, but consistently denied applications to erect modular homes.

[7] Covenants 108 € 349

108 Covenants

108II Construction and Operation

108II(C) Covenants as to Use of Real Property

108k49 k. Nature and operation in general. Most Cited Cases

Covenants are contractual in nature and are to be interpreted in accordance with the principles of contract law.

*1153 Alexander K. Davison and Wendy J. Curtis of Patton & Davison, Cheyenne, Wyoming, Representing Appellants. Argument by Mr. Davison.

Julie Nye Tiedeken of Tiedeken Law Offices, Cheyenne, Wyoming, Representing Appellee.

Before HILL, C.J., and LEHMAN FN*, KITE, and VOIGT, JJ.; and KAUTZ, D.J.

FN* Chief Justice at time of oral argument.

*1154 KAUTZ, District Judge.

[¶ 1] This case considers whether an "Architectural Control Committee" properly denied Appellants', Joseph R. Hammons and Darlene S. Hammons (the Hammons), application to place a modular home in Table Mountain Ranches, a subdivision in Laramie County. The district court determined that covenants, which specifically excluded modulars in Table Mountain Ranches, were invalidly adopted. However, it found that prior covenants, still in effect, authorized rejection of the Hammons' plans on "aesthetic" grounds. The district court also found that the Architectural Control Committee acted reasonably in denying the plans.

[¶ 2] We conclude that the district court properly applied the law and that sufficient evidence supports its findings and conclusions. We affirm the trial court's declaratory judgment.

ISSUES

[¶ 3] The Hammons list these issues:

- 1. Did the District Court properly apply Wyoming Law of Aesthetic Covenants when determining that the decision of the Board of Table Mountain Ranches was reasonable?
- 2. Is the District Court's reliance upon the testimony of the architectural control committee clearly erroneous considering its order invalidat-

ing the 1998 covenants?

The Appellee, Table Mountain Ranches Owners Association, Inc. (TMROA) rephrases the issues as follows:

Issue 1 Did the Trial Court properly hold that the original purpose of the covenants can still be accomplished and thus the covenants have not been abandoned?

Issue 2 Did the Trial Court properly hold that the actions of the Architectural Control Committee in disapproving the Hammons' proposed home was reasonable and made in good faith?

Issue 3 a) Since the membership of the Architectural Control Committee was not raised in front of the Trial Court, should it be considered by the Supreme Court on appeal?

b) Did the Trial Court properly hold that the decision of the Architectural Control Committee would have been the same under the 1973 version of the covenants and should stand even though the 1998 covenants were found to be invalid?

FACTS

[¶ 4] Table Mountain Ranches is a subdivision in Laramie County. In 1973 its developers filed a declaration of protective covenants. They made minor adjustments to those covenants in 1974 and 1977. (The 1973 covenants with the 1974 and 1977 amendments are referred to herein as the 1977 covenants). The 1977 covenants created an Architectural Control Committee (A.C.C.), whose declared purpose was

[t]o assure, through intelligent architectural control of building design, placement and construction, that Table Mountain Ranches shall become and remain an attractive community, and to uphold and enhance property values.

The A.C.C. consisted of three members. The subdivider appointed one member, and owners of complete dwellings in the subdivision selected the

other two. After 90% of the tracts in the subdivision were sold, the "homeowners group" selected all three A.C.C. members. Initially, a three-member A.C.C. functioned. At some point, however, the Homeowner's Association Board assumed the role of the A.C.C.

[¶ 5] The covenants required that lot owners submit their plans and obtain written approval from the A.C.C. before they build. The A.C.C. had broad latitude in deciding what plans to approve or disapprove under the 1977 covenants. Those covenants stated, "[d]isapproval of plans and specifications may be based on any grounds including purely aesthetic grounds."

[¶ 6] Initially, the A.C.C. excluded prefabricated buildings except for "Boise Cascade Homes." The evidence established that Boise Cascades more resembled stick-built homes than prefabricated homes. Through 1993 the A.C.C. excluded modular homes. From 1994 to 1996 the A.C.C. napped rather than enforced the covenants of the subdivision*1155 and permitted prefabricated homes by failing to consider or respond to applications. After this lapse, the subdivision contained 107 undeveloped lots, 57 stick-built homes, and 11 prefabricated homes. In 1996, a more vigilant A.C.C. assumed the helm. Since then, it has consistently disapproved prefab homes with rectangular lowpitched roofs. It took legal action and forced the removal of a "double-wide" or modular prefabricated home.

[¶ 7] In 1998, the TMROA attempted to amend the covenants of the subdivision. For purposes of this case, the 1998 covenants contained two significant changes. First, they gave the TMROA board the role of the A.C.C. This change reflected the practice that had been followed for some time. Second, the 1998 covenants added this language: "No mobile, manufactured, modular or site built homes resembling basic rectangular low pitch roof double wide manufactured or modular homes will be authorized."

[¶ 8] The Hammons bought two lots in the Table Mountain subdivision in 1995. On May 3, 1999, they sought approval for a prefabricated home. The A.C.C. denied approval twice, once after some members viewed a sample home, citing aesthetic grounds. Thereafter, the Hammons filed this case. Their complaint alleged that the 1998 amendments to the covenants were invalid, and that their plans would have been approved under the 1977 covenants.

PROCEDURAL HISTORY

[¶ 9] The Hammons sued for declaratory judgment. They sought (1) a declaration that the 1998 covenants were invalid, (2) a declaration that they were entitled to have their home plans approved, irrespective of which covenants governed, and (3) damages. The trial court invalidated the 1998 covenants, held that the 1977 covenants had not been abandoned, and held that under them, the A.C.C. acted reasonably and within their authority in denying the Hammons' plans.

[¶ 10] Inspired by the trial court's invalidation of the 1998 covenants, the Hammons asked the trial court to amend its Findings and Conclusions. They argued that because it invalidated the 1998 covenants, the court should also have disregarded the testimony of the Board as to whether the Hammons' home would have been disapproved under the older covenants. The Hammons asserted that because the 1977 covenants provided a different A.C.C. membership than the 1998 covenants, the TMROA could not speak as the A.C.C. under the older covenants. Several TMROA board members testified that they would not approve the Hammons' plans under either set of covenants.

[¶ 11] TMROA submitted a judgment under W.R.C.P. 58, to which the Hammons filed an objection, restating the grounds from their motion to amend. The trial court considered the motions on March 1, 2001, and entered the declaratory judgment without the Hammons' proposed amendments. The Hammons then filed both a Rule 50(b) motion and a motion nominally based on Rules 59(a)(6)

and (e). However, in a strange turn, they withdrew those motions and timely filed this appeal.

STANDARD OF REVIEW

[¶ 12] The district court's decisions as to whether the covenants were abandoned, and whether the board acted reasonably, combine questions of law and fact. Questions of law are reviewed de novo. Stansbury v. Heiduck, 961 P.2d 977, 978 (Wyo.1998). A district court's findings of fact will be upheld unless the findings are clearly erroneous. Mathis v. Wendling, 962 P.2d 160, 163 (Wyo.1998) . A finding is clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Springer v. Blue Cross and Blue Shield of Wyoming, 944 P.2d 1173, 1176 (Wyo.1997) (citing Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531, 538 (Wyo.1993)).

ANALYSIS

Were the Covenants Governing the Table Mountain Ranches Subdivision Abandoned?

[1] [¶ 13] The Hammons claim that TMROA lost the right to enforce, or abandoned,*1156 the "aesthetic" provision in the 1977 covenants because other prefabricated homes were built in the subdivision.

[¶ 14] A protective covenant is abandoned by failure to enforce that covenant when the covenant is violated, the violations are ignored or acquiesced to, and the violations are

... so great, or so fundamental or radical as to neutralize the benefits of the restriction to the point of defeating the purpose of the covenant. In other words, the violations must be so substantial as to support a finding that the usefulness of the covenant has been destroyed, or that the covenant has become valueless and onerous to the property owners.

Keller v. Branton, 667 P.2d 650, 654 (Wyo.1983) (citing Riley v. Stoves, 22 Ariz.App.

223, 526 P.2d 747, 68 A.L.R.3d 1229 (1974)). The trial court properly utilized the standard from *Keller* in deciding the abandonment issue.

[¶ 15] The purpose and benefit of the "aesthetic" provision in the 1977 covenants is specified in the covenants themselves. The covenants specifically state that their intent is to "protect and enhance the value, desirability and attractiveness" of the subdivision.

[¶ 16] The record contains considerable evidence indicating that the purpose of protecting and enhancing the value of property in the subdivision by excluding certain prefabricated homes remains viable. Although 11 prefabricated homes now exist there, there are 57 stick-built homes and the balance of the 217 lots are undeveloped. The evidence indicated that the manner in which those remaining lots are developed could have a significant impact on the value of the existing homes. The trial court recognized this evidence and held that the "aesthetic" covenant was not abandoned. We find that this decision is supported by evidence and not "clearly erroneous."

Should this Court Consider Membership of the A.C.C. When that Issue Was Not Presented to the Trial Court Until After the Trial Court's Decision?

[2][3][4] [¶ 17] This Court will ordinarily entertain only arguments raised in the court below. Cooper v. Town of Pinedale, 1 P.3d 1197, 1208 (Wyo.2000). Exceptions to this rule exist if the argument is jurisdictional, or if it is "of such a fundamental nature that it must be considered." Id. (citing WW Enterprises v. City of Cheyenne, 956 P.2d 353, 356 (Wyo.1998) and Bredthauer v. TSP, 864 P.2d 442, 447 (Wyo.1993)).

[¶ 18] The Hammons did not allege in their complaint that the selection of A.C.C. members under the 1977 covenants was invalid. They did not assert that if the 1998 covenants were improperly adopted, the court should order a different committee to review the Hammons' plans. The Hammons

did not present this issue to the trial court, and the trial court did not consider it. They asked only for a declaration that their plans should be approved under the 1973 covenants.

[¶ 19] The issue about composition of the A.C.C. is not jurisdictional. It is not so "fundamental" that it must be considered. The Hammons did not raise this issue until after the trial court decided the case. This Court will not consider the issue now.

[¶ 20] The Hammons imply that it is logically impossible for the trial court to invalidate the 1998 covenants, but then to consider testimony from the A.C.C. formed under the 1998 covenants. That testimony indicated that the 1998 A.C.C. would not approve the Hammons' plans even under the 1977 covenants. The evidence established, however, that the composition of the A.C.C. under the 1998 covenants was the same as had been put in practice before the 1998 amendments. The Hammons did not assert that the A.C.C. membership was invalid before the 1998 amendments, and we will not consider that issue now.

[5] [¶ 21] After the trial court issued its decision, the Hammons attempted to raise their questions about the A.C.C. membership through motions. Then they withdrew their motions. FNI Those motions did not timely raise *1157 an issue that should have been presented before trial. A motion to alter or amend "cannot be used to raise arguments which could, and should, have been made before judgment issued." Beyah v. Murphy, 825 F.Supp. 213, 214 (E.D.Wis.1993); F.D.I.C. v. World University Inc., 978 F.2d 10, 16 (1st Cir.1992). Further, Appellants withdrew the motions. A motion withdrawn leaves the record as it stood prior to the filing of the motion, i.e., as though it had not been made. In re Stoute, 91 A.D.2d 1043, 458 N.Y.S.2d 640, 641 (1983); People v. Steinhoff, 38 Mich.App. 135, 195 N.W.2d 780, 781 (1972); 56 Am.Jur.2d Motions, Rules, and Orders § 32 (2000).

FN1. The withdrawal of the Hammons' post-trial motions is not a direct issue in this case. We note, however, that the Hammons incorrectly believed they could not appeal while a motion was pending. The Hammons relied on Rutledge v. Vonfeldt, 564 P.2d 350 (Wyo.1977) for this belief. We decided Rutledge before adopting the Wyoming Rules of Appellate Procedure. WRAP 2.04 solves the Hammons' concerns under Rutledge by preserving the effect of a premature notice of appeal.

Did the Trial Court Properly Hold that the Actions of the Architectural Control Committee in Disapproving the Hammons' Proposed Home was Reasonable and Made In Good Faith?

[6][7] [¶ 22] Covenants "are contractual in nature and are to be interpreted in accordance with the principles of contract law." McHuron v. Grand Teton Lodge Company, 899 P.2d 38, 40 (Wyo.1995) (citing Kindler v. Anderson, 433 P.2d 268 (Wyo.1967)). The district court invalidated the 1998 covenants because of procedural defects in the amendment process. Neither side appealed that ruling. Consequently, the prior covenants remained effective. They said:

Authority: No structure, including walls and fences shall be erected, converted, placed, added to or altered on any lot until the construction plans, specification (to include samples of exterior materials and colors to be used) and a plan showing the location of the structure have been approved in writing by the Architectural Control Committee. Consideration will be given to quality of workmanship and materials, harmony of external design with existing structure, location with respect to other structures (actual and planned), topography and to finished grade elevation. Disapproval of plans and specifications may be based on any grounds including purely aesthetic grounds. Structural color schemes will be compatible with the natural environment of the subdivision. Natural or earth colors will be

required. [Emphasis added.]

[¶ 23] "Aesthetic grounds," should not be a carte blanche for arbitrary use of power by a homeowners' association. By that same token, courts should not be arbiters of taste. The majority approach in other states requires decisions under a consent-to-build covenant to be reasonable, e.g., Riss v. Angel, 131 Wash.2d 612, 934 P.2d 669, 678 (1997); Trieweiler v. Spicher, 254 Mont. 321, 838 P.2d 382, 385 (1992) (citing nine cases from eight states); see also McHuron, 899 P.2d at 43-44 (Golden, C.J., dissenting) (discussing the reasonableness approach). We adopt the requirement of reasonableness, even if the covenants do not specifically impose such a requirement.

[¶ 24] The trial court properly reviewed the A.C.C.'s denial of the Hammons' plans to determine if that decision was reasonably made. The trial court's finding of reasonableness was a finding of fact. *Trieweiler*, 838 P.2d at 385. That finding of fact will be upheld unless it is clearly erroneous. *Mathis*, 962 P.2d at 163. Such error is absent here.

[¶ 25] The district court found that, "[t]he decision of the A.C.C. was not based upon caprice, but was a good faith attempt to carry out the original intent of the developers of the subdivision." The court then went on to discuss the incompatibility between the Hammons' proposed prefabricated home and the character of the subdivision. There was evidence directly supporting the trial court's finding. A vast majority of the other homes in the subdivision were not modulars. Witnesses established that additional modulars would negatively impact the value of existing homes and would change the nature of the subdivision. The A.C.C. did not single out the Hammons for rejection, but consistently denied applications to erect modular homes. *1158 This Court will not substitute its judgment on the value of this evidence for that of the A.C.C. or the trial court. The trial court's finding of reasonableness was not clearly erroneous. We affirm the trial court's finding that the A.C.C. acted reasonably.

[¶ 26] The Hammons argue that the district court improperly employed a test that balanced their interests against TMROA's interests when it determined reasonableness. Although the district court's decision letter stated that "their (Hammons') plight ... must be ... weighed against the aspirations of the homeowners ..." and found in favor of TMROA "after weighing the factors," it did not employ a balancing of interests test. The "weighing" language does not demonstrate a balancing test, but only shows the trial court's serious consideration of the positions taken by each side. The district court's decision letter properly addresses the legal standard for enforceability of an aesthetic covenant. It discusses evidence that supports reasonableness in the A.C.C.'s decision.

CONCLUSION

[¶ 27] Sufficient evidence supports the trial court's findings that the aesthetic covenant was not abandoned, and that the A.C.C. of TMROA acted reasonably when it denied the Hammons' application to install a modular home. The Hammons did not claim that the A.C.C. membership was improper in the trial court, and this Court will not consider that new issue now. The judgment of the district court is affirmed.

Wyo.,2003. Hammons v. Table Mountain Ranches Owners Ass'n, Inc. 72 P.3d 1153, 115 A.L.R.5th 777, 2003 WY 85

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EXHIBIT D

Westlaw.

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C

Supreme Court of Pennsylvania. ALTŞMAN

KELLY et al. (three cases).

Appeal of EXHIBITORS SERVICE CO.

Appeal of KELLY.

Nov. 27, 1939.

Appeals Nos. 253-255, March term, 1939, from judgment of Court of Common Pleas, Allegheny County, at No. 2898 April term, 1937; Thomas M. Marshall, Judge.

Three actions in trespass by Irene E. Altsman against Raymond P. Kelly and Exhibitors Service Company for injuries received by plaintiff when struck by truck driven by the defendant Raymond P. Kelly and owned by the corporate defendant. Judgment for plaintiff on a verdict for \$16,000, and the defendants appeal.

Affirmed.

West Headnotes

[1] Automobiles 48A € 244(6)

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(B) Actions 48Ak241 Evidence 48Ak244 Weight and Sufficiency 48Ak244(2) Negligence 48Ak244(6) k. Injuries to Per-

sons on Foot. Most Cited Cases

Automobiles 48A 244(35)

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(B) Actions
48Ak241 Evidence
48Ak244 Weight and Sufficiency
48Ak244(35) k. Speed and Control.
Most Cited Cases

Evidence justified judgment against truck owner and truck driver for injuries received by pedestrian when struck by truck at intersection on ground that truck driver crossed intersection at speed in excess of 30 miles an hour, went through red traffic signal, was driving to left of the regular traffic lane, failed to observe presence of pedestrian rightfully

on crosswalk in time to avoid striking her, and

[2] Automobiles 48A € 160(3)

swerved truck suddenly in her direction.

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(A) Nature and Grounds of Liability
48Ak160 Persons on Foot in General
48Ak160(3) k. Lights, Signals, and
Lookouts. Most Cited Cases

Automobiles 48A \$\infty\$ 168(6)

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(A) Nature and Grounds of Liability 48Ak168 Excessive Speed, Control, and Racing

48Ak168(6) k. Intersections and Crossings. Most Cited Cases

On approaching intersection, truck driver had duty to maintain high degree of vigilance to anticipate presence of pedestrians within intersection and to have truck under such control that he could stop at shortest possible notice or alter its direction in order to avoid striking persons committed to the crossing.

[3] Automobiles 48A \$\infty\$ 160(4)

9 A.2d 423 336 Pa. 481, 9 A.2d 423 (Cite as: 336 Pa. 481, 9 A.2d 423) Page 2

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(A) Nature and Grounds of Liability
48Ak160 Persons on Foot in General
48Ak160(4) k. Crossing Street or Way.
Most Cited Cases

Automobiles 48A \$\infty\$ 217(5)

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(A) Nature and Grounds of Liability
48Ak202 Contributory Negligence
48Ak217 Persons Crossing Highway
48Ak217(5) k. Duty to Stop, Look,
and Listen. Most Cited Cases

A pedestrian crossing intersection with the green traffic light in his favor does not have an absolute right of way for the full distance of the crossing, and must continually be on guard for his safety.

[4] Automobiles 48A \$\infty\$ 160(4)

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(A) Nature and Grounds of Liability
48Ak160 Persons on Foot in General
48Ak160(4) k. Crossing Street or Way.
Most Cited Cases

A pedestrian crossing intersection in crosswalk with traffic light in her favor had superior right of way over truck approaching from her right where traffic light remained in favor of pedestrian until truck struck her.

[5] Automobiles 48A € 240(2)

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(B) Actions 48Ak236 Pleading 48Ak240 Issues, Proof, and Variance 48Ak240(2) k. Evidence Admissible Under Pleading. Most Cited Cases

In action for injuries received by pedestrian when struck by truck at intersection, admission of testimony with respect to truck driver's disregard of red traffic signal at intersection under general allegation of statement of claim was not error as against contention that charge of negligence should have been specifically pleaded, since evidence was relevant not only as to truck driver's negligence, but also with respect to question of contributory negligence.

[6] Automobiles 48A € 217(5)

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(A) Nature and Grounds of Liability
48Ak202 Contributory Negligence
48Ak217 Persons Crossing Highway
48Ak217(5) k. Duty to Stop, Look,
and Listen. Most Cited Cases

Automobiles 48A € 245(72)

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(B) Actions

48Ak245 Questions for Jury
48Ak245(67) Contributory Negligence
48Ak245(72) k. Persons on Foot in
General, Most Cited Cases

Although a pedestrian is required to exercise continued vigilance in crossing a street, he is not required to look constantly for approaching traffic, but just where he should look depends on shifting conditions and is fact question, especially where pedestrian is invited to cross by a favorable traffic signal.

[7] Automobiles 48A \$\infty\$ 245(72)

48A Automobiles

48AV Injuries from Operation, or Use of High-

9 A.2d 423 336 Pa. 481, 9 A.2d 423 (Cite as: 336 Pa. 481, 9 A.2d 423)

way

48AV(B) Actions
48Ak245 Questions for Jury
48Ak245(67) Contributory Negligence
48Ak245(72) k. Persons on Foot in
General. Most Cited Cases

A pedestrian who entered crosswalk at intersection when traffic signal was in her favor was not negligent as matter of law in proceeding toward opposite corner after seeing approaching truck, since pedestrian had right to rely on assumption that truck driver would not ignore traffic signal or pedestrian's rightful presence on the crosswalk.

[8] Automobiles 48A \$\infty\$ 245(6)

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(B) Actions 48Ak245 Questions for Jury

48Ak245(2) Care Required and Negli-

gence

48Ak245(6) k. Persons on Foot. Most Cited Cases

Automobiles 48A € 245(72)

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(B) Actions

48Ak245 Questions for Jury 48Ak245(67) Contributory Negligence 48Ak245(72) k. Persons on Foot in

General. Most Cited Cases

In action against truck driver and truck owner for injuries received by pedestrian when struck by truck at intersection which pedestrian entered after looking carefully in both directions and in reliance on favorable traffic signal, questions of truck driver's negligence and pedestrian's contributory negligence were for jury.

[9] Judgment 228 🖘 564(1)

228 Judgment

228XIII Merger and Bar of Causes of Action and Defenses

228XIII(A) Judgments Operative as Bar 228k564 Finality of Determination 228k564(1) k. In General. Most Cited

Cases

By filing a motion to remove a nonsuit, the plaintiff submits the legal sufficiency of his case to the court in banc with the same effect as though the defendant had demurred to the evidence, and the determination of the motion is a "final judgment" and unless plaintiff appeals therefrom and secures its reversal the judgment is a bar to a second suit against the defendant on the same cause of action.

[10] Judgment 228 € 570(4)

228 Judgment

228XIII Merger and Bar of Causes of Action and Defenses

228XIII(A) Judgments Operative as Bar 228k570 Judgment on Discontinuance, Dismissal, or Nonsuit

228k570(4) k. Involuntary Dismissal or Nonsuit in General. Most Cited Cases

The effect of the withdrawal of a motion to remove a nonsuit was to place the record where it stood prior to the filing of the motion as though it had not been made and left on the record merely the entry of the nonsuit, the mere existence of which unaccompanied by refusal of the court in banc to take it off could not have the effect of "res judicata" as to a second suit.

[11] Judgment 228 €== 570(4)

228 Judgment

228XIII Merger and Bar of Causes of Action and Defenses

228XII(A) Judgments Operative as Bar 228k570 Judgment on Discontinuance, Dismissal, or Nonsuit

228k570(4) k. Involuntary Dismissal or Nonsuit in General. Most Cited Cases

The mere entry of a nonsuit does not bar the

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right to bring a subsequent action.

[12] Judgment 228 € 570(4)

228 Judgment

228XIII Merger and Bar of Causes of Action and Defenses

228XIII(A) Judgments Operative as Bar 228k570 Judgment on Discontinuance, Dismissal, or Nonsuit

228k570(4) k. Involuntary Dismissal or Nonsuit in General. Most Cited Cases

In action for injuries, refusal to admit in evidence on issue of res judicata, record of prior action on same cause of action wherein trial judge entered compulsory nonsuit at conclusion of plaintiff's testimony and plaintiff filed motion to remove nonsuit which was argued before court in banc but, before decision was rendered, order granting leave to withdraw motion to remove nonsuit was granted, was not error.

[13] Evidence 157 € 207(1)

157 Evidence

157VII Admissions

157VII(A) Nature, Form, and Incidents in General

157k206 Judicial Admissions 157k207 In General

157k207(1) k. In General. Most

Cited Cases

In action for injuries, record of prior action on same cause of action in which trial court entered compulsory nonsuit and plaintiff filed motion to remove nonsuit which motion was withdrawn by leave of court was properly rejected as an "admission," since discontinuance does not constitute either an adjudication of the party's right of action or an acknowledgment that the claim is not good in law.

[14] Pretrial Procedure 307A 517.1

307A Pretrial Procedure 307AIII Dismissal 307AIII(A) Voluntary Dismissal 307Ak517 Effect

307Ak517.1 k. In General. Most Cited

Cases

(Formerly 307Ak517, 128k42 Dismissal and Nonsuit)

In action for injuries, contention that order granting leave to withdraw and discontinue motion to take off nonsuit in prior action on same cause of action was invalid because it was granted by trial judge alone, was not available, since if defendants believed discontinuance to have been irregular they should have petitioned court in prior action to strike it off, and could not attack its validity collaterally in subsequent action.

[15] Appeal and Error 30 € 1069.3

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)19 Conduct and Deliberations of

Jury

30k1069.3 k. Recalling Jury and Further Instructions. Most Cited Cases

(Formerly 30k1069(3))

In action for injuries, that additional instructions were given by trial court to jury at their written request in absence of counsel for parties was not harmful to defendant so as to warrant granting of new trial, where in open court and in presence of all parties and counsel trial judge again instructed jury in response to question which it had asked, and defendants were given full opportunity to suggest corrections.

*482 **424 Argued before KEPHART, C. J., and SCHAFFER, MAXEY, LINN, STERN, and BARNES, JJ.*483 E. O. Golden, of Kittanning, and A. E. Kountz and Kountz & Fry, all of Pittsburgh, for appellants.

Bloom & Bloom, of Washington, Arnold J. Lange, of Pittsburgh, and George I. Bloom, of Washington, for appellee.

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BARNES, Justice.

On March 2, 1936, about eleven o'clock in the evening, plaintiff, while crossing the intersection of Fifth and Bellefield Avenues, in the City of Pittsburgh, was struck and severely injured by an automobile truck owned by the defendant company, and operated by its employee, the individual defendant. Fifth Avenue, a main thoroughfare for traffic, with double street car tracks thereon, runs approximately east and west at the place where the accident occurred, and is intersected diagonally by Bellefield Avenue, which extends generally north and south. The crosswalk for pedestrians from the southwest to the northwest corners of the intersection is upon an angle toward the east, and is 71 feet in length, although Fifth Avenue is only 48 feet from curb to curb. The double tracks, totaling 14 feet 4 inches in width, are 21 feet from the south curb, and approximately 13 feet from the north curb of Fifth Aven-ue.

The plaintiff testified that she had been a passenger on an eastbound Fifth Avenue trolley car, and had alighted *484 therefrom when the car made its stop at Bellefield Avenue. She then walked to the southwest corner, where she waited until the trolley car passed, and the traffic light turned green for Bellefield Avenue. After looking to the left and observing that there was no oncoming traffic, she looked to her right or east, where she had a view for a distance of 320 feet to the point where Fifth Avenue curves toward the east, and there likewise the way was clear of vehicles. She started across the intersection to the northwest corner. As she neared the first rail of the trolley tracks, she looked again, **425 and this time she noticed automobile headlights approaching from her right, about 300 feet distant. She continued to advance, directing her attention to the crosswalk upon which she was walking, which was rough and slippery from a recent rain, and at the same time watching for traffic upon Fifth Avenue.

She further testified that when she was between the second and third rails of the tracks she glanced again to the right and saw the defendant's truck bearing down upon her about 19 feet away, traveling west on Fifth Avenue. She thrust herself forward in an effort to escape injury, but the truck suddenly swerved and struck her with such force that she was hurled twenty feet from the place of impact. The truck was running upon the first or south rail of the tracks, over which plaintiff had just passed, and was, in consequence, upon the left or wrong side of Fifth Avenue, according to the direction in which it was proceeding.

Two disinterested witnesses corroborated plaintiff's testimony that the traffic light was green for Bellefield Avenue, and in plaintiff's favor, from the time she left the southwest curb until she was struck. It turned red for Bellefield Avenue almost immediately after the accident. These witnesses also said that at the time she was struck, plaintiff was walking upon the usual pedestrian crossing from the southwest to the northwest corners of the intersection. One of the witnesses, who *485 was operating her car on Fifth Avenue in the same direction as and immediately behind defendant's truck, stated that the light did not turn green for Fifth Avenue traffic until her own car reached the intersection. She said that just prior thereto the truck had passed her upon the left at a time when she was driving astride the north rail on Fifth Avenue. Her speed was then thirty to thirty-five miles an hour, and she testified that the truck had overtaken and passed her, continuing ahead at a greater speed.

As a result of the injuries received the plaintiff is permanently disabled, and prevented from engaging in any gainful occupation. After trial in the court below the case was submitted to the jury which rendered a verdict for plaintiff. Defendants' motions for new trial and for judgment non obstante veredicto were overruled by the court in banc, and judgment having been entered upon the verdict, these appeals followed.

The defendants' contentions are (1) that there is insufficient evidence of negligence on the part of the driver of the truck to entitle plaintiff to recover;

9 A.2d 423 336 Pa. 481, 9 A.2d 423 (Cite as: 336 Pa. 481, 9 A.2d 423)

(2) that plaintiff was guilty of contributory negligence.

[1][2] A review of the record convinces us that the charge of negligence against the defendants is fully sustained by the evidence. The jury was justified in finding that the defendant driver crossed the intersection at a speed in excess of thirty miles an hour, that he went through a red light, that he was driving to the left of the regular traffic lane, that he failed to observe the presence of pedestrian rightfully on the crosswalk in time to avoid striking her, and that he swerved the truck suddenly in her direction. On approaching the crossing it was his duty, as we have so often said, to maintain a high degree of vigilance, to anticipate the presence of pedestrians within the intersection and to have his car under such control that he could stop at the shortest possible notice, or alter its direction, in order to avoid striking persons committed to the crossing. *486 Newman v. Protective M. S. Co., 298 Pa. 509, 148 A. 711; Ferguson v. Chris, 314 Pa. 164, 170 A. 131; Goodall v. Hess, 315 Pa. 289, 172 A. 693; MacDougall v. American Ice Co., 317 Pa. 222, 176 A. 428; Smith v. Wistar, 327 Pa. 419, 194 A. 486; Smith v. Shatz, 331 Pa. 453, 200 A. 620.

[3][4] While a pedestrian crossing an intersection with a green traffic light in his favor does not have an absolute right of way for the full distance of the crossing, and must continually be upon guard for his safety, Schroeder v. Pittsburgh Rys. Co., 311 Pa. 398, 165 A. 733; Jones v. Pittsburgh Rys. Co., 312 Pa. 450, 167 A. 332; Dando v. Brobst, 318 Pa. 325, 177 A. 831, here no testimoney was offered to support the defendants' contention that the plaintiff failed to exercise the degree of watchfulness required of pedestrians under such circumstances, or that she carelessly stepped into the path of approaching danger. Under the facts here appearing, the plaintiff had the superior right of way; for the traffic light was in her favor until the vehicle struck her. Maselli v. Stephens, 331 Pa. 491, 495, 200 A. 590.

[5] Defendants objected to the admission of

any testimony with respect to the disregard by the driver of the truck of the red traffic signal at the intersection, under the general allegations plaintiff's statement of claim. They assert that this **426 charge of negligence should have been specifically pleaded, if it were to proved. We find no merit in this contention. The averments of the statement are sufficiently broad to include this evidence, and it was not error to permit it to be introduced. McNulty v. Joseph Horne Co., 298 Pa. 244, 148 A. 105. See also Nark v. Horton Motor Lines, Inc., 331 Pa. 550, 1 A.2d 655; Lynch v. Bornot, Inc., 120 Pa.Super. 242, 182 A. 49. It was relevant not only as to defendants' negligence, but also with respect to the question of plaintiff's contributory negligence, for the presence of a traffic signal has an important bearing upon the pedestrian's duty of care. See Newman v. Protective M. S. Co., supra, 298 Pa. at page 512, 148 A. at page 711.

[6] Under the evidence plaintiff cannot be held contributorily negligent as a matter of law. It is clear from the record that she looked carefully before entering upon *487 the crossing, that she proceeded across in reliance upon a favorable traffic signal, that she kept to the crosswalk, and that she looked at least twice again as she advanced to the opposite side. While a pedestrian is required to exercise continued vigilance in crossing a street, he is not required to look constantly for approaching traffic. Healy v. Shedaker, 264 Pa. 512, 107 A. 842. 'Just where he should look depends upon shifting conditions and is a question of fact rather than of law'. Mackin v. Patterson, 270 Pa. 107, 110, 112 A. 738, 740. And especially is this so when the pedestrian is invited to cross by a favorable traffic signal. Newman v. Protective M. S. Co., supra, 298 Pa. at page 512, 148 A. at page 711.

[7][8] Moreover, it does not appear from the evidence that plaintiff was negligent in proceeding toward the opposite corner after seeing the truck approaching. Lamont v. Adams Express Co., 264 Pa. 17, 107 A. 373. She had the right to rely upon the assumption that the operator of the truck would

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not ignore the traffic signal, and her own rightful presence upon the crosswalk. Villiger v. Yellow Cab Co. of Pittsburgh, 309 Pa. 213, 163 A. 537; Smith v. Wister, supra. Clearly this was a case for the jury to determine whether the driver exercised the degree of care required of him at a street crossing, and whether any lack of care on the part of plaintiff contributed to the accident. Gilles v. Leas, 282 Pa. 318, 127 A. 774. The jury having determined both questions in favor of plaintiff, we see no reason to disturb its findings.

A further question remains for discussion. Prior to bringing the present suit plaintiff sued the defendants upon the same cause of action to recover damages for the same injuries. In the trial of the first suit, at the conclusion of plaintiff's testimony, the trial judge entered a compulsory nonsuit. Thereafter the plaintiff filed a motion to remove the nonsuit, which was argued before the court in banc. Before a decision was rendered, however, plaintiff's attorney at the time, who is now deceased, presented an application to withdraw the motion to take off the nonsuit, and an order granting*488 leave to do so was signed 'By the Court'. The costs in that proceeding were paid and the following day the present suit was instituted.

At the trial of this case the defendants offered in evidence the entire record of the former suit on the ground that it constituted a bar to the present suit under the doctrine of res judicata, and that, in any event, it was proper evidence as an admission by the plaintiff, that by not pressing the motion to take off the nonsuit, the action of the trial judge in the first case was proper. Both offers were rejected by the trial judge, and the evidence was not received.

[9] By filing a motion to remove a nonsuit, the plaintiff submits the legal sufficiency of his case to the court in banc, with the same effect as though the defendant had demurred to the evidence. Its determination is a final judgment, and unless the plaintiff appeals therefrom and secures its reversal, that judgment is bar to a second suit against the de-

fendant upon the same cause of action. Finch v. Conrade's Ex'r, 154 Pa. 326, 328, 26 A. 368; Scanlon v. Suter, 158 Pa. 275, 27 A. 963; Hartman v. Pittsburgh Incline Plane Co., 159 Pa. 442, 28 A. 145; Fine v. Soifer, 288 Pa. 164, 135 A. 742.

[10] This well settled rule is without application to the question here presented, because the motion to remove the nonsuit was withdrawn before it was acted upon by the court in banc. The effect of the withdrawal of the motion was to place the record where it stood prior to the filing of the motion,-as though it had not been made. Farne v. Penna. Lighting Co., 275 Pa. 444, 119 A. 537. In other words, it left upon **427 the record merely the entry of a compulsory nonsuit, the existence of which, unaccompanied by a refusal of the court in banc to take it off, could not have the effect of res judicata as to a second suit. Bliss v. Phila. Rapid Trans. Co., 73 Pa. Super. 173. See also Bournonville v. Goodall, 10 Pa. 133; Fitzpatrick v. Riley, 163 Pa. 65, 29 A. 783.

[11][12][13] *489 The mere entry of a nonsuit does not bar the right to bring a subsequent action. Bournonville v. Goodall, supra; Cleary v. Quaker City Cab Co., 285 Pa. 241, 132 A. 185; Fine v. Soifer, supra. Accordingly, as the record in the first case is devoid of any judgment that operates as a bar to the institution of this suit by the plaintiff, it contained nothing that was relevant in support of the defendants' plea of res adjudicata. Therefore the action of the trial judge in refusing its admission was proper. As a discontinuance does not constitute either an adjudication by an appropriate tribunal, of a party's right of action or an acknowledgment that the claim is not good in law, Sweigart v. Frey, 8 Serg. & R. 299, it was proper here to reject the record as an admission.

[14] Finally, it is urged by defendants in this connection that the order granting leave to withdraw and discontinue the motion to take off the nonsuit was invalied because it was granted by the trial judge alone. Defendants assert that once the motion to withdraw was submitted to the court in

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banc, it could be withdrawn and discontinued only with the consent of that body, and the order of a single judge was accordingly insufficient and invalied. This contention, however, is not supported by the record. It appears that the order was signed 'By the Court', and there is no indication upon its face that it was improperly entered. If the defendants believed the discontinuance to have been irregular, they should have petitioned the court below, in the first suit, to strike it off. They cannot attack its validity collaterally in the present case. In Lindsay v. Dutton, 217 Pa. 148, at page 149, 66 A. 250, at page 251, we said: 'If the discontinuance was improperly or illegally entered the defendant should have applied to the court to strike it off. So long as the record of that case shows that the suit has been discontinued, we must, in this action, treat it as having been regularly and legally done.'

[15] There is no merit in defendants' complaint that they were prejudiced because certain additional instructions *490 were given by the trial judge to the jury, at their written request, in the absence of counsel for the parties. Thereafter, in open court, and in the presence of all parties and counsel, the trial judge again instructed the jury in response to the question which it had asked. It clearly appears that defendants were given full opportunity to suggest corrections or modifications with respect to the additional charge. Under these circumstances no harm was done defendants and we find nothing to warrant the granting of a new trial for such reason. Cunningham v. Patton, 6 Pa. 355; Allegro v. Rural Valley Mut. Fire Ins. Co., 268 Pa. 333, 112 A. 140. See also Noreika v. Penna. Indemnity Corp., 135 Pa.Super. 474, 5 A.2d 619.

The assignments of error are overruled and the judgment is affirmed.

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EXHIBIT

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United States District Court, E.D. California. David F. JADWIN, D.O., Plaintiff, v. COUNTY OF KERN, Defendant.

No. 1:07--CV-00026--OWW-DLB. Jan. 24, 2011.

Background: Former employee brought action alleging that county and its employees retaliated and discriminated against him in contravention of Due Process Clause, Family and Medical Leave Act (FMLA), California Fair Employment and Housing Act (FEHA), and California Family Rights Act (CFRA). After jury entered verdict in employee's favor, employee moved for attorney fees, costs, and prejudgment interest, and defendants moved for new trial and to amend judgment.

Holdings: The District Court, Oliver W. Wanger, J., held that:

- (1) improper comments by employee's counsel did not so permeate trial that jury was necessarily prejudiced;
- (2) employee's claims did not violate primary rights doctrine;
- (3) appropriate rate of prejudgment interest was average of federal prime rate and state statutory rate;
- (4) documentary evidence submitted by employee's counsel was inadequate to support attorney fee petition;
- (5) hours claimed by counsel in researching and drafting complaint and its subsequent amendments and supplements were excessive;
- (6) employee was not entitled to recover attorney fees incurred in connection with his unsuccessful motions for reconsideration;
- (7) Fresno Division, rather than Sacramento Division, was relevant legal community to be used in selecting appropriate hourly rates; and
- (8) no fee multiplier was warranted.

Motions granted in part and denied in part.

West Headnotes

[1] Federal Civil Procedure 170A € 2331

170A Federal Civil Procedure 170AXVI New Trial 170AXVI(B) Grounds 170Ak2331 k. In general. Most Cited Cases

Federal Civil Procedure 170A 2339

170A Federal Civil Procedure
170AXVI New Trial
170AXVI(B) Grounds
170Ak2338 Verdict or Findings Contrary to
Law or Evidence

170Ak2339 k. Weight of evidence. Most Cited Cases

New trial may be granted only if, after weighing evidence as court saw it, verdict is contrary to clear weight of evidence, is based upon false or perjurious evidence, or to prevent miscarriage of justice. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.

[2] Federal Civil Procedure 170A € 2332

170A Federal Civil Procedure 170AXVI New Trial 170AXVI(B) Grounds

170Ak2332 k. Misconduct of parties, counsel or witnesses. Most Cited Cases

Decision whether misconduct of trial counsel has been so egregious to require new trial is committed to court's broad discretion. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.

[3] Federal Civil Procedure 170A 2332

170A Federal Civil Procedure
170AXVI New Trial
170AXVI(B) Grounds
170Ak2332 k. Misconduct of parties, counsel or witnesses. Most Cited Cases

Improper comments by counsel for former county employee concerning county's size and available resources did not so permeate trial that jury was necessarily prejudiced, and thus did not warrant new trial in em-

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ployee's action against county alleging unlawful discrimination and retaliation, where court sua sponte instructed jury to disregard counsel's statement about size and county's power, comments were isolated rather than persistent, and occurred only during closing argument, and county's attorney failed to object, to seek additional instructions, or to move for mistrial. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.

[4] Federal Civil Procedure 170A \$\infty\$ 1974.1

170A Federal Civil Procedure 170AXV Trial 170AXV(A) In General

170Ak1974 Jury's Custody, Conduct and Deliberations

170Ak1974.1 k. In general. Most Cited Cases

Law presumes that jury carefully follows instructions given to it.

[5] Federal Civil Procedure 170A € 2332

170A Federal Civil Procedure 170AXVI New Trial 170AXVI(B) Grounds

170Ak2332 k. Misconduct of parties, counselor witnesses. Most Cited Cases

Plaintiff's attorneys' gesturing, grimacing, and scoffing during witness questioning did not deprive defendant of fair trial in discrimination action, and thus did not warrant new trial, where defendant's objections were made for first time in its motion for new trial, and defendant did not bring alleged misconduct to court's attention during trial. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.

[6] Federal Civil Procedure 170A € 2332

170A Federal Civil Procedure 170AXVI New Trial 170AXVI(B) Grounds

170Ak2332 k. Misconduct of parties, counsel or witnesses. Most Cited Cases

New trial should only be granted based on counsel's misconduct where flavor of misconduct sufficiently per-

meates entire proceeding to provide conviction that jury was influenced by passion and prejudice in reaching its verdict. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.

[7] Federal Civil Procedure 170A € 2332

170A Federal Civil Procedure 170AXVI New Trial 170AXVI(B) Grounds

170Ak2332 k. Misconduct of parties, counsel or witnesses. Most Cited Cases

Misconduct by plaintiff's counsel during trial in employment dispute did not so permeate trial as to constitute plain or fundamental error, and thus did not warrant new trial, even though counsel was admonished for making guttural sounds and making sarcastic remark to witness, where defense counsel's objections were sustained and jury was given curative instruction, defendant did not raise issue of cumulative prejudice and did not move for mistrial or request further jury instruction, discordant nature of counsel's examination of witnesses was often brought on by witnesses, and counsel's misstatements were due to his total inexperience as trial attorney and unfamiliarity with federal rules of evidence. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.

[8] Federal Civil Procedure 170A € 2332

170A Federal Civil Procedure 170AXVI New Trial 170AXVI(B) Grounds

170Ak2332 k. Misconduct of parties, counsel or witnesses. Most Cited Cases

Statements by plaintiff's attorney during closing arguments, in which he purportedly "equivocated" on plaintiff's claims, did not permeate trial and irreversibly prejudice defendant, and thus did not warrant new trial, where defendant did not object to comments and did not move for mistrial, and attorney's statements were indicative of his inexperience, not gross incompetence or intentional misconduct. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.

[9] Action 13 \$\infty\$ 38(1)

13 Action

767 F.Supp.2d 1069 (Cite as: 767 F.Supp.2d 1069)

13III Joinder, Splitting, Consolidation, and Sever- ance 13k38 Single and Entire Cause of Action in General

13k38(1) k. In general. Most Cited Cases Under California law, party may bring only one cause of action to vindicate primary right.

[10] Action 13 5 38(4)

13 Action

13III Joinder, Splitting, Consolidation, and Sever- ance 13k38 Single and Entire Cause of Action in General

13k38(4) k. Separate torts or wrongful acts and words of characterization. Most Cited Cases

Under California law, former employee suffered injury to more than one interest as result of employer's violations of Family and Medical Leave Act (FMLA), California Fair Employment and Housing Act (FEHA), and California Family Rights Act (CFRA), and thus employee's claims did not violate primary rights doctrine, where complaint identified five separate primary rights, and jury determined that employee experienced multiple violations of his different federal and state statutory rights. Family and Medical Leave Act of 1993, § 2 et seq., 29 U.S.C.A. § 2601 et seq.; West's Ann.Cal.Gov.Code §§ 12900 et seq., 12945.2.

[11] Interest 219 2 39(2.6)

219 Interest

219III Time and Computation

219k39 Time from Which Interest Runs in Gener-

al

219k39(2.5) Prejudgment Interest in General 219k39(2.6) k. In general. Most Cited Cases

Prejudgment interest is element of compensation, not penalty, and has primary goal of making aggrieved party whole.

[12] Interest 219 €==31

219 Interest

219II Rate

219k31 k. Computation of rate in general. Most Cited Cases

Appropriate rate of prejudgment interest in action alleging violations of Family and Medical Leave Act (FMLA), California Fair Employment and Housing Act (FEHA), and California Family Rights Act (CFRA) was average of federal prime rate and state statutory rate, where jury did not allocate amount of damages attributable to federal or state violations. 28 U.S.C.(1994 Ed.) § 1961; Family and Medical Leave Act of 1993, § 2 et seq., 29 U.S.C.A. § 2601 et seq.; West's Ann.Cal.Gov.Code §§ 12900 et seq., 12945.2; West's Ann.Cal.Civ.Code § 3287(a).

[13] Civil Rights 78 € 1483

78 Civil Rights

78111 Federal Remedies in General 78k1477 Attorney Fees

78k1483 k. Good or bad faith; misconduct. Most Cited Cases

Civil Rights 78 €== 1773

78 Civil Rights

78V State and Local Remedies

78k1771 Costs and Fees

78k1773 k. Employment practices. Most Cited Cases

Labor and Employment 231H €== 395

231H Labor and Employment

231HVI Time Off; Leave

231Hk381 Actions

231Hk395 k. Attorney fees. Most Cited Cases

Former county employee who prevailed in action alleging violations of Due Process Clause, Family and Medical Leave Act (FMLA), California Fair Employment and Housing Act (FEHA), and California Family Rights Act (CFRA) was not completely barred from receiving any attorney fee award due to his counsel's alleged misconduct during trial, where counsel's overall conduct as vigorous advocate did not raise to level of intentional bad faith misconduct. U.S.C.A.

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Const.Amend. 14; Family and Medical Leave Act of 1993, § 107(a)(3), 29 U.S.C.A. § 2617(a)(3); 42 U.S.C.A. § 1988; West's Ann.Cal.Gov.Code § 12965.

[14] Federal Civil Procedure 170A \$\infty\$2737.4

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorney Fees
170Ak2737.4 k. Amount and elements. Most Cited Cases

In determining reasonableness of attorney fee award, court should: (1) calculate lodestar figure by taking number of hours reasonably expended on litigation and multiplying it by reasonable hourly rate, and (2) adjust lodestar upward, via fee enhancer or "multiplier," or downward based on evaluation of certain factors, including, among other things, time and labor required, novelty and difficulty of questions involved, skill requisite to perform legal service properly, preclusion of other employment by attorney due to acceptance of case, and whether fee is fixed or contingent.

[15] Federal Civil Procedure 170A 2742.5

170A Federal Civil Procedure 170AXIX Fees and Costs 170Ak2742 Taxation

· 170Ak2742.5 k. Attorney fees. Most Cited Cases

Party seeking attorney fee enhancement bears burden of proof.

[16] Federal Civil Procedure 170A \$2742.5

170A Federal Civil Procedure 170AXIX Fees and Costs 170Ak2742 Taxation

170Ak2742.5 k. Attorney fees. Most Cited

Courts may reduce requested attorney fee award, or deny one altogether, where fee request appears unreasonably inflated.

[17] Federal Civil Procedure 170A 2742.5

170A Federal Civil Procedure

170AXIX Fees and Costs 170Ak2742 Taxation 170Ak2742.5 k. Attorney fees. Most Cited

Attorney fee applicant bears burden of documenting appropriate hours expended in litigation and must submit evidence in support of those hours worked.

[18] Federal Civil Procedure 170A € 2742.5

170A Federal Civil Procedure 170AXIX Fees and Costs 170Ak2742 Taxation 170Ak2742.5 k. Attorney fees. Most Cited Cases

Party opposing attorney fee application has burden of rebuttal that requires submission of evidence to district court challenging accuracy and reasonableness of hours charged or facts asserted by prevailing party in its submitted affidavits.

[19] Civil Rights 78 € 1490

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1490 k. Taxation. Most Cited Cases

Civil Rights 78 € 1773

78 Civil Rights
78V State and Local Remedies
78k1771 Costs and Fees
78k1773 k. Employment practices, Most Cited
Cases

Labor and Employment 231H € 395

231H Labor and Employment 231HVI Time Off; Leave 231Hk381 Actions

231Hk395 k. Attorney fees. Most Cited Cases
Documentary evidence submitted by plaintiff employee's counsel in action alleging violations of Due
Process Clause, Family and Medical Leave Act
(FMLA), California Fair Employment and Housing Act
(FEHA), and California Family Rights Act (CFRA) was

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inadequate to support attorney fee petition, even though counsel submitted voluminous billing records, where counsel failed to provide functional delineation of number of hours spent litigating case with description of services performed. U.S.C.A. Const.Amend. 14; Family and Medical Leave Act of 1993, § 107(a)(3), 29 U.S.C.A. § 2617(a)(3); 42 U.S.C.A. § 1988; West's Ann.Cal.Gov.Code § 12965.

[20] Federal Civil Procedure 170A €==2742.5

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2742 Taxation
170Ak2742.5 k. Attorney fees. Most Cited
Cases
When district court makes its attorney fee award, it

When district court makes its attorney fee award, it must explain how it came up with amount; explanation need not be elaborate, but it must be comprehensible.

[21] Civil Rights 78 🖘 1488

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1488 k. Time expended; hourly rates. Most Cited Cases

Civil Rights 78 €== 1490

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1490 k. Taxation. Most Cited Cases

Civil Rights 78 € 1773

78 Civil Rights
78V State and Local Remedies
78k1771 Costs and Fees
78k1773 k. Employment practices. Most Cited Cases

Labor and Employment 231H €==395

231H Labor and Employment 231HVI Time Off; Leave

231Hk381 Actions

231Hk395 k. Attorney fees. Most Cited Cases For purposes of calculating attorney fee award for prevailing plaintiff in action alleging violations of Due Process Clause, Family and Medical Leave Act (FMLA), California Fair Employment and Housing Act (FEHA), and California Family Rights Act (CFRA), 415 hours claimed by counsel in researching and drafting complaint and its subsequent amendments and supplements were excessive, and would be reduced to 120 hours; counsel's supporting documentation was incomplete and underdeveloped, complaint's various iterations were nearly identical and of limited complexity, statutes in question were customary and familiar to any employment lawyer in California, and case did not present any novel issues. U.S.C.A. Const.Amend. 14; Family and Medical Leave Act of 1993, § 107(a)(3), 29 U.S.C.A. § 2617(a)(3); 42 U.S.C.A. 1988; West's Ann.Cal.Gov.Code § 12965.

[22] Civil Rights 78 🗪 1486

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1486 k. Services or activities for which fees may be awarded. Most Cited Cases

Civil Rights 78 € 1773

78 Civil Rights
 78V State and Local Remedies
 78k1771 Costs and Fees
 78k1773 k. Employment practices. Most Cited
 Cases

Labor and Employment 231H € 395

231H Labor and Employment
231HVI Time Off; Leave
231Hk381 Actions
231Hk395 k. Attorney fees. Most Cited Cases
In calculating attorney fee award in former employee's action against employer alleging violations of Due
Process Clause, Family and Medical Leave Act
(FMLA), California Fair Employment and Housing Act

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(FEHA), and California Family Rights Act (CFRA), court would exclude time spent by employee's attorneys seeking reconsideration of court's determination that employer was entitled to present evidence of employee's purported misconduct to justify its adverse employment actions, where fact that law recognized employer's ability to assert such defense should have been abundantly clear to competent employment law counsel, issue was fully presented, and repeated reassertion of motions were meritless disguised motions for reconsideration. U.S.C.A. Const.Amend. 14; Family and Medical Leave Act of 1993, § 107(a)(3), 29 U.S.C.A. § 2617(a)(3); 42 U.S.C.A. § 1988; West's Ann.Cal.Gov.Code § 12965.

[23] Civil Rights 78 🗪 1486

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1486 k. Services or activities for which fees may be awarded, Most Cited Cases

Civil Rights 78 €==1773

78 Civil Rights
78V State and Local Remedies
78k1771 Costs and Fees
78k1773 k. Employment practices. Most Cited
Cases

Labor and Employment 231H €==395

231H Labor and Employment 231HVI Time Off; Leave 231Hk381 Actions

23·1Hk395 k. Attorney fees. Most Cited Cases Former employee's motion for reconsideration of court's denial of his request to telephonically appear at mandatory settlement conference and time spent drafting it were unreasonable and unjustified, and thus employee was not entitled to recover time spent preparing motion after prevailing in his action alleging violations of Due Process Clause, Family and Medical Leave Act (FMLA), California Fair Employment and Housing Act (FEHA), and California Family Rights Act (CFRA); court's standing order required presence of counsel and

client at settlement conference for good reason. U.S.C.A. Const.Amend. 14; Family and Medical Leave Act of 1993, § 107(a)(3), 29 U.S.C.A. § 2617(a)(3); 42 U.S.C.A. § 1988; West's Ann.Cal.Gov.Code § 12965.

[24] Civil Rights 78 \$\infty\$ 1486

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1486 k. Services or activities for which fees may be awarded. Most Cited Cases

Civil Rights 78 €== 1773

78 Civil Rights
78V State and Local Remedies
78k1771 Costs and Fees
78k1773 k. Employment practices. Most Cited Cases

Labor and Employment 231H €==395

231H Labor and Employment 231HVI Time Off; Leave 231Hk381 Actions

231Hk395 k. Attorney fees. Most Cited Cases Former employee who prevailed in his action against employer alleging violations of Due Process Clause, Family and Medical Leave Act (FMLA), California Fair Employment and Housing Act (FEHA), and California Family Rights Act (CFRA) was not entitled to recover attorney fees incurred in connection with his unsuccessful motions for reconsideration of magistrate judge's rulings, despite employee's contention that magistrate judge was biased against him and had issued controversial rulings, where employee's counsel's unduly contentious conduct during discovery and conflicts with opposing counsel made magistrate judge's intervention necessary on number of occasions, one motion was withdrawn, district judge denied motions, and motions demonstrated manifest confusion of relevant legal standards. U.S.C.A. Const.Amend. 14; Family and Medical Leave Act of 1993, § 107(a)(3), 29 U.S.C.A. § 42 U.S.C.A. 2617(a)(3); Ş 1988; West's Ann.Cal.Gov.Code § 12965,

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[25] Civil Rights 78 € 1486

78 Civil Rights
78111 Federal Remedies in General
78k1477 Attorney Fees
78k1486 k. Services or activities for which fees may be awarded. Most Cited Cases

Civil Rights 78 € 1773

78 Civil Rights
78V State and Local Remedies
78k1771 Costs and Fees

78k1773 k. Employment practices. Most Cited

Cases

Labor and Employment 231H €==395

231H Labor and Employment 231HVI Time Off; Leave 231Hk381 Actions

231Hk395 k. Attorney fees. Most Cited Cases

Co-counsel's presence at depositions was not necessary, and thus 30% reduction in time spent in depositions was warranted in calculating attorney fee award for prevailing plaintiff in action alleging violations of Due Process Clause, Family and Medical Leave Act (FMLA), California Fair Employment and Housing Act (FEHA), and California Family Rights Act (CFRA), where co-counsel did not separately pose questions, lodge objections, conduct deposition, or defend witness. U.S.C.A. Const.Amend. 14; Family and Medical Leave Act of 1993, § 107(a)(3), 29 U.S.C.A. § 2617(a)(3); 42 U.S.C.A. § 1988; West's Ann.Cal.Gov.Code § 12965.

[26] Civil Rights 78 € 1486

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1486 k. Services or activities for which fees may be awarded. Most Cited Cases

Civil Rights 78 €==1773

78 Civil Rights 78V State and Local Remedies 78k1771 Costs and Fees 78k1773 k. Employment practices, Most Cited Cases

Labor and Employment 231H €==395

231H Labor and Employment 231HVI Time Off; Leave 231Hk381 Actions

231Hk395 k. Attorney fees. Most Cited Cases Time spent by former county employee's attorney in conversations with television reporter and phone calls between attorneys to discuss employee's performance on television could not be included in calculating attorney fee award after employee prevailed in his action against county alleging violations of Due Process Clause, Family and Medical Leave Act (FMLA), California Fair Employment and Housing Act (FEHA), and California Family Rights Act (CFRA). U.S.C.A. Const.Amend. 14; Family and Medical Leave Act of 1993, § 107(a)(3), 29 U.S.C.A. § 2617(a)(3); 42 U.S.C.A. § 1988; West's Ann.Cal.Gov.Code § 12965.

[27] Civil Rights 78 €== 1486

78 Civil Rights
78111 Federal Remedies in General
78k1477 Attorney Fees
78k1486 k. Services or activities for which fees may be awarded. Most Cited Cases

Civil Rights 78 € 1773

78 Civil Rights
78V State and Local Remedies
78k1771 Costs and Fees
78k1773 k. Employment practices. Most Cited Cases

Labor and Employment 231H €= 395

231H Labor and Employment
231HVI Time Off; Leave
231Hk381 Actions
231Hk395 k. Attorney fees. Most Cited Cases
Time spent by counsel organizing and formatting
litigation software was properly recoverable in calculat-

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170A Federal Civil Procedure

ing attorney fee award for prevailing plaintiff in action alleging violations of Due Process Clause, Family and Medical Leave Act (FMLA), California Fair Employment and Housing Act (FEHA), and California Family Rights Act (CFRA). U.S.C.A. Const.Amend. 14; Family and Medical Leave Act of 1993, § 107(a)(3), 29 U.S.C.A. § 2617(a)(3); 42 U.S.C.A. § 1988; West's Ann.Cal.Gov.Code § 12965.

[28] Federal Civil Procedure 170A €==2737.4

170AXIX Fees and Costs 170Ak2737 Attorney Fees 170Ak2737.4 k. Amount and elements. Most Cited Cases

Secretarial time is part of attorney's overhead, and thus is not compensable in calculating attorney fee award.

[29] Labor and Employment 231H €==880

231H Labor and Employment 231HVIII Adverse Employment Action 231HVIII(B) Actions 231Hk878 Costs

231Hk880 k. Attorney fees. Most Cited

Cases

Former county employee who prevailed in his civil rights action against county was not entitled to recover attorney fees for time spent exploring possible whistleblower claims, where whistleblower claims and number of other claims advanced by employee shared common issues of fact, but employee failed to produce adequate billing records or demonstrate that fees sought were associated with successful claim. Family and Medical Leave Act of 1993, § 107(a)(3), 29 U.S.C.A. § 42 U.S.C.A. 2617(a)(3); 1988; δ Ann.Cal.Gov.Code § 12965; West's Ann.Cal.Health & Safety Code § 1278.5; West's Ann.Cal.Labor Code § 1102.5.

[30] Civil Rights 78 2 1488

78 Civil Rights
78III Federal Remedies in General

78k1477 Attorney Fees
78k1488 k. Time expended; hourly rates. Most Cited Cases

· Civil Rights 78 € 1490

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1490 k. Taxation. Most Cited Cases

Civil Rights 78 1773

78 Civil Rights
78V State and Local Remedies
78k1771 Costs and Fees
78k1773 k. Employment practices. Most Cited
Cases

Labor and Employment 231H 5395

231H Labor and Employment 231HVI Time Off; Leave 231Hk381 Actions

231Hk395 k. Attorney fees. Most Cited Cases For purposes of calculating attorney fee award for prevailing plaintiff in action alleging violations of Due Process Clause, Family and Medical Leave Act (FMLA), California Fair Employment and Housing Act (FEHA), and California Family Rights Act (CFRA), 319 hours claimed by counsel in preparing motions to compel or for protective orders were excessive, and would be reduced to 160 hours; time spent preparing motions to compel were required by deterioration of counsel's professional relationship with opposing counsel, and much of supporting documentation was missing or vague. U.S.C.A. Const.Amend. 14; Family and Medical Leave Act of 1993, § 107(a)(3), 29 U.S.C.A. § 2617(a)(3); 42 U.S.C.A. § 1988; West's Ann.Cal.Labor Code § 1102.5.

[31] Civil Rights 78 € 1486

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1486 k. Services or activities for which

767 F.Supp.2d 1069 (Cite as: 767 F.Supp.2d 1069)

fees may be awarded. Most Cited Cases

Former county employee who prevailed in his civil rights action against county was entitled to recover attorney fees for time spent satisfying administrative prerequisites for commencing litigation against county. 42 U.S.C.A. § 1988.

[32] Civil Rights 78 € 1488

78 Civil Rights 78III Federal Remedies in General 78k1477 Attorney Fees 78k1488 k. Time expended; hourly rates. Most Cited Cases

Civil Rights 78 €== 1773

78 Civil Rights 78V State and Local Remedies 78k1771 Costs and Fees 78k1773 k. Employment practices. Most Cited Cases

Labor and Employment 231H €=395

231H Labor and Employment 231HVI Time Off; Leave 231Hk381 Actions

231Hk395 k. Attorney fees. Most Cited Cases For purposes of calculating attorney fee award for prevailing plaintiff in action alleging violations of Due Process Clause, Family and Medical Leave Act (FMLA), California Fair Employment and Housing Act (FEHA), and California Family Rights Act (CFRA), 712.4 hours claimed by counsel in connection with parties' cross-motions for summary judgment were excessive, and would be reduced to 300 hours, even though motions totaled more than 2,000 pages, where arguments were neither novel nor innovative, more than 92% of dispositive motion briefing consisted of deposition testimony and discovery responses, counsel's lack of trial experience inflated total hours expended, and each party's motion was granted in part and denied in part. U.S.C.A. Const.Amend. 14; Family and Medical Leave Act of 1993, § 107(a)(3), 29 U.S.C.A. § 2617(a)(3); 42 U.S.C.A. § 1988; West's Ann.Cal.Labor

Code § 1102.5.

[33] Civil Rights 78 € 1488

78 Civil Rights 78III Federal Remedies in General 78k1477 Attorney Fees 78k1488 k. Time expended; hourly rates. Most Cited Cases

Civil Rights 78 1773

78 Civil Rights 78V State and Local Remedies 78k1771 Costs and Fees 78k1773. k. Employment practices. Most Cited Cases

Labor and Employment 231H € 395.

231H-Labor and Employment

231HVI Time Off; Leave 231Hk381 Actions 231Hk395 k. Attorney fees. Most Cited Cases For purposes of calculating attorney fee award for

prevailing plaintiff in action alleging violations of Due Process Clause, Family and Medical Leave Act (FMLA), California Fair Employment and Housing Act (FEHA), and California Family Rights Act (CFRA), 107 hours claimed by counsel preparing motions in limine were excessive, and would be reduced to 60 hours, where majority of plaintiff's motions in limine were boilerplate motions, and plaintiff did not prevail on most difficult and fact-intensive motions. U.S.C.A. Const.Amend. 14; Family and Medical Leave Act of 1993, § 107(a)(3), 29 U.S.C.A, § 2617(a)(3); 42 U.S.C.A. § 1988; West's Ann.Cal.Labor Code § 1102.5.

[34] Civil Rights 78 € 1488

78 Civil Rights 78III Federal Remedies in General 78k1477 Attorney Fees 78k1488 k. Time expended; hourly rates. Most Cited Cases

Civil Rights 78 € 1773

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78 Civil Rights 78V State and Local Remedies 78k1771 Costs and Fees 78k1773 k. Employment practices. Most Cited -Cases

Labor and Employment 231H € 395

231H Labor and Employment

231HVI Time Off; Leave 231Hk381 Actions 231Hk395 k. Attorney fees. Most Cited Cases For purposes of calculating attorney fee award for prevailing plaintiff in action alleging violations of Due

Process Clause, Family and Medical Leave Act (FMLA), California Fair Employment and Housing Act (FEHA), and California Family Rights Act (CFRA), 22 hours claimed by counsel preparing unauthorized response briefs were excessive, and would be reduced to 10 hours, where reply was not entirely helpful and contained very little legal analysis, U.S.C.A. Const.Amend. 14; Family and Medical Leave Act of 1993, § 107(a)(3), 29 U.S.C.A. § 2617(a)(3); 42 U.S.C.A. § 1988; West's Ann.Cal.Labor Code § 1102.5.

[35] Civil Rights 78 € 1488

78 Civil Rights 78III Federal Remedies in General 78k1477 Attorney Fees 78k1488 k. Time expended; hourly rates. Most Cited Cases

Civil Rights 78 € 1773

78 Civil Rights 78V State and Local Remedies 78k1771 Costs and Fees 78k1773 k. Employment practices. Most Cited Cases

Labor and Employment 231H €=>395

231H Labor and Employment 231HVI Time Off; Leave 231Hk381 Actions 231Hk395 k. Attorney fees. Most Cited Cases

Fifteen percent reduction of time spent by plaintiff's counsel preparing and attending trial was warranted in calculating attorney fee award for prevailing plaintiff in action alleging violations of Due Process Clause, Family and Medical Leave Act (FMLA), California Fair Employment and Housing Act (FEHA), and California Family Rights Act (CFRA), where there was some duplication of effort, and time requested included correspondence and time spent with television and print media reporters. U.S.C.A. Const.Amend. 14; Family and Medical Leave Act of 1993, § 107(a)(3), 29 U.S.C.A. § 2617(a)(3); 42 U.S.C.A. § 1988; West's Ann.Cal.Labor Code § 1102.5.

[36] Federal Civil Procedure 170A 2742.5

170A Federal Civil Procedure 170AXIX Fees and Costs 170Ak2742 Taxation 170Ak2742.5 k. Attorney fees, Most Cited Cases

To inform and assist court in exercise of its discretion, burden is on applicant for attorney fee award to produce satisfactory evidence, in addition to attorney's own affidavits, that requested rates are in line with those prevailing in community for similar services by lawyers of reasonably comparable skill, experience, and reputation.

[37] Federal Civil Procedure 170A 2737.4

170A Federal Civil Procedure 170AXIX Fees and Costs 170Ak2737 Attorney Fees 170Ak2737.4 k. Amount and elements. Most Cited Cases

"Relevant legal community" in lodestar calculation is generally forum in which district court sits, but another forum may be proper relevant community if local counsel was unavailable, either because they are unwilling or unable to perform because they lack degree of experience, expertise, or specialization required to handle properly case.

[38] Civil Rights 78 € 1488

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78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1488 k. Time expended; hourly rates. Most
Cited Cases

Civil Rights 78 € 1773

78 Civil Rights
78V State and Local Remedies
78k1771 Costs and Fees
78k1773 k. Employment practices. Most Cited
Cases

Labor and Employment 231H € 395

231H Labor and Employment 231HVI Time Off; Leave 231Hk381 Actions 231Hk395 k Attorne

231Hk395 k. Attorney fees. Most Cited Cases
Eastern District of California, Fresno Division,
rather than Sacramento Division, was relevant legal
community to be used in selecting appropriate hourly
rate to be used in lodestar calculation for determining
attorney fee award in former employee's action against
Kern County alleging violations of Due Process Clause,
Family and Medical Leave Act (FMLA), California Fair
Employment and Housing Act (FEHA), and California
Family Rights Act (CFRA), where employee had local
counsel before out-of-town counsel became involved,
and case was not legally complex. U.S.C.A.
Const.Amend. 14; Family and Medical Leave Act of
1993, § 107(a)(3), 29 U.S.C.A. § 2617(a)(3); 42
U.S.C.A. § 1988; West's Ann.Cal.Labor Code § 1102.5.

[39] Federal Civil Procedure 170A \$\infty\$2737.4

170A Federal Civil Procedure 170AXIX Fees and Costs 170Ak2737 Attorney Fees

170Ak2737.4 k. Amount and elements. Most Cited Cases

Reasonable hourly rate to be used in calculating prevailing party's attorney fee award is not made by reference to rates actually charged by prevailing party, attorney's undergraduate institution, or by number of

years spent as practicing lawyer; rather, reasonable hourly rate is determined by experience, skill, and reputation.

[40] Civil Rights 78 € 1488

78 Civil Rights
78111 Federal Remedies in General
78k1477 Attorney Fees
78k1488 k. Time expended; hourly rates. Most Cited Cases

Civil Rights 78 €== 1773

78 Civil Rights
78V State and Local Remedies
78k1771 Costs and Fees
78k1773 k. Employment practices. Most Cited Cases

Labor and Employment 231H €==395

231H Labor and Employment
231HVI Time Off; Leave
231Hk381 Actions
231Hk395 k. Attorney fees. Most Cited Cases
Hourly rate of \$275 for lead counsel was approp

Hourly rate of \$275 for lead counsel was appropriate for use in lodestar calculation to determine attorney fee award for former employee who prevailed in his action alleging violations of Due Process Clause, Family and Medical Leave Act (FMLA), California Fair Employment and Housing Act (FEHA), and California Family Rights Act (CFRA), even if attorney's actual hourly rate was \$400, where recovery was limited to approximately 12% of economic damages attorney requested from jury, case was attorney's first trial, attorney exhibited inexperience with Federal Rules of Civil Procedure, Rules of Evidence, federal and state legal frameworks and found it difficult to comply with court's rulings, and attorney was unjustifiably rude, argumentative, and unreasonable in his dealings with opposing counsel. U.S.C.A. Const.Amend. 14; Family and Medical Leave Act of 1993, § 107(a)(3), 29 U.S.C.A. § 2617(a)(3); 42 U.S.C.A. § 1988; West's Ann.Cal.Labor Code § 1102.5.

[41] Civil Rights 78 €== 1488

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78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1488 k. Time expended; hourly rates. Most
Cited Cases

Civil Rights 78 € 1773

78 Civil Rights
78V State and Local Remedies
78k1771 Costs and Fees
78k1773 k. Employment practices. Most Cited Cases

Labor and Employment 231H €= 395

231H Labor and Employment
231HVI Time Off; Leave
231Hk381 Actions
231Hk395 k. Attorney fees. Most Cited Cases
Hourly rate of \$350 for co-counsel was appropri
for use in lodestar calculation to determine attorney

Hourly rate of \$350 for co-counsel was appropriate for use in lodestar calculation to determine attorney fee award for former employee who prevailed in his action alleging violations of Due Process Clause, Family and Medical Leave Act (FMLA), California Fair Employment and Housing Act (FEHA), and California Family Rights Act (CFRA), despite attorney's request for \$450, where attorney prepared no independent work product and appeared before court only in limited role. U.S.C.A. Const.Amend. 14; Family and Medical Leave Act of 1993, § 107(a)(3), 29 U.S.C.A. § 2617(a)(3); 42 U.S.C.A. § 1988; West's Ann.Cal.Labor Code § 1102.5.

[42] Civil Rights 78 € 1488

78 Civil Rights
78111 Federal Remedies in General
78k1477 Attorney Fees
78k1488 k. Time expended; hourly rates. Most
Cited Cases

Civil Rights 78 € 1773

78 Civil Rights
78 V State and Local Remedies
78k1771 Costs and Fees
78k1773 k. Employment practices. Most Cited

. Cases

Labor and Employment 231H €=>395

231H Labor and Employment

231HVI Time Off; Leave
231Hk381 Actions
231Hk395 k. Attorney fees. Most Cited Cases
Hourly rate of \$295 for contract counsel was appropriate for use in lodestar calculation to determine attorney fee award for former employee who prevailed in his action alleging violations of Due Process Clause, Family and Medical Leave Act (FMLA), California Fair Employment and Housing Act (FEHA), and California Family Rights Act (CFRA). U.S.C.A. Const.Amend. 14; Family and Medical Leave Act of 1993, § 107(a)(3), 29 U.S.C.A. § 2617(a)(3); 42 U.S.C.A. § 1988; West's Ann.Cal.Labor Code § 1102.5.

[43] Civil Rights 78 € 1488

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1488 k. Time expended; hourly rates. Most
Cited Cases

Civil Rights 78 € 1773

78 Civil Rights
78V State and Local Remedies
78k1771 Costs and Fees
78k1773 k. Employment practices. Most Cited
Cases

Labor and Employment 231H €==395

231H Labor and Employment
231HVI Time Off; Leave
231Hk381 Actions
231Hk395 k. Attorney fees. Most Cited Cases
Hourly rate of \$380 for fee counsel was appropriate
for use in lodestar calculation to determine attorney fee
award for former employee who prevailed in his action
alleging violations of Due Process Clause, Family and
Medical Leave Act (FMLA), California Fair Employment and Housing Act (FEHA), and California Family

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(Cite as: 767 F.Supp.2d 1069)

Rights Act (CFRA). U.S.C.A. Const.Amend. 14; Family and Medical Leave Act of 1993, § 107(a)(3), 29 U.S.C.A. § 2617(a)(3); 42 U.S.C.A. § 1988; West's Ann.Cal.Labor Code § 1102.5.

[44] Federal Civil Procedure 170A € 2737.4

170A Federal Civil Procedure 170AXIX Fees and Costs 170Ak2737 Attorney Fees

170Ak2737.4 k. Amount and elements. Most Cited Cases

In determining whether it is necessary to adjust presumptively reasonable lodestar figure in calculating attorney fee award, court should consider: (1) results obtained by plaintiff's counsel; (2) skill and quality of representation; (3) novelty and difficulty of questions involved; (4) extent to which litigation precluded other employment by attorneys; and (5) case's contingent nature.

[45] Civil Rights 78 € 1487

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1487 k. Amount and computation. Most Cited Cases

Civil Rights 78 €== 1773

78 Civil Rights
78V State and Local Remedies
78k1771 Costs and Fees
78k1773 k. Employment practices. Most Cited
Cases

Labor and Employment 231H €==395

231H Labor and Employment 231HVI Time Off; Leave 231Hk381 Actions

No fee multiplier was warranted in determining reasonable attorney fee award for former employee who prevailed in his action against county alleging violations of Due Process Clause, Family and Medical Leave Act

(FMLA), California Fair Employment and Housing Act (FEHA), and California Family Rights Act (CFRA), even though attorney took case on contingency basis; recovery was limited to approximately 12% of economic damages requested from jury, attorney's inexperience and unduly disputatious nature required special judicial attention, case was garden-variety employment case, and attorney identified no cases or prospective clients that he had to turn away. U.S.C.A. Const.Amend. 14; Family and Medical Leave Act of 1993, § 107(a)(3), 29 U.S.C.A. § 2617(a)(3); 42 U.S.C.A. § 1988; West's Ann.Cal.Labor Code § 1102.5.

[46] Federal Civil Procedure 170A \$\infty\$ 2742.5

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2742 Taxation
170Ak2742.5 k. Attorney fees. Most Cited
Cases
Judges are experts in matter of attorney fees.

*1077 Eugene David Lee, Law Office Eugene Lee, Los Angeles, CA, Joan Herrington, Bay Area Employment Law Office, Oakland, CA, for Plaintiff.

Mark A. Wasser, Law Offices of Mark A. Wasser, Sacramento, CA, for Defendant.

MEMORANDUM DECISION RE: POST-TRIAL MO-TIONS (Docs. 424, 425) OLIVER W. WANGER, District Judge. I. INTRODUCTION.

This case arises out of Plaintiff's former employment at the Kern Medical Center, an acute care teaching hospital owned and operated by the County of Kern, California. Plaintiff David F. Jadwin, D.O. ("Plaintiff") claimed, among other things, that the County and its employees retaliated and discriminated against him in contravention of federal and state law. The employment issues were tried before the Court and a jury from May 14, 2009 to June 4, 2009. On June 5, 2009, the jury returned verdicts in favor of Plaintiff. On August 4, 2009, Findings of Fact and Conclusions of Law were issued on the claims tried to the court alone. On May 4, 2010,

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Final Judgment was entered in favor of Plaintiff and against Kern County in the amount of \$505,457, plus \$1 in nominal damages on his civil rights claim. At trial, Plaintiff requested over \$4.2 million in economic damages.

Before the Court for decision are several post-trial motions. Plaintiff has moved to amend the judgment to incorporate his bill of costs and for prejudgment interest. He has also moved to recover \$3,944,818.00 in attorneys' fees pursuant to 42 U.S.C. § 1988, 29 U.S.C. § 2617(a)(3) and California Government Code § 12965.

No Defendants*1078 have moved for a new trial under Rule 59(e) and, separately, to amend the judgment to reflect to reflect the dismissals of several individually-named defendants.

FN1. During the July 28, 2010 oral argument the Court noted that Plaintiff's fee motion was the highest it had received in over nineteen years:

I suppose it bears noting that in an application for fees, with the multiplier, this is the highest fee award that I've ever been asked to make in over 19 years. And that includes public interest cases involving water and the environment, where thousands of hours, water supply for most of the State of California is involved and legions of lawyers, approximately 30 to 40 representing the diverse interests in those cases have, under the Equal Access to Justice Act, sought fees against the United States under statutory authority. And the difference in the amount is a multiplier of at least three in this case over anything that's ever been requested, let alone awarded.

(RT, July 28, 2010, 121:4-121:15.)

Plaintiff requested \$3,944,818 in fees in his original motion, filed on June 1, 2010. (Doc. 425.)

Oral argument on these motions was held on July 28, 2010. The Court, pursuant to Moreno v. City of Sac-

ramento. 534 F.3d 1106 (9th Cir.2008), a Ninth Circuit case establishing the rules for evaluating an attorney's fee request under 42 U.S.C. § 1988, directed Plaintiff to supplement, organize, and refine his motion for attorneys' fees. FN2 In particular, it was determined that Plaintiff's counsel's documentary evidence concerning the hourly rates and tasks performed was materially non-specific and limited the district court's ability to meet Moreno's exacting and mandatory standards imposed on district judges for calculating fee awards. See id. at 1111 ("[w]hen the district court makes its award, it must explain how it came up with the amount. ") (emphasis added). FN3 Plaintiff filed his supplemental and reply briefs, more than 500 pages of argument and billing information, on August 16 and September 16, 2010. Defendants opposed the supplemental motion on September 3, 2010. The motions are now submitted for decision.

FN2. Supplemental briefing was also requested on the issue of prejudgment interest. (Doc. 440.) Plaintiff argues that prejudgment interest should be awarded on the entire jury award at the state law 7% interest rate. Defendants disagree.

FN3. For example, the Court, pursuant to a minute order, requested that counsel "include task and billing totals in their supplemental applications for attorneys fees." (Doc. 440.) However, Plaintiff's lead counsel, Mr. Eugene Lee, did not provide this itemized information in his supplemental briefing. Rather, he printed out his "Excel" billing sheet, which captured only thirty characters of text. This was not helpful. Mr. Lee's purported "documentary support" is especially problematic given the Court's recitation to counsel of the Ninth Circuit case law, including Moreno. during oral argument and the fact that his co-counsel's (Ms. Herrington) declaration correctly contained the required billing support necessary to calculate the Lodestar. Mr. Lee is again reminded that "[t]he fee applicant bears the burden of establishing entitlement to an award and document-

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ing the appropriate hours expended and hourly rates." Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). As a result of Plaintiff's counsel's continued oversights, which are unexplained given the number of opportunities he had been provided to amend his billing information, part of the County's billing analysis is adopted to calculate the Lodestar figure.

II. BACKGROUND.

The relevant facts and procedural history are summarized in the Court's previous Memorandum Decisions in this case, filed on April 8, 2009 and March 31, 2010, in brief: FN4 In this employment case, trial commenced on May 14, 2009 and concluded on June 5, 2009. The jury returned verdicts, entered on June 8, 2009, in favor of Plaintiff. (Doc. 384.) The jury found that Defendant County: (1) retaliated against Plaintiff for engaging in certain activities *1079 in violation of the Family and Medical Leave Act ("FMLA") and the California Fair Employment and Housing Act ("FEHA"); (2) retaliated

against Plaintiff for taking medical leave under the FMLA and the California Family Rights Act ("CFRA"); (3) discriminated against Plaintiff on the basis of his mental disability in violation of the FEHA; (4) failed to reasonably accommodate Plaintiff's mental disability in violation of the FEHA; and (5) failed to engage in an interactive process with Plaintiff in violation of the FEHA. The jury found against the County on its defense that Plaintiff's employment contract was not renewed by reason of his conduct and alleged violation of the employer's rules and contract requirements and/or that Plaintiff's improper behavior was the cause of the nonrenewal of his contract. The jury awarded damages as follows:

FN4. Jadwin v. County of Kern, 2010 WL 1267264 (E.D.Cal. Mar.31, 2010); Jadwin v. County of Kern, 610 F.Supp.2d 1129 (E.D.Cal.2009)

Mental and emotional distress and suffering.

\$ 0.00

Reasonable value of necessary medical care, treatment, and service received to the present time.

30,192.00

Reasonable value of necessary medical care, treatment and services which with reasonable probability will be required in the future.

\$ 0.00

Reasonable value of earnings and professional fees lost to the present time.

\$321,285.00

Reasonable value of earnings and professional fees with which reasonable probability will be lost in the future.

\$154,080.

Total damages

\$505,457.

Certain claims were not submitted to the jury, specifically, Plaintiff's claim for interference with his rights under the FMLA/CFRA and a deprivation of Plaintiff's due process rights under the Fourteenth Amendment (made actionable by 42 U.S.C. § 1983). FNS On August 4, 2009, Findings of Fact and Conclusions of Law were issued on those claims. As to the FMLA/CFRA claim, it was determined that Plaintiff lacked standing to assert his claim or, *arguendo*, assuming standing existed at the

time of the operative pleading, the claim was moot. As to the procedural due process claim, it was determined that Plaintiff's due process rights were violated and he was awarded nominal damages. On May 4, 2010, Final judgment was entered in favor of Plaintiff and against Kern County in the amount of \$505,457, plus \$1 in nominal damages on Plaintiff's due process claim, and any costs as permitted by law.

FN5. The parties stipulated that these claims

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should be tried by the court sitting without a jury, and each party, pursuant to Federal Rule of Civil Procedure 38(d); voluntarily and knowingly waived on the record in open court any right to try these claims to a jury. The stipulation was accepted on the twelfth day of the jury trial, June 6, 2009, and a corresponding order entered.

On May 28, 2010, Defendant filed two post-trial motions. The first, to amend the Final Judgment to incorporate the dismissals of several individually-named defendants. (Doc. 414.) According to the County, these individually-named defendants are "prevailing parties" in this action and are entitled to recover their costs of suits. The motion concerns the following individuallynamed defendants, who were named in the original and first amended *1080 complaint: Dr. Eugene Kercher, Dr. Jennifer Abraham, Dr. Scott Ragland, Dr. William Roy, Dr. Irwin Harris, Toni Smith and Peter Bryan. FN6 Defendant's second post-trial motion was for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. (Doc. 415.) The County argues that Ninth Circuit case law mandates a new trial based on Plaintiff's counsel's wrongful misconduct during trial.

FN6. Defendant's "Motion to Amend the Judgment" to incorporate the dismissals of several individually-named defendants was resolved pursuant to Court Order on August 12, 2010. (Doc. 445.) The motion was granted as to Defendants Peter Bryan and Irwin Harris only. Defendant's motion was, in all other respects, denied. The Final Judgment is amended to reflect the dismissals with prejudice of Mr. Bryan and Mr. Harris.

Plaintiff also filed two post-trial motions. On May 28, 2010, Plaintiff moved to amend the Final Judgment to incorporate in the final judgment, prejudgment interest and his recoverable costs. (Doc. 424.) On June 1, 2010, Plaintiff moved for attorney's fees of \$3,944,818.00 pursuant to 42 U.S.C. § 1988, 29 U.S.C. § 2617(a)(3), Cal. Gov't Code § 12965, and E.D. Local Rule 54–293. (Doc. 425.)

Oral argument on the post-trial motions was held on July 28, 2010. At the conclusion of the hearing, it was determined that supplemental briefing and specific justification was necessary to resolve the motions for prejudgment interest and attorney's fees. (Doc. 450.) Opening supplemental briefs/oppositions on these issues were filed on August 6, 13, 16, and 18, 2010. (Docs. 444, 447–49.) The final opposition and reply briefs were filed on September 3 and 16, 2010. (Docs. 450 and 451.)

III. DISCUSSION.

A. New Trial Motion

1. Introduction and Argument

The County moves for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. FN7 The County argues that there are several independent reasons to grant a new trial, including: the intentional attorney misconduct of Plaintiff's counsel, Mr. Eugene Lee, during trial; Mr. Lee's repeated use of the word "demotion" in violation of an in limine order and despite numerous admonitions during trial; Mr. Lee and his co-counsel's inappropriate gesturing, mocking, and disruptive behavior at Plaintiff's counsel table in the juries' presence during trial; Mr. Lee's interference with the County's attempt to evaluate Plaintiff during discovery; and Mr. Lee's intentional "blurring" to the jury of Plaintiff's employment-based claims, which allegedly resulted in an erroneous award of "front pay" and a violation of the "primary rights" doctrine.

FN7. An Order denying the County's Motion for New Trial was entered on August 12, 2010. (Doc. 446.) The merits are discussed in this Memorandum Decision to fully develop the record.

The County filed its motion for a new trial on May 28, 2010. FNR In support of its motion, Defendant submitted: (1) a Memorandum supporting the County's motion; (2) the declaration of Mark A. Wasser, the County's lead counsel; (3) the declaration of Karen S. Barnes, an in-house attorney for Kern County, who was present throughout and testified at trial; (4) the declara-

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tion of Amy Remly, Mr. Wasser's paralegal; (5) the declaration of Joanne *1081 DeLong, an attorney who observed the entire trial in the courtroom; (6) the declaration of Dr. Robert Burchuk, the County's medical expert; (7) the declaration of Dr. Irwin Harris, who provided expert testimony during trial; and (8) the declaration of Renita Nunn, who testified on May 20 and June 2, 2009. (Docs. 417–423.)

FN8. It is undisputed that the County's motion is timely under Rule 59(b). See Fed R. Civ. Proc. 59(b) ("A motion for a new trial must be filed no later than 28 days after the entry of judgment.").

The declarations describe Mr. Lee's conduct during trial, including his alleged gesturing and scoffing during witness examinations in front of the jury; his inappropriate and inflammatory comments during closing argument; and his apparent "confusion" over yet repeated use of the term "demotion" as it relates to Dr. Jadwin's removal from his Pathology Department chairmanship position at Kern County Medical Center. The declarations and other supporting Rule 59 evidence are delineated by topic:

a. Use of Word "Demotion" at Trial 1. Mr. Wasser

Early in trial, Mr. Lee began using the words "demoted" and "demotion" to refer to Plaintiff's removal from his chairmanship position at Kern County Medical Center despite the absence of any evidence that Plaintiff was demoted. Every time he used these words, I objected. The Court sustained all of my objections. After Mr. Lee's third or fourth continued usage of the words, the Court admonished Mr. Lee and told him he was dangerously close to being held in contempt. Mr. Lee never stopped using the words. He even used them in his closing argument, prompting yet another admonition from the Court. On at least one occasion, Mr. Lee sought to excuse his misconduct by claiming it was his first trial. (Doc. 417 at § 6.)

2. Joanne Delong
During the course of the trial, in the presence of the

jury, Plaintiff's attorney, Eugene Lee, used the word "demotion" several times in reference to Plaintiff's removal from the chairmanship of the Pathology Department at Kern Medical Center. On at least one occasion, after trial had concluded for the day but before the attorneys were dismissed, the Court admonished Mr. Lee for his continued use of the word "demotion." I remember the admonishment was lengthy and quite stern. (Doc. 420 at ¶ 3.)

3. Karen Barnes

Ms. Barnes' declaration mirrors that of Ms. Delong's. (See, e.g., Doc. 418 at ¶ 3) ("During the course of the trial, in the presence of the jury, Plaintiff's attorney, Eugene Lee, used the word "demotion" several times in reference to Plaintiff's removal from the chairmanship of the Pathology Department at Kern Medical Center.").

b. Gesturing, Shrugging, and Scoffing 1. Amy Remly

During the trial, I sat in the gallery. I had an unobstructed view of the Plaintiff's counsel table. Mr. Lee often became agitated and, when he did, he frequently threw himself back into his chair and threw his arms up into the air. Joan Herrington frequently turned her face toward Mr. Lee and made facial expressions in response to witness' testimony. She rolled her eyes, arched her eyebrows and shook her head. This behavior lasted throughout the trial. (Doc. 419 at ¶ 2.)

2. Dr. Irwin Harris

I testified in this case on Friday, may 15, 2009, and Tuesday, May 19, 2009.

When I was being questioned about acts by the Plaintiff at Kern Medical Center, regardless of whether the acts were little*1082 or big events, the Plaintiff shaking his head "no" with facial expressions of disappointment in me. For the Plaintiff's attorney, Eugene Lee, to allow his client to behave in such a manner was very disturbing to me[...]

Every few minutes, Plaintiff's other attorney, Joan

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Herrington, would respond to my answers by raising her eyebrows, looking surprised, and then she would lean over and whisper into the ear of Mr. Lee, who would suspend that line of questioning until another approach was taken with that line of questioning. I found these pauses to be filled with drama, and it disturbed my concentration.

(Doc. 422 at ¶ 3-4.)

c. Trial Witnesses: "Uncomfortable" and "Huffing Sounds"

Karen Barnes and Renita Nunn, two trial witnesses, submitted sworn declarations describing similar conduct by Plaintiff's counsel during trial. (Docs. 418 & 423.) According to Ms. Barnes, she was "uncomfortable" and "distracted" by the constant gesturing, facial grimaces, and snickers from Plaintiff and his attorneys. (Doc. 418 at ¶ 4.) Renita Nunn states that Mr. Lee and Ms. Herrington made "huffing sounds" and rolled their eyes when they disagreed with a witness or opposing counsel. (Doc. 423 at ¶ 3.) Ms. Nunn further recounts an incident where Mr. Lee was admonished by the court after he yelled "come on" in response to one of her answers. (Id. at ¶ 4.) She also states that Mr. Lee "threw his arms about" and engaged in "theatrics" during trial. (Id. at ¶ 3.)

d. Inappropriate Comments During Closing Argument

The County argues that Mr. Lee improperly appealed to bias, prejudice and emotion in his closing argument by referring to the County's size and power. According to the County, this was a "clear theme" to Mr. Lee's trial strategy and supports its Rule 59 motion for a new trial. During his closing argument, Mr. Lee stated:

And you know, we've heard Dr. Jadwin, how he is supposedly a millionaire, this and that. You know, in the end, he's just an individual, it's just one person against an entire County and all of its resources that we faced in this case. But I will tell you, it's very important that even a powerful organization such as the County understand that in a court of law, everybody's equal.

(RT, June 4, 2009, 81:10-81:17.)

The Court, *sua sponte*, immediately instructed the jury to disregard Mr. Lee's statement:

And I must say, ladies and gentleman, that an appeal to status, big versus little, strong versus weak, is improper under the law and you should disregard any such suggestion.

(RT, June 4, 2009, 81:23-82:1.)

Each time Mr. Lee was admonished he apologized and on more than one occasion stated that it was his first trial and he was "trying." FN9 The court's response, in keeping with its duty to recognize the inexperience of counsel, attempted to balance Mr. Lee's violation of rudimentary rules of trial decorum, against the rights of all parties *1083 to a fair trial, and refrained from interfering with or chilling Mr. Lee's advocacy while reminding him of his professional responsibility to abide by the rules. Mr. Lee, notwithstanding, continued to violate the rules.

FN9. On June 2, 2009, following Mr. Lee's cross-examination of a defense expert witness, the Court, outside the presence of the jury, reminded Mr. Lee that Courtroom Decorum Rule No. 13 states: "counsel shall not repeat, comment on or echo the answer given by the witness." Mr. Lee responded:

Your Honor, I will—I will eliminate the behavior from this point forward. And the only thing I'll say is that, Your Honor, it's completely inadvertent. I must emphasize this is really my first trial and a lot of stuff is going on. But that's not an excuse and it will stop, Your Honor. It will stop.

(RT, June 2, 2009, 35:8-35:13.)

2. Merits

[1][2] Rule 59(a) of the Federal Rules of Civil Procedure provides that a court may grant a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed.R.Civ.P. 59(a). Rule 59 does not specify the grounds on which a motion for a new trial may be gran-

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ted. Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020. 1035 (9th Cir.2003). Rather, the court is "bound by those grounds that have been historically recognized." 1d. Historically recognized grounds for a new trial include a verdict that is against the weight of the evidence, damages that are excessive, or a trial that was not fair to the moving party. Molski v. M.J. Cable, Inc., 481 F.3d 724, 729 (9th Cir.2007). A new trial may be granted only if, after weighing the evidence as the court saw it, "the verdict is contrary to the clear weight of the evidence, is based upon false or perjorious evidence, or to prevent a miscarriage of justice." Molski, 481 F.3d at 729 (quoting Passantino v. Johnson & Johnson Consumer Prods., 212 F.3d 493, 510 n. 15 (9th Cir.2000)). The decision whether misconduct of trial counsel has been so egregious to require a new trial is committed to the broad discretion of the court. See Landes Const. Co. v. Royal Bank of Canada, 833 F.2d 1365, 1371-72 (9th Cir. 1987); see also Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 36, 101 S.Ct. 188, 66 L.Ed.2d 193 (1980) ("The authority to grant a new trial [...] is confided almost entirely to the exercise of discretion on the part of the trial court.")

The County argues that Plaintiff's attorneys committed "grievous misconduct" throughout the trial, leading to an improper and inconsistent jury award. The County explains:

Plaintiff's counsel's misconduct, their continuing misbehavior and breach of courtroom decorum, their refusal to abide by or respect the Court's ruling, the puree of commingled legal theories thrown to the jury, combined with Plaintiff's ever-shifting dance to reconcile his inconsistent positions, substantially prejudiced the County and renders the resulting verdict flawed to the point a new trial is required.

(Doc. 433 at 5:19-5:23.)

Plaintiff's counsel is critical of the County's characterization of his behavior during trial. According to Mr. Lee, there was "no misconduct which permeated the entire proceeding so as to prejudice the jury" and, even if there was, "Defendant failed to object [...] This bars relief." Defendant also disputes the County's interpreta-

tion of Ms. Herrington's alleged gesturing and misconduct, which he describes as minimal and not impacting the Rule 59 analysis.

The County's Rule 59 motion also argues that Plaintiff's counsel continually committed gross prejudicial misconduct during closing argument when he "aggressively appealed to a bias against big organizations." According to the County, the references to the County's supposed "power and size" were so numerous that they created "a clear theme to his argument." Defendant argues that Plaintiff's counsel's "plan" or "theme" culminated in closing argument when he characterized the County as "powerful" and described his client's interaction with his employer as "one person against an entire County and all of its resources."

[3][4] Here, Plaintiff's counsel's comments concerning the County's size and available resources were improper, as he readily concedes. (RT, July 28, 2010 at *1084 88:2-88:3) ("the Court gave an admonition at that time, sua sponte [...] and Mr. Lee accepted the admonition [..] He apologized."). However, there is no indication that Mr. Lee's comments so permeated the trial that the jury was necessarily prejudiced, as required by Settlegoode v. Portland Pub. Schs.. 371 F.3d 503 (9th Cir.2004). First, immediately following Mr. Lee's comments, the Court, sua sponte, instructed the jury to disregard Mr. Lee's statement about size and the County's power. It did so in a neutral and dispassionate manner to avoid emphasizing any prejudice and so as to not reflect adversely on either party. The law presumes that the jury carefully follows the instructions given to it. See Doe v. Glanzer, 232 F.3d 1258, 1270 (9th Cir.2000); see also United States v. Sarkisian, 197 F.3d 966 (9th Cir.1999) ("Given that the district court sustained the objection, coupled with the district court's earlier instruction to the jury ..., if there was any error, it was harmless."). Here, the prejudicial effect on the jury, if any, was minimal and a new trial is not warranted on that basis. See Kehr v. Smith Barney. Harris Upham & Co., 736 F.2d 1283, 1286 (9th Cir.1984) (explaining that the trial court is in the best position to gauge the prejudicial effect of improper comments).

As the Court stated during oral argument on the

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Motion for New Trial on July 28, 2010, the comment was improper but was immediately and appropriately remedied:

talking about the powerful organization and the—it's just us, one against the powerful County, the entire County and all its resources faced in this case, the Court gave an admonition at that time, sua sponte. And Mr. Lee accepted the admonition. He apologized.

And I believe that that did cure and minimize the prejudice that could be caused. Because such a remark can be prejudicial. Referring to big versus little. Referring to have versus have not, powerful versus weak, David v Goliath. Those are all classic hyperbolic type arguments that are recognized in the cases and involve improper argument.

But again, it was isolated. The theme wasn't repeated. And the Court, again, did not have a motion for mistrial and acted as promptly and as even handedly as possible. In other words, I didn't raise my voice. I didn't express any disapproval or anger. I rather simply—I gave [an] admonition.

(RT, July 28, 2010, 87:24-88:15.)

Second, the "size" comments alleged to have deprived the County of a fair trial were isolated rather than persistent. They occurred only during closing argument. See Cooper v. Firestone Tire & Rubber Co., 945 F.2d 1103, 1107 (9th Cir.1991) (declining to grant a motion for a new trial where "the alleged misconduct occurred only in the argument phase of the trial ... most of counsel's comments were not objected to at trial and appellants did not move for a mistrial at the end of the argument"). The misconduct complained of in this case is substantially different from the "closing argument misconduct" supporting a new trial in Bird v. Glacier Electric Coop., Inc., 255 F.3d 1136 (9th Cir.2001). In Bird, the Ninth Circuit concluded that counsel's closing arguments offended fundamental fairness because counsel: (1) argued in inflammatory terms; (2) linked the defendant's behavior to white racism in exploitation of Indians; (3) appealed to historical racial prejudices of or against the white race; and (4) used incendiary racial

and nationalistic terms to encourage the all-tribal member jury to make an award of damages against the non-Indian defendant. *Id.* at 1152. *Bird* is distinguishable.

Lastly, had defense counsel believed that any prejudice to the jury was not cured by the Court's *sua sponte* admonition*1085 and instruction, he should have objected, assigned misconduct to Mr. Lee, requested additional instruction or moved for a mistrial. However, Defendant chose not to do so.

The County next argues that Plaintiff's counsels' gesturing, grimacing, and scoffing during witness questioning deprived the County of a fair trial. The County explains:

Both Plaintiff's attorneys, Mr. Lee and Ms. Herrington, while seated at counsel table listening to witnesses testify, grimaced, sighed, snickered, rolled their eyes, shook their heads, huffed, made facial expressions of disapproval, and feigned exaggerated looks of exasperation. Ms. Herrington constantly arched her eyebrows and shook her head. Mr. Lee made guttural sounds and grunts and would lean back in his char, throw his arms up and slap the armrests when he did not like an answer. While he examined witnesses, Mr. Lee routinely repeated the witness' answers back to the witness. He was admonished several times by the Court to stop it. He made sarcastic statements like, 'of course you would say that' and 'come on' [...]

(Doc. 416 at 6:6-6:18.)

According to the County, this conduct continued through the entire trial and had a distracting, disturbing, and infuriating impact on witnesses. Plaintiff and his counsel disagree.

[5] The starting point is the County's failure to object to these alleged gestures, facial expressions, or grunts during trial. The objections are made for the first time in the County's motion for a new trial. The "non-objection" issue was discussed during the July 28, 2010 oral argument, at which point the Court stated that it did not observe the alleged inappropriate gesturing

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and mocking, in part because defense counsel did not bring the conduct to the Court's attention. Rather, the Court was focused primarily on the witness, jury, trial exhibits, real-time testimony on the Court's monitor, and its taking of trial notes; not on Plaintiff's attorneys or the individuals sitting near Plaintiff's table. FNIO Defense counsel stated that he did not personally witness the conduct because he "was examining the witness [...] [the gesturing and comments] it's behind me." (RT, July 28, 2010 at 80:18–80:23.) This explains why no objection was then raised, but does not explain why the subject was not raised at a recess or the close of the court day, to give the judge an opportunity to address the claim. Nor was a motion for mistrial made.

FN10. With respect to witnessing the alleged improper trial conduct, the Court stated:

And so, again, those things shouldn't occur. But I'm focused on the witness, I'm also looking at the jury, I'm also taking notes, and I take copious notes during every trial. So my head is down a lot of the time as I'm taking my notes. And I didn't see those gestures. I didn't see those facial expressions. I didn't hear the comments being made.

(RT, July 28, 2010 at 80:18-80:23.)

[6] The Ninth Circuit holds that a new trial should only be granted where the "flavor of misconduct ... sufficiently permeate[s] an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict." Settlegoode, 371 F.3d at 516–17. An even higher threshold governs where, as here, defendant failed to object to the alleged misconduct during trial. FNII Id. at 518. Under those circumstances, the Ninth Circuit reviews for "plain or fundamental*1086 error," which requires: "(1) an error; (2) that the error be plain or obvious; (3) that the error have been prejudicial or affect substantial rights; and (4) that review be necessary to prevent a miscarriage of justice." Id.

FN11. In Settlegoode, the Ninth Circuit stated that a higher threshold is necessary for two

reasons: "First, raising an objection after the closing argument and before the jury begins deliberations 'permit[s] the judge to examine the alleged prejudice and to admonish ... counsel or issue a curative instruction, if warranted.' "This was not done. "Second, allowing a party to wait to raise the error until after the negative verdict encourages that party to sit silent in the face of claimed error." *Id.* at 516–17 (internal quotations omitted).

a. Counsel's Misconduct.

[7] Here, the conduct at issue does not meet this high threshold. See, e.g., A.D. v. Cal. Highway Patrol, No. C-07-5483-SI, 2009 WL 1817004, at *5 (N.D.Cal. June 23, 2009) (finding that defendants did not meet Settlegoode's high threshold).

As to the objections that were made at trial, the County claims that Mr. Lee's conduct was "part of an overall strategy to compromise the integrity of the trial to emotion and bias." To support its argument, the County submits several declarations describing an admonishment of Mr. Lee for "making guttural sounds." The declarations also portray a reprimand of Mr. Lee for making a sarcastic remark to a witness. With respect to these statements and conduct, defense counsel's objections were sustained and the jury was given a curative instruction, See, e.g., Messick v. Patrol Helicopters Inc., 360 Fed.Appx. 786, 789 (9th Cir.2009) ("Plaintiffs' counsel erred [...] however, the district court gave the jury a curative instruction subsequent to that argument, and a jury is presumed to follow the district court's instructions.").

Defendant did not raise the issue of cumulative prejudice and did not move for a mistrial or request further jury instruction on the issues, nor raise concerns that the County was forced to make repeated objections, which cast the County in the light of being obstructionist.

None of the objected-to conduct satisfied the Settle-goode standard; it did not permeate the entire proceeding so as to influence and/or prejudice the jury. A review of the record reveals that Mr. Lee's cross-examination of several witnesses was contentious and at

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times sarcastic, particularly as to Plaintiff's former professional colleagues at Kern Medical Center. However, the discordant nature of the examination was often brought on by the witnesses, who themselves argued or were adverse in response to points Defendant sought to establish. Further, the record does not indicate that Mr. Lee's extraneous comments were actually heard by any member of the jury. It is also possible that the jury viewed Plaintiff and his counsel in a less favorable light by observing the complained-of behavior.

The same reasoning applies to the argument that "Mr. Lee's continued use of the word 'demotion' was prejudicial to the County because it implied Plaintiff was punished even though neither party introduced evidence to support such a finding." The objections were sustained and, as the County explains: "the Court gave Mr. Lee a lengthy admonition and warning, outside the presence of the jury, for his continued use of the word [...] Mr. Lee extravagantly apologized and assured the Court he would stop." Contrary to the County's assertions, there is no evidence in the record that Mr. Lee made "insincere apologies" to the Court or that his language choice was "calculated and pervasive in nature." Rather, the record demonstrates Mr. Lee's misstatements were due to his total inexperience as a trial attorney and unfamiliarity with the federal rules of evidence.FN12

> FN12. With respect to the "demotion" issue, the Court stated during oral argument on July 28, 2010: "And so on this issue, and particularly the use of the term 'demotion,' the Court sustained the objections and did not admonish Mr. Lee in front of the jury. And so I don't think there was any prejudice to the plaintiff. And since the objections were sustained and-it was a close issue, and an arguable point, the Court doesn't believe that either cumulatively, or standing alone, that that was the kind of intentional black-hearted misconduct that can essentially-those cases are where the attorney very purposefully and with malice aforethought, knowing what the off limits areas of the Court are, are knowing that what the at

torney's going to appeal to, matters that are categorically inadmissible, that are prejudicial, sets out, if you will, on a course to flout and violate the orders to do nothing but prejudice the jury." (RT, July 28, 2010 at 73:7-73:21.)

*1087 Here, in contrast to cases such as Cadorna v. City and County of Denver, Colorado, 245 F.R.D. 490 (D.Colo.2007) and Ballarini v. Clark Equipment Co., 841 F.Supp. 662 (E.D.Pa.1993), there is no evidence that counsel flouted the Court's rulings or that the conduct served to "plant in the jury's minds that the Federal Rules of Evidence were inconvenient devices to conceal the truth." Cadorna, 245 F.R.D. at 495. Under the totality of the circumstances, there is insufficient evidence to conclude that the alleged misconduct permeated the trial with prejudice against the County. The general level of courtroom etiquette returned to normal after counsel was admonished.

b. Confusing Federal and State Front Pay Claims

The County also moves for a new trial or, in the alternative, to alter, amend, or obtain relief from judgment based on Mr. Lee's confusion over the applicability to his case and, particularly, the employment-based claims he prevailed on at trial. The County advances three arguments to support its position. First, the jury's verdict for the reasonable value of earnings and professional fees which with reasonable probability will be lost in the future should be amended because the basis for such an award is unclear. Second, Plaintiff's counsel equivocated on Plaintiff's claims during closing argument, which "encouraged juror confusion and denied the County of its right to have the jury treat each claim separately and accurately. Third, Plaintiff allegedly violated the primary rights doctrine by alleging violation of several legal theories when there was only one in-jury.

The County's first argument is an extension of the "liquidated damages" analysis contained in the March 31, 2010 Memorandum Decision. The Memorandum Decision explained that the statutory basis for the claimed "reasonable value of earnings and professional fees" award was unintelligible, therefore liquidated damages were not available. It also discussed the impact

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of the general jury verdict in the context of prejudgment interest, which was unavailable for the same reasons. Here, the County adds an additional element to the analysis: If liquidated damages were improper because the foundation for "future damages" was unclear, then the entire "future damage" award is infirm.

This issue is discussed in detail in the "prejudgment interest" section, § III(B)(1), infra. Both parties argue that the award must be modified (upward or downward) because the jury did not award damages based on federal (FMLA) or state (FEHA or CFRA) violations. According to the County, the entire future damage award must be thrown out because "it might be based on the FMLA." It does not follow that the entire "future" damage award is infirm. While the federal FMLA does not provide for "front pay," the award of reasonable value of earnings and professional fees is properly supported under the state FEHA and CFRA claims. Although Mr. Lee did not make this explicitly clear during trial, the County did *1088 not object to Mr. Lee's statements at that time. More critically, Mr. Lee's intermingling of the statutory frameworks did not result in Rule 59 error; the jury award is supported by state statutory law. FN13

FN13. It is undisputed that the jury heard evidence to properly support an award for future losses. The March 31, 2010 Memorandum Decision provides:

At trial, Plaintiff put on evidence of his future losses through his economist, Stephanie Rizzardi, who testified that she calculated future losses based on the salary and other forms of compensation (such as professional fees) Plaintiff lost by virtue of not having his contract renewed, i.e., what he expected to receive had he remained employed with the County. Plaintiff's damages expert projected this loss out to February 2016, Plaintiff's worklife expectancy. The expert also prepared a damages report, which was submitted into the evidence. (Exhibit No. 451.1-451.6.) Given the nature of Plaintiff's evidence regarding future losses, it is apparent that the \$154,080 the jury awarded for

"[r]easonable value of earnings and professional fees which with reasonable probability will be lost in the future" represents an award of front pay. Accordingly, even assuming it stems from an FMLA violation, the \$154,080 amount is not eligible for inclusion in a liquidated damages computation under the FMLA.

Jadwin v. County of Kern. 2010 WL 1267264, at *11 (E.D.Cal.2010).

[8] The County's second argument, that counsel "equivocated" during closing argument, is resolved under the "misconduct" framework, discussed in detail above. Here, the "equivocation" allegedly took place during closing arguments and was not objected to by the County. On these facts, there is no basis to grant a new trial. See Cooper v. Firestone Tire & Rubber Co., 945 F.2d 1103, 1107 (9th Cir.1991) (declining to grant a motion for a new trial where "the alleged misconduct occurred only in the argument phase of the trial [...] most of counsel's comments were not objected to at trial and appellants did not move for a mistrial at the end of the argument"). Defendant did not move for a mistrial based on the Plaintiff's arguments. Taking Mr. Lee's "equivocation" independently or in the aggregate, there is insufficient evidence to conclude that this alleged misconduct permeated the trial and irreversibly prejudiced the County. Mr. Lee's (mis)expressions in this area are indicative of counsel's inexperience, not gross incompetence or intentional misconduct.

c. Primary Rights Doctrine.

The County's final argument is that Plaintiff's "redundant" claims ran afoul of the "primary rights" doctrine. The California Supreme Court explained that the primary rights theory:

[P]rovides that a "cause of action" is comprised of a "primary right" of the plaintiff, a corresponding "primary duty" of the defendant, and a wrongful act by the defendant constituting a breach of that duty. The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action.

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[9] Mycogen Corp. v. Monsanto Co. 28 Cal.4th 888, 904, 123 Cal.Rptr.2d 432, 51 P.3d 297 (2002) (citations omitted). A party may bring only one cause of action to vindicate a primary right. *Id.* at 897, 123 Cal.Rptr.2d 432, 51 P.3d 297. Claims not raised in this single cause of action may not be raised at a later date. *Id.*

The foundation for the County's primary rights argument, which was raised for the first time in its third round of post-trial briefing, is that Plaintiff's August 10, 2009 motion "revealed for the first time that Plaintiff's claims all arose from the same set of employment actions." The County states that: "had it known that Plaintiff believed his claims all arose from the same *1089 facts, it would have moved in limine or otherwise to narrow or eliminate redundant claims."

The County's argument incorporates language from the Ninth Circuit's decision in Manufactured Home Communities Inc. v. City of San Jose. 420 F.3d 1022 (9th Cir.2005), discussing the primary rights doctrine:

MHC's claims in federal and state court all involve a single primary right: the right to receive a fair return on its investment at Westwinds. They all stem from a single injury MHC claims to suffer. See Takahashi v. Bd. of Trs., 783 F.2d 848, 851 (9th Cir.1986) (holding the plaintiff's statutory mandamus proceeding in state court barred the plaintiff's constitutional claims in federal court because both actions stemmed from a single primary right: the contractual right to employment). MHC's claims all relate to a single Ordinance and the City's application of that Ordinance to MHC's petition for a rent increase. MHC's different Counts are simply different legal theories under which MHC may recover. Different theories of recovery are not separate primary rights. Mycogen Corp., 28 Cal.4th at 897, 123 Cal.Rptr.2d at 438, 51 P.3d at 307; see also Slater v. Blackwood, 15 Cal.3d 791, 795, 126 Cal.Rptr. 225, 226-27, 543 P.2d 593, 594-95 (1975)

Id: at 1031-31.

Plaintiff responds that the County "fundamentally misunderstands the primary rights theory." Plaintiff re-

lies on Agarwal v. Johnson, 25 Cal.3d 932, 160 Cal.Rptr. 141, 603 P.2d 58 (1979) for the proposition that "one adverse employment action could involve the violation of more than one primary right."

On this point, Plaintiff also cites Los Angeles Branch NAACP v. Los Angeles Unified School Dist., 750 F.2d 731 (9th Cir.1984): "As both Mattson [v. Cirv of Costa Mesa, 106 Cal.App.3d 441, 164 Cal.Rptr. 913 (1980)] and Agarwal indicate, the single most important factor in determining whether a single course of conduct has violated more than one primary right is whether plaintiff suffered injury to more than one interest." Plaintiff then recounts eight "interests," including the right to a reasonable accommodation in employment; right to a workplace free from discrimination; right to an interactive process; and right to workplace free from retaliation as separate "interests," involving distinct primary rights, which were included in the second amended complaint.

[10] Plaintiff argues that the case involved a "set of facts" that violated several "rights" or "interests." The County frames the issue as: "there was only one injury, therefore there was only one claim for relief." The County does not specify the "single injury" allegedly suffered by Plaintiff. In this case, contrary to the County's arguments, Plaintiff possessed a number of legally protectable "interests" under different statutes. Uncertainty over what statutory violation(s)—federal or state—led to the damage award, cuts against the County's arguments.

The jury verdict contains several damage awards that reflect the jury determined that Plaintiff experienced multiple violations of his different federal and state statutory rights. Given the jury's findings and the lack of legal authority supporting the County's position, there is no basis to find that Plaintiff violated the primary rights doctrine. As the Court explained during oral argument on July 28, 2010:

So there's five separate primary rights that were identified by claims, that were separately stated correctly in the complaint. And so I don't believe that there's only one injury or only one primary right that was at

issue in the case, or on which the jury could have found a basis to award damages.

*1090 So that's my tentative ruling there [...] There was a way to make this very clear if the County wanted to break it down. And that is that—and there's a good reason not to do this, a good strategic reason, but it certainly is within your ability to ask for a verdict form that would have defined, if you will, the harms and the primary rights violated, and have findings in the verdict form on each of those. But candidly, it would have been accentuating and emphasizing those [separate claims and bases for recovery] to the jury.

And again, an experienced trial lawyer makes strategic decisions. And if I'm defending that case, I may just as likely say "I don't want to go there" and have it in black and white, here's five separate primary rights being violated, and makes your [separate] findings on [each of] those. Maybe you end up, if there's a plaintiff's verdict, with more damages or worse findings.

And so certainly we didn't have the specific findings on those, but there was a way to address that. And no party requested that the Court give any further instructions of law or have any different or additional verdict forms to address that.

(RT, July 28, 2010 at 94:10-95:13.)

It was within the County's ability to request answer to such clarifying questions by jury instruction and verdict form with specific findings. The County did not ask for such findings in the verdict forms to separately identify which primary rights were violated.

3. Conclusion on the County's Motion for a New Trial

The trial of this case culminated in a result that was supported by substantial evidence. The testimony of members of the Medical Board of Kern Medical Center show that they had personal disputes with and animosities toward the Plaintiff arising out of conflicts. Trial testimony given by members of the Board could have been perceived by the jury as condescending, if not ar-

rogant, and unduly critical of the Plaintiff. Even accepting the defense theory that the Plaintiff was a difficult colleague to interact with; unreasonable in his insistence on conformity with his views as to medical quality assurance; and unduly sensitive in withdrawing from professional practice at the hospital; there was countervailing evidence that demonstrated that Plaintiff was well thought of by nurses and other Department of Pathology staff; that he was a dedicated scientist and committed in good faith to medical quality assurance. That his personal idiosyncracies were not consonant with the culture of the Board and Medical Directors at Kern Medical Center, in the jury's view did not justify removing him from medical practice in the Department of Pathology, even if his removal as the Director was required by his chronic absences. It is also likely that the jury did not accept the Defendant's view that Dr. Jadwin was "too disruptive" to be permitted to continue in residence in the practice of pathology at the hospital.

Throughout this case, the level of contentiousness between counsel was unprecedented. Substantial unnecessary court time was required to resolve discovery disputes, personal quarrels, and logistical issues between counsel. This hostility continued at trial.

This was Plaintiff's lead counsel's (Mr. Lee) first trial. His inexperience was obvious, he violated a number of the applicable Rules of Court Decorum that governed the trial. A copy is attached to this opinion marked Exhibit A and incorporated herein by this reference. Mr. Lee was *1091 disputatious, ultimately unaccepting of the Court's guidance, and quarrelsome with opposing counsel and with the Court's rulings. His performance in closing argument was at the limit of acceptable professional conduct. He crossed the line a number of times, however, the Court accommodated his inexperience and undue contentiousness to endeavor to assure a fair trial to both sides.

FN14. The Court's Rules of Courtroom Decorum were served on all counsel on April 23, 2009, before the trial commenced. Rules 4 and 16 provide, in relevant part:

4. Avoid disparaging personal remarks or ac-

rimony toward opposing counsel and/or parties. Remain detached from any ill feeling between the litigants or witnesses [...]

16. Counsel shall admonish all persons at counsel table and parties present in the courtroom that gestures, facial expressions, laughing, snickering, audible comments, or other manifestations of approval, disapproval or disrespect during the testimony of witnesses are prohibited.

(Doc. 319.)

Defense counsel was very competent and experienced. The defense made numerous strategic choices to not object, to not assign misconduct, not move for a mistrial, or otherwise request admonitions or jury instructions that would have addressed the specific problems now raised by the now-surfacing post-trial objections to the trial conduct of Plaintiff's counsel. As the law of this Circuit cited in this decision pellucidly establishes, the time to address and to cure trial counsel's misconduct is when it occurs. There are many strategic reasons not to do so, all within the sound judgment of an experienced trial lawyer. Such reasons include not alienating the jury; not wishing to appear obstructionist; not repeatedly objecting to the point that the jury is disaffected; not appearing to be unduly hostile toward opposing counsel which may engender an adverse response from the jury; not wishing to emphasize a negative comment from the judge or conduct which would unduly prejudice the jury; and attempting to focus the jury on the points the defense sought to establish, rather than concentrating on the Plaintiff's arguments and contentions. The Court attempted not to intervene, except where absolutely necessary, and attempted to treat counsel for both sides with respect and courtesy. The Court did not use a raised voice, did not express anger, irritation, was neutral in addressing each counsel, and ultimately endeavored to focus counsel and the parties on the merits of the case.

The County's Rule 59 motion for a new trial is DENIED. FN15

FN15. As stated by the Ninth Circuit, a civil litigant is "entitled to a fair trial, [he is] not entitled to a perfect trial, for there are no perfect trials." In re First Alliance Mortgage Co., 471 F.3d 977, 991 (9th Cir.2006) citing United States v. Payne, 944 F.2d 1458, 1477 (9th Cir.1991). The parties received a fair trial in this case.

B. Remaining Post-Trial Motions

Having decided the County is not entitled to a new trial under Rule 59, Plaintiff's requests for prejudgment interest, attorney's fees and costs remain to be decided.

1. Prejudgment Interest

Plaintiff moves to amend or correct the Final Judgment to include prejudgment interest of \$32,286.39. Plaintiff first moved for an award of prejudgment interest on August 10, 2009, citing Hopi Tribe v. Navajo Tribe, 46 F.3d 908, 922 (9th Cir.1995), Criswell v. Western Airlines, Inc. 709 F.2d 544, 556-557 (9th Cir.1983), Currie v. Workers' Comp. Appeals Board, 24 Cal.4th 1109, 1115, 104 Cal.Rptr.2d 392, 17 P.3d 749 (2001) and California Civil Code § 3287(a). That motion was denied on March 31, 2010 on grounds that the jury did not allocate the amount of damages attributable to the federal (FMLA) or *1092 state (FEHA or CFRA) violations. Nor did the jury itemize damages by each adverse employment action. These two "shades of grey" precluded an award of prejudgment interest:

Here, the jury did not specifically allocate the amount of damages attributable to a FMLA violation, making it impossible to select any amount on which to award prejudgment interest exclusively under the FMLA. The only amount on which prejudgment interest could be theoretically awarded under the FMLA is the \$321.285 the jury awarded for the reasonable value of earnings and professional fees lost to the present time. As to the other amounts, because this is a compensation loss case under § 2617(a)(1)(A)(i)(I), the jury's award of \$30,192 for the "[r]easonable value of necessary medical care, treatment, and services received to the present time" is not recoverable as damages under the FMLA and, by extension, interest could not be awarded on this amount under the FMLA. Because

the \$154,080 the jury awarded for the "[r]easonable value of earnings and professional fees which with reasonable probability will be lost in the future" represents an award of front pay, this amount falls under § 2617(a)(1)(B) and could not be included in a prejudgment interest computation under § 2617(a)(1) (A)(ii) [...]

As to his state law claims, citing Currie v. Workers' Comp. Appeals Board, 24 Cal.4th 1109, 1115, 104 Cal.Rptr.2d 392, 17 P.3d 749 (2001) and California Civil Code § 3287(a), Plaintiff argues that "in an action to recover backpay, interest is recoverable on each salary or pension payment from the date it was due." (Doc. 399 at 8.) Currie determined that, pursuant to California Civil Code § 3287, prejudgment interest could be recovered on a backpay amount awarded to a plaintiff who was wrongfully denied reinstatement. There, the employer's refusal to reinstate the plaintiff violated California Labor Code § 132a [...]

Plaintiff's reliance on Currie and California Civil Code § 3287(a) is nevertheless problematic because, even assuming any backpay awarded in this case is linked to a FEHA/CFRA violation, the jury awarded backpay in one lump sum—\$321,285—without specifying which particular adverse employment action(s) caused what amount of backpay damages. Because this case involves multiple adverse employment actions that occurred at different points in time—not just a one-time wrongful denial of reinstatement as in Currie—the generalized backpay award makes it difficult to compute prejudgment interest.

Under California Civil Code § 3287(a), Plaintiff can, in theory, recover prejudgment interest on backpay awarded to him. This interest runs from the day the right to recover the backpay "vested in him." § 3287(a). The jury's verdict does not, however, specify the particular adverse employment action(s) on which they based their backpay award, nor the amount of backpay attributable to any particular adverse employment action(s), making it difficult to determine when Plaintiff's entitlement to any discrete amount of the awarded backpay "vested in" Plaintiff. In this

case, at least three adverse employment actions that could have lead to an award of backpay are Plaintiff's wrongful removal from his position as Chair of the Pathology Department, his wrongful placement on administrative leave, and the wrongful non-renewal of his contract, all of which occurred on different dates (July 2006, December 2006, and October 2007 respectively). To the extent the \$321,285 the jury award consists of backpay damages caused by these different events, what amount of backpay did the jury attribute to each event? The current state of the briefing does not adequately *1093 address these issues and prejudgment interest cannot be computed at this time.

Whether construed as a motion directed to the court's inherent authority to modify a non-final order or a motion under Rule 54(b), Plaintiff's request for prejudgment interest is DENIED WITHOUT PREJUDICE.

Jadwin v. County of Kern, 2010 WL 1267264, at *16-17 (E.D.Cal.2010).

Plaintiff renewed his motion for prejudgment interest on May 28, 2010. The second time around, Plaintiff argues that the \$505,457.00 damage award does not include "front pay," which is not recoverable under the FMLA, but rather "past damages" and "future damages" which are both recoverable under Civil Code § 3287(a).FN16 Applying Plaintiff's reasoning, state law violations, not federal, provided the basis for the damage award, therefore he is entitled to prejudgment interest on the entire \$505,457.00, not \$321,285. Plaintiff's restyled theory, however, overlooks the fact that the jury did not assign damages based on federal (FMLA) or state (FEHA or CFRA) violations. Plaintiff's new argument also ignores the fact that he previously argued, in his trial brief, that he was entitled to "front pay" damages under the FMLA, (Doc. 325 at 11:20-11:21) ("Plaintiff is also entitled to back pay, front pay, liquidated damages and compensatory damages on his FMLA claim"), and introduced "front pay evidence" at trial, see Jadwin v. County of Kern, 2010 WL 1267264, at *11 ("Given the nature of Plaintiff's evidence regarding future losses, it is apparent that the \$154,080 the jury awarded for the '[r]easonable value

of earnings and professional fees which with reasonable probability will be lost in the future' represents an award of front pay."). FN17

FN16. Civil Code § 3287(a) provides, in relevant part: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any such debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state."

FN17. Specifically, as discussed in the March 31, 2010 Memorandum Decision: "At trial, Plaintiff put on evidence of his future losses through his economist, Stephanie Rizzardi, who testified that she calculated future losses based on the salary and other forms of compensation (such as professional fees) Plaintiff lost by virtue of not having his contract renewed, i.e., what he expected to receive had he remained employed with the County. Plaintiff's damages expert projected this loss out to February 2016, Plaintiff's worklife expectancy. The expert also prepared a damages report, which was submitted into the evidence. (Exhibit No. 451.1-451.6.) [...] Accordingly, even assuming it stems from an FMLA violation, the \$154,080 amount is not eligible for inclusion in a liquidated damages computation under the FMLA." Jadwin v. County of Kern, 2010 WL 1267264, at *11.

Without any guidance from the verdict form or case law, Plaintiff now asks the Court to ignore the FMLA claims and evidence, which he failed to differentiate for the jury and failed to request separate verdict findings on each state and federal claim to eliminate the ambiguity of what the jury findings are on these claims, and to

calculate interest under the "prejudgment interest friendly" FEHA and CFRA. This is unprecedented and requires impermissible post-trial judicial interpretation of a "stipulated" general verdict form. Contrary to Plaintiff's arguments, there is no basis to conclude that the damage award was based on state law violations, or vice versa. FNI8 On the present record, the Court *1094 cannot interpret and give meaning to a general verdict form that did not allocate damages based on the underlying statutory violations and adverse employment actions. FN19 Plaintiff's argument that the entire jury award can be characterized as a Civil Code § 3287(a) damage award is without merit. The jury's verdict did not so specify, and such an award is inconsistent with Plaintiff's evidence and argument at trial. FN20 Moreover, no formula or other finite predetermined calculation formula was introduced into evidence.

> FN18. To support his latest round of arguments, Plaintiff disingenuously submits that there was no mention of "front pay" during trial and the jury did not have authority to award "front pay" under the FMLA. First, in his original motion, Plaintiff argued that prejudgment interest was proper based on both the federal and state law violations, which is inconsistent with his current position. Second, even if the term "front pay" was not used, the jury awarded "future" damages for lost earnings and did not differentiate between federal and state law violations. That determination was based on the "front pay" evidence presented by Plaintiff's counsel at trial. Plaintiff's argument is inconsistent with his original position and merely incorporates a correct recitation of the law, which was first brought to his attention in the March. 31, 2010 Memorandum Decision.

FN19. Contrary to Defendant's arguments, there is no support to deny prejudgment interest in its entirety based on the general jury finding. As stated in the March 31, 2010 Memorandum Decision, "[b]ecause prejudgment interest is theoretically available on all of Plaintiff's claims submitted to the jury, the fact

that the jury did not specifically allocate the damages among Plaintiff's various claims does not outright preclude an award to Plaintiff for prejudgment interest." Jadwin, 2010 WL 1267264, at *15.

FN20. The record reveals that the parties expressly agreed to the use of a single verdict question on the issue of damages and, specifically, that the County agreed to the "undifferentiated jury verdict." As in Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101 (9th Cir.2001), the parties could have objected to the verdict form after the verdict was announced, before the jury was excused, but did not. As stated by the Ninth Circuit, "[b]y waiting until post-trial motions to raise its specific contentions, Deckers prevented the court from correcting any problems ex ante and, for some of these contentions, prevented the development of an adequate record." Id. at 1110. That language applies with equal force here.

Plaintiff next offers a "solution" for the adverse employment actions issue, i.e., what adverse employment action formed the basis for the jury's damage award:

A reasonable basis for approximating interest would be to calculate interest on past and future economic damages from the date on which the jury rendered its verdict, 6/9/09, up through the date of entry of judgment, 5/4/10. This is a conservative method by any measure as the jury was not instructed to include interest on past damages "to the present time", and so the jury's past damages award likely did not include interest.

(Doc. 424 at 6:19-6:23.)

Plaintiff offered the following prejudgment interest calculation:

1. 333 days/365 days x 7% interest x 505,557 = 32,286.39 (Id. at 6:25.)

Plaintiff's proposal is a reasonable solution to a

unique problem, i.e., absence of itemized damages referable to each adverse employment action or identifying the underlying theory of recovery. The general approach submitted by Plaintiff is adopted to calculate prejudgment interest. Plaintiff's specific calculations, however, are rejected as they are based on the entire jury award, \$505,457.00. As discussed in detail in this Memorandum Decision, in open court on July 28, 2010, and in the March 31, 2010 Memorandum Decision, the jury did not allocate the amount of damages attributable to the federal or state violations. There is nothing in the record to ascertain whether the jury's damage award was based entirely on state *1095 law violations. The jury, pursuant to its general findings on June 5, 2009, established that the "principal" amount of damages for any potential claim for prejudgment interest is \$321,285. FN21 Plaintiff has been unable to present, after three rounds of briefing, any binding or persuasive authority to support his arguments, which conflict with the jury's unanimous verdicts.

FN21. The \$321,285 represents the "reasonable value of earnings and professional fees lost to the present time," the only amount for which prejudgment interest is available. See Jadwin, 2010 WL 1267264, at *15 ("The only amount on which prejudgment interest could be theoretically awarded under the FMLA is the \$321.285 the jury awarded for the reasonable value of earnings and professional fees lost to the present time.").

This does not the end the analysis. The parties dispute whether federal or state law provides the applicable prejudgment interest rate. Plaintiff originally argued that the correct rate was 10% per annum, the maximum state law rate for post judgment interest; but has since revised his request to 7% per annum. Plaintiff argues that this is the correct interest rate because "state law is controlling with regard to the prejudgment interest rate." (Doc. 449 at 4:17–4–18.) In support, Plaintiff cites Evanston Ins. Co. v. OEA, Inc., 566 F.3d 915 (9th Cir.2009) and the March 31, 2010 Decision, which stated that "prejudgment interest is substantive for Erie purposes [...] that makes California law applications.

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able to prejudgment interest on Plaintiff's state law claims." (Doc. 408 at 32:12-32:13.)

Plaintiff once again ignores the seminal dispute in this case, that the jury did not allocate the amount of damages attributable to the federal or state violations. Without a specific jury determination on that issue, there is no basis to support an omnibus "state law" prejudgment interest calculation to the exclusion of the federal rate. To illustrate, a 7% interest rate is appropriate in diversity cases, when a party prevails on a state law claim. FN22 It is undisputed that Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and its progeny supply the relevant interest rate in that instance. However, this case is different. Here, the jury determined that both Plaintiff's federal and state law employment rights were violated, without distinction as to the separate claims for relief. Plaintiff explicitly acknowledged as much in his August 6, 2010 supplemental brief: "Here, the jury found that medical leave was a 'motivating factor' in all 4 of the adverse actions taken by Kern County against Plaintiff, in violation of the FMLA (as well as the California Family Rights Act) and awarded Plaintiff both past and future lost wages." (Doc. 444 at 3:12-3:14.)

> FN22. This hypothetical assumes that the forum employs a 7% interest rate to calculate prejudgment interest.

The Defendant's reciprocal contention is unavailing. FN23 Like the state interest rate arguments, the federal interest rate, statutory or prime, cannot be adopted in its entirety because it is unclear whether the award was based on federal or state law violations. The jury award could be based on federal violations, but it is also arguable that the entire award was based on violations of the FEHA/CFRA.

FN23. According to Defendant, the Court cannot award 7% prejudgment interest because "it is impossible to differentiate the state and federal claims, determine when they accrued and which adverse employment actions they were based on [and] to the extent the claims are comingled in the verdict they bear interest at dif-

ferent rates." This contention is without merit.

There is no clear solution on how to best to calculate prejudgment interest in this *1096 case. If the jury award was based purely on state law, a 7% interest rate applies. See Pro Value Properties, Inc. v. Quality Loan Service Corp., 170 Cal.App.4th 579, 582, 88 Cal.Rptr.3d 381 (2009). On the other hand, if the jury award was based solely on the FMLA, prejudgment interest must be calculated according to either the rate of interest published by the Board of Governors of the Federal Reserve System, 28 U.S.C. § 1961(a), FN24 or the "prime rate." FN25 See Hite v. Vermeer Mfg. Co., 361 F.Supp.2d 935, 949 (S.D.Iowa 2005) (discussing potential prejudgment interest rate calculations under the FMLA), aff'd 446 F.3d 858 (8th Cir.2006); see also Bell v. Prefix, Inc., No. 05-74311, 2010 WL 4260081, at *2 (E.D.Mich. Oct. 22, 2010) (applying the federal reserve interest rate to determine prejudgment interest in an FMLA case). Defendant argues for a federal "prime rate" of 3.25%. In view of the historical reduction of interest rates while this case has been pending, this is a fair measure for the federal prime rate.

FN24. Under 28 U.S.C. § 1961(a), the applicable interest rate is "the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of judgment." 28 U.S.C. § 1961(a). This rate may be found by referring to the Federal Reserve website, located at: http:// www. federalreserve. gov/ RELEASES/ h 15/. Here, the relevant Weekly Average 1-year constant maturity treasury yield is .44%.

FN25. The prime rate is the rate that banks charge for short-term unsecured loans to credit-worthy customers. Forman v. Korean Air Lines Co., Ltd.. 84 F.3d 446, 450 (D.C.Cir.), cert. denied, 519 U.S. 1028, 117 S.Ct. 582, 136 L.Ed.2d 513 (1996). The prime rate set by the Federal Reserve for the relevant period is 3.25%, ht tp:// www. federalreserve. gov/ releases/ h 15/ data/ Daily/ H 15_ PRIME_NA. txt.

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[11][12] The Ninth Circuit has made clear that prejudgment interest is an element of compensation, not a penalty, and has the primary goal of making an aggrieved party whole. See generally Dishman v. UNUM Life Ins. Co. of Am., 269 F.3d 974, 988 (9th Cir.2001); accord Drumm v. Morningstar, Inc., 695 F.Supp.2d 1014, 1022 (N.D.Cal.2010) ("The purpose of prejudgment interest 'is to provide just compensation to the injured party for loss of use of the award during the prejudgment period-in other words, to make the plaintiff whole as of the date of the injury.") (citing Lakin v. Watkins Assoc.'d Indus., 6 Cal.4th 644, 663, 25 Cal.Rptr.2d 109, 863 P.2d 179 (1993)). FN26 Based on such a compensatory rationale, some district courts have determined that the federal statutory interest rate did not fulfill the purpose of awarding prejudgment interest, see, e.g., Perez v. Cozen & O'Connor Group Long Term Disability Coverage, No. 07-cv-0837-DMS-AJB, 2008 WL 6693714, at *2 (C.D.Cal. Aug. 19, 2008) and Hite. 361 F.Supp.2d at 949, while others have found that the federal rate prescribed in 28 U.S.C. § 1961 appropriately compensated the aggrieved party, see, e.g., Traxler v. Multnomah County, No. 06-1450-KI, 2010 WL 3069340, at *1 (D.Or. Aug. 2, 2010) and Austin v. Jostens, Inc., No. 07-2380-JAR, 2009 WL 902417 (D.Kan. Mar. 31, 2009). As no clear guidepost exists and the parties have not offered a reasonable solution on how to calculate prejudgment interest in this case, the Ninth Circuit's preferred "compensatory approach" governs. To properly compensate Plaintiff and to account for the possibility that the jury returned a verdict supported only by the FMLA or the FEHA/CFRA, Plaintiff is entitled to prejudgment interest at the average of the "prime rate," 3.25%, and *1097 the California rate, 7%, for an average rate of 5.125%. Although this rate does not correlate exactly with either the federal (prime) or state (statutory) rates, it is reasonably proximate to both, and it will ensure Plaintiff is fully compensated.

FN26. Although Dishman v. UNUM Life Ins. Co. of America, 269 F.3d 974 is not on all fours with this case—it was decided under ERISA—, it did analyze the rationale and purpose behind prejudgment interest awards.

Plaintiff is awarded prejudgment interest from the date of the jury's verdict, June 5, 2009, to the date of entry of final judgment, May 4, 2010. However, based on the uncertainty in the jury's general verdict award, which was proposed, given, and accepted by the parties without objection, or request for an alternate verdict form, Plaintiff is awarded prejudgment interest at a rate of 5.125% on the principal damages award of \$321,285. The total prejudgment interest award is \$15,022.27. FN27 The May 4, 2010 Judgment is amended to include this amount.

FN27. Graphical representation: 333 days/365 days x 5.125% interest x 321,285 = \$15,022.27.

2. Post-Judgment Interest

The parties agree that the Plaintiff is entitled to an award of post-judgment interest at the federal treasury rate, from the date of the judgment to the date of satisfaction of the judgment. (RT, July 28, 2010, 58:24–59:24.)

Plaintiff's request is GRANTED and the judgment is AMENDED to include an award of post-judgment interest at the federal treasury rate, from the date of the judgment to the date of satisfaction of the judgment.

3. Attorney's Fees

a. Introduction

Plaintiff requests an award of attorney's fees under both Federal law (42 U.S.C. § 1988 and 29 U.S.C. § 2617(a)(3)) and California law (Cal. Gov't Code § 12965). FN28 Plaintiff seeks a total of \$3,944,818.00 in attorneys' fees, broken down as follows: a lodestar of \$1,972,409.00 in fees, with a 2.0 multiplier for extraordinary litigation efforts and expertise in the area of employment law. FN29 The total amount requested is based on the work of four counsel at out-of-town hourly rates: (1) lead counsel Eugene Lee, \$400/hr.; (2) counsel Joan Herrington, \$500/hr.; (3) contract counsel Marilyn Minger, \$385/hr.; (4) fee counsel David Hicks, \$660/hr.

FN28. Generally, litigants "are required to bear the expenses of their litigation unless a statute

or private agreement provides otherwise." *Carbonell v. I.N.S.*, 429 F.3d 894, 897–98 (9th Cir.2005).

FN29. (See Doc. 451 at 23:18-23:25.)

The statutes cited by Plaintiff provide that a district court, in its discretion, may award reasonable fees to the prevailing party. See 42 U.S.C. § 1988 ("In any action or proceeding to enforce a provision of section ... 1983 of this title, ... the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs..."); Dotson v. Pfizer. Inc., 558 F.3d 284, 295 (4th Cir.2009) ("The FMLA directs the award of reasonable attorneys' fees to a prevailing plaintiff [...] [t]he amount of attorneys' fees awarded is at the trial court's discretion.") (citations omitted); see also Cal. Gov't Code § 12965(b) ("the court, in its discretion, may award to the prevailing party reasonable attorney's fees and costs.").

The County does not dispute that Plaintiff is the prevailing party under the cited statutes and case law, however, it argues that the motion should be denied in its entirety due to Plaintiff's conduct/behavior and egregious over-litigation and limited success. FN30 In the event fees are awarded, *1098 the County asserts that Plaintiff is not entitled to recover the total amount of fees requested because such amount is unreasonable and the Court should, instead, reduce Plaintiff's attorney's fees request to between \$125,000 and \$250,000.FN31

FN30. In the typical attorney's fees case, the analysis begins with the definition of "prevailing party" set forth by the Supreme Court in Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Res., 532 U.S. 598, 600, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001). In Buckhannon, the Supreme Court noted that prevailing party status requires that a party "received a judgment on the merits, or obtained a court-ordered consent decree." 532 U.S. at 605, 121 S.Ct. 1835 (citations omitted). Additionally, such relief must "create the material alteration of the legal relationship of the parties necessary to

permit an award of attorney's fees." *Id.* at 604, 121 S.Ct. 1835. Applying *Buckhannon* to the facts of this case, it is clear that Plaintiff is the "prevailing party." Because Plaintiff is the prevailing party, he is entitled to attorneys' fees under both federal and state law.

FN31. Specifically, the County asserts that the "amount awarded should be reduced to a small fraction of Plaintiff's request." (Doc. 432 at 1:20–1:21.) The County argues that "a reasonable fee in this matter is in the range of \$125,000 to \$250,000." (Id. at 1:22–1:23.)

b. Should the Fee Request Be Denied in its Entirety?

Acknowledging that Plaintiff is a prevailing party under the relevant federal and state statutes, the County still argues that no attorney fees should be awarded because his fee request was poorly documented and overstated. The County also asserts that a complete denial is support by Plaintiff's counsel's "substantial and continuing misconduct and unprofessional behavior." The County cites Serrano v. Unruh, 32 Cal.3d 621, 635, 186 Cal.Rptr. 754, 652 P.2d 985 (1982), for the proposition that a trial court may "reduce the award or deny one altogether" if the fee request "appears unreasonably inflated."

[13] Here, while the litigation was contentious and counsel was inexperienced, there are no facts to justify a complete denial of attorney's fees under either Federal or California law. Courts in both fora have limited the complete denial of fee awards to cases involving "special circumstances." FN32 See Chavez v. City of Los Angeles, 47 Cal.4th 970, 976, 104 Cal.Rptr.3d 710, 224 P.3d 41 (2010) ("[FEHA] has been interpreted to mean that in a FEHA action a trial court should ordinarily award attorney fees to a prevailing plaintiff unless special circumstances would render a fee award unjust.") (citations omitted); see also Child Evangelism Fellowship of Greater San Diego v. Acle, No. 05-CV-1166-IEG-WMc, 2009 WL 484204, at *4 (S.D.Cal. Feb. 24, 2009) ("the Court finds the Plaintiff's success in this case was not merely de minimus or technical and there are no 'special circumstances' warranting a complete denial of fees"). For example, in Young

v. Exxon Mobil Corp., 168 Cal.App.4th 1467, 86 Cal.Rptr.3d 507 (2008), it was determined that "special circumstances" existed because the fee award was "unjust." The Young Court stated: "[J]ust as there are circumstances in which a prevailing plaintiff, who ordinarily should recover attorney fees, may not recover them—when special circumstances make an award unjust—the same is true of a prevailing defendant in a frivolous case [...] [t]his is just such a case: where the fee award to the prevailing defendant would redound to the benefit of another defendant who is not entitled to recover fees." Id. at 1575–76, 86 Cal.Rptr.3d 507. There are no "unjust" facts to support a complete denial of fees in this case.

FN32. Although arising in a slightly different context, the Ninth Circuit's discussion of "special circumstances" in Saint John's Organic Farm v. Gem County Mosquito Abatement Dist., 574 F.3d 1054 (9th Cir.2009) is instructive.

Fischer v. SJB-P.D. Inc., 214 F.3d, 1115 (9th Cir.2000) provides the closest specific context. There, the district court denied *1099 Plaintiff's request for attorney's fees on grounds that he was not the "prevailing party." The district court alternatively stated that even if he had prevailed, the motion was infirm because the request was excessive and poorly documented. The Ninth Circuit reversed the district court, finding that "[a]lthough each one of these [deficiencies] may ultimately provide the district court with a reason to reduce the fee, we do not believe that they provide the court with a valid basis for denying the fee application in its entirety." Id. at 1121. The Ninth Circuit stated that Plaintiff's fee application met the "basic requirements," which included a "summary of the time spent on a broad category of tasks such as pleadings and pretrial motions (16.5 hours), settlement (4.2 hours), and court appearances (1.5 hours)." Id. The Ninth Circuit concluded that if the district court felt that it needed more detailed information, it "should have either requested the information or simply reduced the fee to a reasonable amount." Id.

The same approach was followed here. Although

Plaintiff's counsel's fee request is less detailed and developed than the prevailing party in Fischer, FN33 there are no special circumstances to justify a complete denial of attorney's fees. Rather, the remedy is a reduction of any fee award, not, as the County seeks, complete denial of a fee award. The facts of this case are distinguishable from those involving attorney misconduct or "unjust" fee recovery. See Meyler v. Commissioner of Social Sec., No. 04-CV-4669-GEB, 2008 WL 2704831, at *3 (D.N.J. July 7, 2008) (cataloging "special circumstances" cases). Plaintiff's counsel, while inexperienced and apparently unwilling to follow the Federal Rules of Evidence and Civil Procedure, has not attempted to deceive the Court and has not been duplicitous or dishonest. Although Mr. Lee made many errors, some repeated after admonition, his overall conduct as a vigorous advocate does not raise to the level of intentional bad faith misconduct. The fee request is excessive. A complete denial of attorney fees is not authorized.

FN33. In contrast to the plaintiff in Fischer, Plaintiff's counsel in this case did not provide a "summary of the time spent on a broad category of tasks such as pleadings and pretrial motions." Not a single task total is provided in this case. That omission frustrated any attempt to compose a Memorandum Decision on the many issues raised in post-trial briefing. In addition, unlike the plaintiff in Fischer. Plaintiff's counsel was given three opportunities to produce a properly documented fee motion, to no avail. Because his motion fails to meet the clear standards for fee awards, after three attempts, the Court is required to analyze what was provided.

c. Legal Standards-The Lodestar Calculation

[14] Once a determination is made that attorney's fees are appropriate, the standard to be applied in calculating an award of attorney's fees is that of "reasonableness." Whether under the California state law, or federal law, a determination of reasonableness generally involves a two-step process. First, the court calculates the "lodestar figure" by taking the number of

hours reasonably expended on the litigation and multiplying it by a reasonable hourly rate. See, e.g., Ketchum v. Moses. 24 Cal.4th 1122, 1131–32, 104 Cal.Rptr.2d 377, 17 P.3d 735 (2001); PLCM Group. Inc. v. Drexler, 22 Cal.4th 1084, 1095, 95 Cal.Rptr.2d 198, 997 P.2d 511 (2000); see also McGrath v. County of Nevada. 67 F.3d 248, 252 (9th Cir.1995). In determining the lodestar amount, the California Supreme Court has "expressly approved the use of prevailing hourly rates as a basis for the lodestar." Ketchum, 24 Cal.4th at 1132, 104 Cal.Rptr.2d 377, 17 P.3d 735. The "relevant legal community" in the lodestar calculation is generally the *1100 forum in which the district court sits. Mendenhall v. NTSB. 213 F.3d 464, 471 (9th Cir.2000).

[15] Second, the court may adjust the lodestar upward (via fee enhancer or "multiplier") or downward based on an evaluation of certain factors, including, among other things, the time and labor required; the novelty and difficulty of the questions involved; the skill requisite to perform the legal service properly; the preclusion of other employment by the attorney due to acceptance of the case; and whether the fee is fixed or contingent. See id.; cf. Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir.1975). Not all factors are always relevant in determining whether an award is reasonable. The party seeking a fee enhancement bears the burden of proof. See Ketchum, 24 Cal.4th at 1138, 104 Cal.Rptr.2d 377, 17 P.3d 735.

[16] Courts may reduce a requested fee award, or deny one altogether, where a fee request appears unreasonably inflated. See id. at 1137, 104 Cal.Rptr.2d 377, 17 P.3d 735; see also Hensley v. Eckerhart, 461 U.S. at 434, 103 S.Ct. 1933 (court may deny compensation for "hours that are excessive, redundant, or otherwise unnecessary").

[17][18] The fee applicant bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked. *Hensley*, 461 U.S. at 437, 103 S.Ct. 1933. The party opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the hours charged or the facts asserted by the prevail-

ing party in its submitted affidavits. Toussaint v. Mc-Carthy, 826 F.2d 901, 904 (9th Cir.1987).

d. Lodestar—Hours Reasonably Expended 1. Introduction

Plaintiff argues that 4,026.1 hours expended by Mr. Lee and the 862 hours expended by Ms. Herrington were reasonable.FN34 Defendant responds that Mr. Lee and Ms. Herrington should be awarded "no more than 1396 hours [] 1145.2 hours for Mr. Lee and 250.5 for Ms. Herrington." FN35 According to Defendant, the number of hours spent by Plaintiff's attorneys should be reduced because Plaintiff's counsel expended an excessive amount of time: (1) drafting complaints; (2) noticing, attending and conducting more than forty depositions, including Plaintiffs; (3) preparing Plaintiffs motion for summary judgment; (4) opposing Defendant's motion for summary judgment; (5) researching and drafting the motion to strike Defendant's fifth affirmative defense; (6) researching and drafting motions for reconsideration; (7) preparing for the pre-trial conference and drafting the joint pre-trial statement; (9) composing and objecting to proposed jury instructions and verdict forms; (10) filing a reply to Defendant's objections to Plaintiff's motion for costs; (11) drafting an 88-page opposition to an ex parte application to shorten time, which was granted on May 7, 2008; (12) alleging spoilation of evidence; (13) communicating with his client; (14) advancing "whistleblowing" claims; and (15) researching appellate procedure and extraordinary writs. FN36 Defendant*1101 also argues that the attorneys' fee award should be reduced for the administrative or secretarial work undertaken by Plaintiff's attorneys.

FN34. (See Doc. 451 at 40:16-40:17.)

FN35. Defendant accumulated and revised the billing totals because Plaintiff's counsel did not adequately respond to the Court's July 28, 2010 oral requests and subsequent Minute Order. Several of the County's billing figures are incorporated into the lodestar analysis.

FN36. These subject areas are not exhaustive. Other time entries and subjects are addressed as relevant to the analysis.

[19] To determine the hours reasonably expended, it is necessary to profile the post-trial briefing in this case, namely the documentation used to support Plaintiff's motion for attorneys' fees. Here, the voluminous documentary evidence submitted by Plaintiff's counsel is inadequate to support an attorney's fee petition in this Circuit, especially one that requests nearly \$4 million from a public entity. FN37 While Plaintiff's counsel's inexperience and unnecessarily adversarial practices have been noted throughout this Memorandum Decision, his refusal to provide a properly documented fee motion continuing adequate descriptions of hours expended for specific services provided on identifiable subject matter. This includes failing to provide a functional delineation of the number of hours spent litigating this case with a description of the services performed.

FN37. The analysis focuses on Mr. Lee's deficient documentation and billing records, as well as his confusion over the Court's requests for specific billing information and task totals. As explained on July 28, 2010, co-counsel Ms. Herrington provided discrete task totals in her declaration consistent with generally accepted billing practices and documentation for fee requests in fee litigation. Mr. Lee, lead counsel, did not provide a single task total in his request for over 4,000 fee hours. Given the fact that Ms. Herrington provided task totals and the Court specifically requested them, Mr. Lee's confusion and omissions are incomprehensible.

Based on the state of law in the Ninth Circuit, including Moreno v. City of Sacramento, 534 F.3d 1106, it is difficult to understand why Plaintiff's lead counsel submitted voluminous billing records without delineating a specific total for each of the categories of work he performed. FNSK Unlike the prevailing party in Fischer, lead counsel's fee request in this case consisted of a bare request for \$4 million dollars and more than 500 pages of "Excel" or "Quick Books" spreadsheets. Not a single task total was provided in his hundreds of pages of supporting documentation. In addition, most of the original spreadsheets were limited to thirty characters, further

frustrating any attempt to calculate an accurate lodestar.

FN38. The Ninth Circuit has previously held that "plaintiff's counsel can meet his burden-although just barely-by simply listing his hours and identify[ing] the general subject matter of his time expenditures." Fischer, 214 F.3d at 1121. This low production threshold does not completely sync with Moreno, especially in cases involving voluminous requests for fees, here, lengthy briefs/objections, hundreds of pages of billing records and nearly 5,000 hours requested. Cf. Perez v. Safety-Kleen Systems, Inc., No. C-05-5338 PJH, 2010 WL 934100, at *7-8 (detailing the difficulties presented by plaintiffs' failure to set forth detailed billing statements).

During oral argument on July 28, 2010, the Court explained Ninth Circuit law on fee motions and that Plaintiff's documentary support foreclosed any attempt to meet that standard:

All right. Let's move on now to the subject of attorney's fees. And let me start by talking about some law that nobody cited. Because the subject of attorney's fees is changing in the Ninth Circuit. And there is a sea change that is occurring.

It used to be that trial judges were viewed as experts in the matter of attorney's fees, both as to the rate, as to the services performed, as to what was reasonably necessary to accomplish the result, and essentially, were evaluators, without having to call other experts to provide that kind of information.

As is often the case in law, the world appears to be changing, at least as Chief Judge Kozinski is there, it's going to *1102 change. In Moreno versus the City of Sacramento, which is found at 534 Fed 3d [F.3d] 1106, case about two years old now, it's a July of 2008 decision. Here's what has happened in the Ninth Circuit. In this case, Judge Levy was hearing a civil rights case brought against Sacramento City involving inverse condemnation, substantive due process, Fourth Amendment unreasonable search and seizure

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and procedural due process violations in a case where an owner's building was demolished. And Judge Levy, based on his experience and understanding and knowledge, made some across the board reductions, 25 percent to the requested hours for legal research, 50 percent reduction for trial preparation hours, 33 percent reduction in actual appeal preparation hours, 50 percent reduction for hours spent interviewing and investigating, 50 percent per hour reduction in the hourly rate, which the panel found was impermissible double counting.

So the starting point in a civil rights case, or a case where statutory attorney's fees are being recovered, is that he starts out, "Lawyers must eat, so they generally won't take cases without a reasonable prospect of getting paid. Congress has recognized that private enforcement of civil rights legislation relies on the availability of fee awards.

If private citizens are to be able to assert their civil rights, and if those would violate the nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it cost them to vindicate these rights in court. At the same time, fee awards are not negotiated at arms length. So there is a risk of overcompensation. A district court thus awards only the fee that it deems reasonable." And it cites the case of *Hensley v. Eckerhari*, 461 U.S. 421 [424] at 433 [103 S.Ct. 1933]

And there's one more case that preliminarily I will refer you to. And that is Lahiri, L-A-H-I-R-I, v. Universal Music & Video Distribution Corporation, 606 Fed 3d [F.3d] 1216 [(9th Cir.2010)]. In Lahiri, the concept of block billing, B-L-O-C-K, was used. And in Lahiri, the Court reduced 80 percent of the billable hours for attorneys and paralegals by 30 percent. And that court, the Ninth Circuit, found that was a permissible reduction citing California State Bar's Committee on Mandatory Fee Arbitration Report that block billing may increase time by 20 to 30 percent.

The Court further excluded fees incurred because the Court requested supplemental information that made an additional 10 percent across the board reduction

for excessive and redundant work, which was found to be a reasoned exercise of discretion.

And in the *Lahiri* case, which was a Lanham Act case, for infringement of copyright. And the ultimate reduction in that case ended up being about 25 percent gross. So we now turn to the plaintiff's motion for attorney's fees. And the present request involving a two times multiplier is for \$3,944,818 in attorney's fees. And we have certain declarations and some billing records that are submitted.

What the Court must say, as the starting point in the Ninth Circuit or an attorney's fee award, an application of a lodestar is that specific billing records are absolutely required. And that block billing records—or in this case, for some reason it appears that the program that the plaintiff used cuts off characters in the billing statement.

And so there are gaps in what the Court has been provided, which the plaintiff is going to have to supplement because we simply can't make sense nor do we have a complete basis for the backup, the *1103 records that are normally and now essentially re-quired.

Because there's no way a district court, as we are commanded by the Ninth Circuit, can make a painstaking and exacting analysis of the basis for a lodestar award without having a comprehensive description of services and allocation of time, normally to the tenth of an hour, spent on all matters with a designation of the identity of the attorney and/or the paralegal who is performing the services.

And so in the Court's experience, that is the minimum that is required to enable calculation of the lodestar.

(RT, July 28, 2010, 109:14–111:11, 116:1–117:18.)

Also on June 28, 2010, the Court, pursuant to a Minute Order, requested that counsel "include task and billing totals in their supplemental applications for attorneys fees," FN39 (Doc. 440.) Task totals were requested to facilitate a thorough and careful review of the lengthy objections/arguments and voluminous

billing records in this case. See Moreno. 534 F.3d at 1111 ("[w]hen the district court makes its award, it must explain how it came up with the amount.").

FN39. The Court in Smith v. District of Columbia, 466 F.Supp.2d 151, 158 (D.D.C.2006) stated:

To be sure, the trial court must be 'practical and realistic' regarding how attorneys operate; if attorneys 'have to document in great detail every quarter hour or half hour of how they spend their time [...] their fee[s] [...] will be higher, and the lawyers will simply waste precious time doing menial clerical tasks.'

While mindful of this language and without elevating form over substance, it is not unreasonable to request more detailed post-trial billing records to calculate an accurate lode-star. See, e.g., Fischer v. SJB-P. D. Inc., 214 F.3d at 1121.

Plaintiff filed supplement billing information on August 16, 2010. (Doc. 448.) In particular, Plaintiff filed a Memorandum of Points and Authorities and Mr. Eugene Lee's supplemental declaration, a 76-page amendment to his original 96-page declaration. FN40 (Doc. 448-1.) The supplemental filing, however, did not improve on the original fee motion. None of the billing information requested in open court or via Minute Order was included.

FN40. Plaintiff also filed the declarations of David Hicks, Lawrence Bohm, and Christina Krasomil. (Docs. 448-2 to 448-4.)

The County opposed the supplemental briefing based on Plaintiff's counsel's lack of detailed billing records and task totals, as requested on July 28, 2010 in open court and, later, pursuant to Minute Order. In its opposition, the County correctly observed that Plaintiff's counsel did not provide the information requested by the Court on July 28, 2010. To remedy these deficiencies and reach a final fee total, the County prepared appropriate task totals:

Plaintiff's new filing suffers from the same filings that prevented the Court from considering the motion on July 28. Contrary to the Court's direction, the revised time records do not include task or billing totals. In fact, they provide no totals. Surprisingly, unlike the time records appended to the first filing, the revised time records Mr. Lee submitted with his new filing are not even in chronological order. This makes them even harder to analyze- or group into tasks. To aid the Court in considering the motion, the County has prepared spreadsheets that group time entries into tasks and provide totals.

(Doc. 450 at 7:21-7:28.)

In a last ditch attempt to meet Ninth Circuit fee standards, Plaintiff filed a reply on September 16, 2010. FN41 In his reply, *1104 Plaintiff admits that the requested task and billing totals were not included, apologizing to the Court for yet another "oversight," (Doc. 451 at 7:18-7:20 ("In its August 4 Minute Order, the Court wrote, 'Counsel are requested to include task and billing totals in their supplemental applications for attorneys' fees' [...] Plaintiff's counsel did not do that [...] [t]his was an oversight for which Plaintiff apologizes.")) Plaintiff nonetheless suggests that the Court and Defendant had enough information to calculate an accurate Lodestar. FN42 Mr. Lee also attached a third "fee" declaration to his reply, the latest iteration/addendum totaling 366 pages. While the declaration includes sporadic and unexplained task totals—the first time doing so after three rounds of briefing-, it omitted the critical task totals/subtotals and other billing analysis requested on July 28, 2010. FN43

FN41. Plaintiff's most recent supplemental fee brief, (Doc. 451), provides several unexplained and untethered fee totals. While Plaintiff argues that this effort is adequate, he overlooks that the complete failure to follow the Court's July 28, 2010 Order or adhere to Ninth Circuit law (which was explained to him during the hearing). He further neglects to consider the burden these actions had on the Court, as well as Defendant's ability to file an opposition. However, when a subtotal was provided by

Plaintiff, an attempt was made to analyze it within the lodestar framework.

FN42. (See Doc. 450 at 7:18–7:20) ("Plaintiff would point out that it appears Defendant was able to calculate these totals anyway.") Plaintiff's counsel is reminded that the Court presides over one of the heaviest caseloads in the nation, over 1,220 criminal and civil cases.

FN43. Plaintiff intersperses certain task totals throughout the latest reply brief. These subtotals are not helpful as they are incomplete, infrequent and not calibrated to the total hours billed. For example, Plaintiff states that Mr. Lee and Ms. Herrington recorded 453.8 hours (327.2 and 126.6 hours) preparing and attending depositions. The deposition subtotal, one of the few subtotal amounts included in the reply, is not separately broken down by deponent, location, related expenses, in relation to the total billed amount. They are not separately tallied to produce an omnibus total, i.e., "added together" in a spreadsheet, text box, graph or separately delineated in the body of the reply brief. Plaintiff does not satisfy his burden by producing a few task totals in his third supplemental brief, while ignoring the bulk of the remaining task totals (which encompass most of the billed time). It is impossible to calculate an accurate lodestar on Plaintiff's evidence, the house spent on each item of legal work billed for, which, after three rounds of supplemental briefing, is nearly a thousand pages of unorganized argument, declarations and computer spreadsheets. It is not the Court's duty to organize and order the underlying records that provide the basis for the lodestar calculation.

The United States Supreme Court has made clear that "[t]he fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Plaintiff has not met that burden in this case. As a result of Plaintiff's counsel's continued oversights,

which are unexplained given the number of opportunities he has been afforded to amend his billing information and the Court's recitation of the relevant legal standards, an independent calculation of an accurate lodestar is required.

2. Specific Legal Standard

[20] Although district courts have discretion to determine the amount of a fee award, "it remains important ... for the district court to provide a concise but clear explanation of its reasons for the fee award." Hensley, 461 U.S. at 437, 103 S.Ct. 1933. The district court should give at least some indication of how it arrived at the amount of compensable hours for which fees were awarded to allow for meaningful appellate review. Cunningham v. County of Los Angeles, 879 F:2d 481, 485 (9th Cir.1988) ("Courts need not attempt to portray the discretionary analyses that leads to their numerical conclusions*1105 as elaborate mathematical equations, but they must provide sufficient insight into their exercises of discretion to enable [the appellate court] to discharge our reviewing function"). "When the district court makes its award, it must explain how it came up with the amount [...] [t]he explanation need not be elaborate, but it must be comprehensible." Moreno, 534 F.3d at

"The fee applicant bears the burden of documenting the appropriate hours expended in litigation and must submit evidence in support of those hours worked." Gates v. Deukmejian, 987 F.2d 1392, 1397 (9th Cir.1992). A court must guard against awarding fees and costs which are excessive and must determine which fees and costs were self-imposed and avoidable. INVST Fin. Group v. Chem-Nuclear Sys., 815 F.2d 391. 404 (6th Cir.1987). A court has "discretion to 'trim fat' from, or otherwise reduce, the number of hours claimed to have been spent on the case." Soler v. G & U, Inc., 801 F.Supp. 1056, 1060 (S.D.N.Y.1992) (citation omitted). Time expended on work deemed "excessive, redundant, or otherwise unnecessary" shall not be compensated. See Gates, 987 F.2d at 1399 (quoting Hensley. 461 U.S. at 433-34, 103 S.Ct. 1933).

> 3. Merits a. Preface

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Determining the appropriate fee award in a case involving voluminous fee materials and resistance by the moving party to comply with the law will inevitably be imprecise. To the extent possible, an attempt was made to address each time entry and objection filed by the parties. If an entry or objection was not addressed, it was either incorporated into a task total without specific reference or, alternatively, was too vague and unnecessary to consider. See Ravet v. Stern. No. 07CV31-JLS-CAB, 2010 WL 3076290, at *6 (S.D.Cal. Aug. 6, 2010) (explaining the "vague entry" case law and excluding fees because "the Court cannot reasonably ascertain whether these conversations were pertinent or irrelevant to the [fee motion]."). A number of time entries were excluded based on the Supreme Court's decision in Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933:

[T]he fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. The applicant should exercise 'billing judgment' with respect to hours worked and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.

Id. at 437, 103 S.Ct. 1933.

The confusion and resistance of Plaintiff's counsel to organize and chronologically catalogue and/or describe the specific service giving rise to the fees in this case further complicated an already arduous undertaking.

b. Complaint Drafting

According to Defendant, Plaintiff's counsel spent an excessive number of hours drafting the original, amended and supplemental complaints. Defendant argues that the Court should "substantially reduce" the claimed number of hours spent on these tasks, which it estimates at 415 hours:

Mr. Lee and Ms. Herrington together recorded nearly 155 hours researching and drafting the first version of the complaint. Mr. Lee spent an additional 260 hours researching, drafting, writing, and filing two supple-

mental complaints and a second amended complaint.

(Doc. 450 at 21:3-21:5.)

Defendant also claims that Court should exclude in its entirety: (1) the time associated with the (mis)filing of the first amended complaint; and (2) the time associated with filing the third supplemental *1106 complaint, which was withdrawn three weeks after it was filed.

Plaintiff rejoins:

A review of Ms. Herrington's and Mr. Lee's declarations reveals that Ms. Herrington spent a total of 59.8 hours researching and drafting the first complaint while Mr. Lee spent a total of 46.6 hours reviewing and drafting the complaint. The total for both attorneys is 106.4 hours [...]

Defendant is arbitrarily categorizing all billing items prior to filing of the complaint as complaint-related, including items such as phone calls, correspondence, and research into non-complaint related items such peer review privilege in discovery. There are additional discrepancies in Defendant's calculations. Exhibit G includes 174 hours of research which it correctly describes as "Additional research after filing complaint". But Defendant then includes this post-complaint research in the 260 hrs which Defendant claims Plaintiff spent researching the supplemental and amended complaints. This is contradictory and wrong. Defendant also appears to have lumped all research time entries together and deemed them complaint-related.

(Doc. 451 at 34:26-35:12.)

[21] Plaintiff's arguments lack merit. As to Mr. Lee's briefing, there was an easy fix to this problem: he could have provided the necessary documentation during the first two rounds of briefing, filed on June 1, 2010 and August 16, 2010, specifying the specific hours spent research and drafting the complaint and subsequent amendments/supplements. Having decided not to do so, after several rounds of briefing and a lengthy instruction on the relevant legal standards, Plaintiff has not satisfied the Moreno standard.

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Even considering the merits of his third and most recent supplemental filing, Mr. Lee's supporting documentation is incomplete and underdeveloped. In particular, Plaintiff argues that Defendant incorrectly includes non-complaint research time into the "complaint" total. Plaintiff, however, does not separately accumulate or relate this "uncategorized" time to the complaint, instead offering an artificially reduced "original" complaint total of 106.4 hours. More problematic is that Mr. Lee responds with task totals for the "complaint" and "third supplemental complaint," but does not follow a similar procedure for other iterations of the complaints: the two supplemental complaints or the "uncategorized research." There is no explanation for Mr. Lee's selective task totaling, which resulted in another layer of confusion.

The preparation of the complaints, including research, should have taken Mr. Lee no more than 80 hours. The various iterations of the complaint were nearly identical and of limited complexity. The gravamen of the litigation was that the County violated Plaintiff's rights, as contract department chair and pathologist within the Kern County Medical Center's hospital, under the FMLA, the FEHA, the CFRA, and 42 U.S.C. § 1983.FN44 (Doc. 2 at ¶¶ 137-212; Doc. 15 at ¶¶ 142-221; Doc. 24 at ¶¶ 152-231; Doc. 30 at ¶¶ 153-232; Doc. 242 at ¶¶ 158-224.) These statutes are customary and familiar to any employment lawyer in California. Mr. Lee was not breaking new ground. No attorney with thirteen years of experience-with "an excellent reputation in the California *1107 employment law community and demonstrated skill and success"-should need to spend more than 100 hours drafting three nearly identical complaints and two minor supplements. Plaintiff's counsel also erred in attaching exhibits and uploading complaints to ECF. These administrative errors are excluded from the fee award in their entirety. With respect to all complaint-related tasks, including research, correspondence and drafting, Mr. Lee is entitled to 80 hours.

FN44. Various state law claims, namely a claim for defamation, were alleged but later withdrawn. (Doc. 15 at ¶¶ 204-214.) As dis-

cussed on July 28, 2010, Plaintiff also advanced claims against five individual defendants, but later omitted these individuals from the second amended complaint.

According to Ms. Herrington's declaration, she expended 17.3 hours researching the complaint and 42.5 hours drafting the complaint, for a total of 59.8 hours. FN45 Billing nearly 60 additional hours as co-counsel is excessive given Ms. Herrington's extensive experience, her specialty in employment law, and the marginal legal complexity of this case and the original complaint. Ms. Herrington's complaint-related task total is reduced from 59.8 hours to 40 hours. This totals 120 hours spent on complaint-related tasks.

FN45. According to her declaration, Ms. Herrington did not work on either the supplemental or amended versions of the complaint. (Doc. 452–2 at ¶ 18.)

c. Travel Time

Defendant argues that Mr. Lee cannot recover a single hour of his travel time. Defendant cites the "blending" together of Mr. Lee's travel time and his time spent on purely legal tasks. This amalgamation allegedly made it impossible to quantify Mr. Lee's travel time, thus the time is not recoverable:

Mr. Lee charged at his full requested rate. However, Mr. Lee frequently lumped his travel time in with the time he spent on other tasks, thereby making it impossible to identify the discrete time he actually spent traveling. The Court asked Mr. Lee to revise his time records to show tasks and avoid "block billing" but Mr. Lee did neither. The County submits none of Mr. Lee's travel time should be compensated.

(Doc. 450 at 9:27-10:7.)

Plaintiff responds by stating that Defendant *could* deconstruct the different time tasks/totals, but simply chose not to do so:

[Calculating travel time] is not impossible. Simply deduct the 4 hours round trip travel time required to travel between Los Angeles and Bakersfield from any

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such entry.

(Doc. 451 at 9:9-9:11.)

Plaintiff misses the point. Under Hensley, 461 U.S. 424, 103 S.Ct. 1933 and Deukmejian, 987 F.2d 1392, it is Plaintiff's burden to document his hours, including travel, and submit evidence to support the hours billed. It is not incumbent on the Court or opposing counsel to isolate, itemize, break down, and attempt to categorize by legal activity Plaintiff's counsel's billing records. See Kearney v. Foley and Lardner, 553 F.Supp.2d 1178, 1185 (S.D.Cal.2008) ("The Court must have 'substantial evidence' to support the fee award."). Ninth Circuit law does not require a district court to work backwards and sift through thousands of pages of billing records and excel spreadsheets. Rather, the Ninth Circuit provides that, in situations involving inadequate fee documentation, the district court may request supplemental billing information from the moving party. See, e.g., Fischer, 214 F.3d at 1121. That approach was initially taken in this case. Plaintiff, however, chose not to comply with the Court's specific requests, communicated to counsel in open court and pursuant to Minute Order, giving him the opportunity to do so. It is difficult to understand Plaintiff's confusion on this point.

*1108 Nearly all of Mr. Lee's travel time is incorporated into the subtotals for depositions, summary judgments, motions in limine, and depositions. The Court's independent research revealed only two "miscellaneous" travel entries, on December 17, 2007 and October 8, 2008. This time, 13.8 hours, is reasonable and awarded. The remaining travel time, if any and to the extent it can be identified, is excluded on the ground the vague and imprecise billing entries do not allow the Court to determine "how much time ... [was] spent on particular claims, and whether the hours were reasonably expended." Ravet v. Stern, 2010 WL 3076290, at *6 (citation and quotation omitted).

Defendant does not object to Ms. Herrington's welldocumented request for 39 hours of travel time. FN46

FN46. Ms. Herrington's travel hours are calculated by multiplying the travel rate, \$200, and

the requested travel time, 39 hours, to reach a total of \$7800. The reduced travel rate also applies to calculate Mr. Lee's travel time, 13.8 hours.

d. Fifth Affirmative Defense

Defendant argues that the 91 hours billed by Mr. Lee and Ms. Herrington in conjunction with Defendant's "Fifth Affirmative Defense" was unnecessary and wasteful. The fifth affirmative defense was advanced in Defendant's June 21, 2007 Answer. FN47 Plaintiff moved to strike the defense on grounds that it was "an insufficient defense" and "scandalous matter" under Rule 12(f). Plaintiff supported the motion to strike with several declarations, amended declarations, a Memorandum of Points and Authorities, proposed orders, corrected orders and a request for judicial notice. (Docs. 32–40.)

FN47. The fifth affirmative defense alleges: "As and for a fifth affirmative defense, Defendants allege that, during Plaintiff's employment at Kern Medical Center, Plaintiff was arrogant, disagreeable, uncooperative, intimidating, overbearing, self-righteous and unfriendly and that Plaintiff's behavior contributed to and was the direct and proximate cause of any stresses, disabilities or injuries that Plaintiff believes he sustained. (Doc. 31 at 12:18–22.)

The motion was denied in a brief 8-page decision on October 23, 2007, 2007 WL 3119670. (Doc. 64.) The Court explained:

Plaintiff reads the fifth affirmative defense narrowly and argues that it asserts only contributory negligence. The court is not persuaded by plaintiff's argument, because it is based on a faulty premise. The problem with plaintiff's premise is that it characterizes the fifth affirmative defense as exclusively contributory negligence and ignores the fact that it concerns other defenses as well. The substance of the fifth affirmative defense is that plaintiff's own misconduct created the situation that resulted in his injuries. An allegation that a party has acted inequitably or asserted a claim in bad faith gives rise to an unclean

hands defense. An allegation that a party has sought to benefit from his own wrongdoing gives rise to an equitable estoppel. Both are apparent in the fifth affirmative defense. Given that the court is obliged to view the fifth affirmative defense in the light most favorable to defendants and to resolve any doubt regarding the sufficiency or relevancy of the defense in defendants' favor, the court does not subscribe to plaintiff's narrow interpretation of the defense.

(Doc. 64 at 5:18-6:3.)

Plaintiff filed a motion for reconsideration of the October 23, 2007 Order, (Doc. 68), which was denied without prejudice on December 17, 2007, 2007 WL 4463282 (Doc. 81). The Court stated that the "evidence of Plaintiff's conduct is relevant to *1109 the totality of the circumstances underlying Plaintiff's allegations, including his allegation of a hostile work environment." (Id. at 3:5-3:7.) Plaintiff was given the opportunity to refile if discovery revealed different facts.

Although those facts never developed, Plaintiff moved to dismiss the fifth affirmative defense four additional times, in his motion for summary judgment, (Doc. 263), twice *in limine*, pre-trial and during trial, (Docs. 324 & 376), and during the Rule 51 conference, (Doc. 381). These requests/motions were all denied.

As explained to Plaintiff on a number of occasions, several times in written decisions, there was no question that the evidence of Plaintiff's misconduct was relevant to whether he was subjected to unlawful adverse employment actions and a hostile work environment. The fifth affirmative defense was one of Defendant's key litigation strategies, i.e., Plaintiff's alleged mistreatment of hospital employees and disagreeable nature precipitated and justifies the employment actions taken against him. Although the jury did not ultimately agree, Plaintiff's alleged misconduct was highly relevant to determine motive, as it was supported by the hospital Board chairs and some Department heads.

[22] That the law recognized Defendant's ability to assert such a defense should have been abundantly clear to competent employment law counsel; at a minimum,

after reviewing the Memorandum Decision re: Cross-Motions for Summary Judgment. Any subsequent billed time to prepare reconsideration motions is excluded from the fee total as unnecessary. The issue was fully presented and the repeated reassertion of the motions were meritless disguised motions for reconsideration. In addition, the total time billed is excessive for the work performed. The preparation of the preceding motions should have taken no more than 40 hours. Plaintiff's counsel also committed a number of administrative errors when he filed the original motion to strike. This time—1 hour—is excluded. For these reasons, among others, the time spent litigating the fifth affirmative defense is reduced from 91 hours to 40 hours.

FN48. The number of hours spent on this task is broken down as follows: Ms. Herrington is awarded 15 hours and Mr. Lee 25 hours.

e. Motions for Reconsideration

Defendant argues that the Court should exclude the 59 hours spent preparing Plaintiff's four motions for reconsideration. Plaintiff disagrees. Citing Emery v. Hunt, 272 F.3d 1042, 1047–48 (8th Cir.2001), Plaintiff argues that the entire 59 hours are recoverable because "a prevailing party is entitled to recover fees for all hours reasonably spent in pursuit of the litigation, including hours spent on unsuccessful motions." (Doc. 451 at 12:13–12:14.)

[23] Plaintiff's arguments are largely unpersuasive as they omit the linchpin of the Eighth Circuit's analysis: that the hours be reasonably spent in pursuit of the litigation. That is not the case here. For example, on May 5, 2008, Plaintiff filed a motion for reconsideration concerning the Court's denial of his request to telephonically appear at a Mandatory Settlement Conference. (Doc. 114.) The motion was withdrawn the same day. (Doc. 115.) Plaintiff spent several hours drafting this motion, which he claims is reasonable. Plaintiff is wrong. The Standing Order of the Court requires the presence of counsel and client at a settlement conference for good reason. The motion and *1110 the time spent drafting it were unreasonable and unjustified. It is excluded from the fee request.

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Plaintiff argues that the remaining motions for reconsideration were necessary based on Magistrate Judge Goldner's "controversial nature" and alleged bias against him:

Magistrate Goldner issued several controversial rulings before recusing herself to become County Counsel for Kern County. At one point, after Plaintiff had filed a motion for reconsideration, Goldner reversed her own controversial order granting Defendant's request for a special master at 50% cost to Plaintiff. Plaintiff objected that, among other things, Goldner was appointing her "friend", Kenneth Byrum, from Bakersfield, despite the fact that remaining depositions were to occur in Los Angeles. The controversial nature of Goldner's rulings necessitated Plaintiff's motions for reconsideration.

(Doc. 451 at 15:7-15:13.)

[24] Plaintiff's arguments are unsupported. Plaintiff's counsel has shown a proclivity to personally criticize any judge who has ruled against Plaintiff's counsel. There is no indication that Magistrate Judge Goldner's rulings were improperly influenced, as they conformed with the Supreme Court and Ninth Circuit precedent. (See, e.g., Doc. 81; Doc. 174; Doc. 222.) Plaintiff's counsel's unduly contentious conduct during discovery and conflicts with opposing counsel made necessary the intervention of the magistrate judge on a number of occasions. The arguing and conflict between the attorneys at depositions justified discovery sanctions and the need for a master, even if not implemented. Plaintiff conveniently overlooks the fact that discovery had degenerated to the point where counsel could not civilly communicate. Judicial intervention was required to complete discovery based on the animosity that existed between Mr. Lee and Mr. Wasser.

In any event, each one of the motions for reconsideration was denied. FN49 Plaintiff has not accused the District Judge of bias. None of the unsuccessful motions for reconsideration were appealed to the Ninth Circuit.

FN49. Plaintiff also neglects to mention that he prevailed on a number of motions before Ma-

gistrate Judge Goldner. (See, e.g., Doc. 113.)

In addition, Plaintiff's motions for reconsideration demonstrated manifest confusion of the relevant legal standards, the likely explanation Plaintiff's lack of success. As discussed in the Court's September 11, 2008 Order, 2008 WL 4217742, denying Plaintiff's motion for reconsideration:

Pursuant to Rule 72-303, a District Judge upholds a Magistrate Judge's ruling on a referred matter unless it is "clearly erroneous or contrary to law." See Rule 72(a), Federal Rules of Civil Procedure; 28 U.S.C. § 636(b)(1)(A). The "clearly erroneous" standard applies to a Magistrate Judge's findings of fact. Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602, 623, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993), "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing [body] on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Id. at 622 [113 S.Ct. 2264]. The "contrary to law" standard allows independent, plenary review of purely legal determinations by the Magistrate Judge. FDIC v. Fidelity & Deposit Co. of Md., 196 F.R.D. 375, 378 (S.D.Cal.2000); Haines v. Liggett Group, Inc., 975 F.2d 81, 91 (3rd Cir.1992). "An order is contrary to law when it fails to *1111 apply or misapplies relevant statutes, case law, or rules of procedure." DeFazio v. Wallis, 459 F.Supp.2d 159, 163 (E.D.N.Y.2006).

Plaintiff's request for reconsideration is DENIED. The record establishes that the conduct of both attorneys during depositions is at fault and that the protective order issued by the Magistrate Judge is well within her discretion and necessary to manage the process of discovery in this action. The mutual protective order is not clearly erroneous or contrary to law. Plaintiff's requests for sanctions were denied without prejudice by the Magistrate Judge because Plaintiff failed to document the requested amounts. These rulings also are not clearly erroneous or contrary to law.

(Doc. 222 at 2:4-3:5.)

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Here, Plaintiff seeks to recover almost 60 hours in fees for filing several motions for reconsideration. One of these motions was withdrawn, several were without a legal basis, and all were denied. This warrants a reduction in the amount of fees recovered for these motions. See Koon Chun Hing Kee Soy & Sauce Factory, Ltd. v. Star Mark Management, No. 04-CV-2293-SMG, 2009 WL 5185808, at *7 (E.D.N.Y. Dec. 23, 2009) ("plaintiff did not prevail on its motion for reconsideration, and this warrants a reduction in the amount of fees recovered."). To account for Plaintiff's lack of success, the confusion over the relevant legal standards, the frivolity of the May 5, 2008 motion and the excessive time spent preparing the motions, the total number of hours are reduced by 50%, from 59 hours to 29.5 hours.

f. Depositions

Defendant next contests the number of hours spent noticing, conducting and defending the more than forty depositions in this case, including Plaintiff's deposition. Defendant contends that many of the depositions were not needed and Mr. Lee wasted countless hours on "useless questioning about subjects that were not in issue and arguing with witnesses." (Doc. 450 at 11:20.) Defendant requests a reduction from 657 hours to 329 hours for deposition-related tasks.

Plaintiff rejoins that Defendant is "wrong" about the number of deposition hours billed by his attorneys:

Mr. Lee recorded 327.2 hours in deposition-related tasks. Ms. Herrington's tally was 126.6 hours. The total is 453.8 hours, far less than the number quoted by Defendant.

(Doc. 451 at 16:26-27.)

The deposition transcripts reveal that both counsel were combative and aggressive. FN50 Both parties are at fault for the breakdown of communication and uncivil decorum, which exposed a number of witnesses to disputatious and offensive commentary and conduct by counsel in this case. It was also unnecessarily imposed on the Court. The need for judicial oversight was unfortunate and a waste of resources. (See Doc. 207, "Order on Letter Request Regarding Discovery Dispute," at

7:9-7:10) ("It should not be necessary for any court to have to regulate the type of conduct which has been exhibited in Ms. Smith's deposition.") Plaintiff's figure of *1112 453.8 hours is accepted as a starting point to determine the number of hours billed for deposition-related tasks.

FN50. For example, Mr. Lee accused Mr. Wasser of "tapping his feet" during a deposition, with the intent to provoke a certain response from the witness (Ms. Antoinette Smith). As a result, Mr. Wasser directed one of Mr. Lee's two webcams to his feet. Mr. Lee responded: "if you touch my camera again, you're not going to like what happens." Mr. Lee made several additional statements concerning what would happen to Mr. Wasser in the event he touched his web camera. Mr. Wasser replied that he would do what was necessary to verify the room conditions. This dispute, among others, is chronicled in the "Order on Letter Request Regarding Discovery Dispute," (Doc. 207).

[25] The substance of the County's arguments are that two counsel were not necessary to defend depositions. Plaintiff fails to acknowledge that any duplication of efforts existed in this case, arguing that Defendant "failed to rebut Ms. Herrington's evidence that, throughout this litigation, including at the depositions, she undertook different, complementary tasks." Such a position is not supported by Plaintiff's briefing. Excluding the deposition of Regina Levison, it is unclear why Ms. Herrington's presence was She did not separately pose questions or lodge she did not conduct the deposition or defend the witness, Mr. Lee did. Ms. Herrington's declaration is similarly vague, listing only her attendance at certain depositions, not her participatory role or most notably what preparation she did. Ms. Herrington did not question, lead, defend or object during depositions, she does not describe her "complementary"

To account for such unjustified duplication of efforts, among other reductions, the total number of deposition hours are reduced by 30%. See Wheeler ν .

Coss, No. 3:06-CV-00717-RAM, 2010 WL 2628667, at *6 (D.Nev. June 22, 2010) (reducing the requested deposition amount by 30.33 hours based on the Court's discretion and its litigation knowledge.). The number of hours spent on all deposition-related tasks are reduced from 453.8 to 317.7, broken down as follows: Ms. Herrington is awarded 88.7 hours and Mr. Lee is awarded 229 hours.^{FNS1}

FN51. This figure includes any time spent traveling to depositions and preparing the "Master Deposition Exhibit."

g. "Manifestly Ineligible"

Defendant argues that three categories of time are "manifestly ineligible" from inclusion in the fee award: (1) attorney-client non-litigation work; (2) secretarial and clerical work; and (3) researching appellate procedures. According to Defendant, Plaintiff spent 57.2 hours on the first unexplained task, 169.1 hours on the second and on 14.5 the third. Defendant provides a separate index of the time spent by Plaintiff's counsel on these tasks. (Doc. 450–1.)

Defendant first argues that the Plaintiff spent 57.2 hours on "tasks [that] have nothing to do with prosecuting Plaintiff's claims." (Doc. 450 at 9:17.) Plaintiff responds that the tasks were "directly related" to the litigation and, in any event, Defendant did not carry his burden to provide specific evidence to challenge the reasonableness and accuracy of the hours billed. Plaintiff ignores that it is the moving party who carries the initial burden to support his fee motion, which was not done in this case. Plaintiff's failure to properly document and support his motion directly impacted the ability to respond/evaluate the motion.

[26] Defendant's primary argument is not entirely accurate. Most of the alleged "non-litigation" time constitutes electronic communications between Plaintiff and his counsel, as well as research of employment issues, specifically, time spent researching Plaintiff's FMLA eligibility and reviewing employment and buyout documents. Time spent on these tasks is recoverable. However, a number of the entries are excluded, including Mr. Lee's conversations with a TV reporter and

phone calls between Mr. Lee and Ms. Herrington to discuss Mr. Lee's performance on television. Other entries are inflated, i.e., billing several hours to send "confirmatory emails" and "read and review" short emails. A modest *1113 downward adjustment of 10% is warranted with respect to the alleged non-litigation work. See Moreno. 534 F.3d at 1112 ("[T]]he district court can impose a small reduction, no greater than 10 percent-a 'haircut'-based on its exercise of discretion and without a more specific explanation.").

Defendant next contends that 169.1 hours should be excluded on the ground it constitutes "secretarial and clerical work." Plaintiff rejoins that these activities are recoverable as "attorney work product." For the most part, the time entries correspond to work on the "chronology grid" and "CaseMap" software.

[27][28] Although somewhat clerical in nature, Courts have held that time spent organizing and formatting "CaseMap" software is properly recoverable. See Semmaterials, L.P. v. Alliance Asphalt, Inc., No. CV-05-320-S-LMB, 2007 WL 676675, at 3 n. 1 (D.Idaho Mar. 1, 2007) ("Time spent updating CaseMap and adding persons, witnesses, and organizations to spreadsheets have not been excluded because, although somewhat clerical in nature, these tasks add to a database that organizes information to save attorneys' time and to help attorneys perform legal services in a more efficient manner."). On the current record, however, there is considerable overlap between CaseMap and Plaintiff's "chronology grid." Plaintiff's cursory explanation of a "chronology grid" bears a striking resemblance to the function of the CaseMap software. FN52 To account for this overlap and several obvious secretarial entries, among other reasons, the time spent on these tasks is reduced from 169.1 hours to 100 hours. Secretarial time is not compensable. It is part of an attorney's overhead. See Yeager Bowlin, ν. 2:08-102-WBS-JFM, 2010 WL 2303273, at *8 (E.D.Cal. June 7, 2010) (secretarial tasks are generally not recoverable as attorney's fees).

FN52. http:// www. lexisnexis. com/ trial/ uslm 137987. asp? ppcid= 137897_ p 137279483& WT. srch= 1& optify_ r= ppc& optify_ rd=

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casemap+ software. (Last visited Dec. 18, 2010).

Defendant's final argument is that Plaintiff's counsel spent 14.5 hours researching appellate procedure, however, "no appeal could have been taken and [an] extraordinary writ was never available." (Doc. 450 at 9:24–9:25.) Plaintiff rejoins:

A trial attorney is required to look ahead to appeal as he litigates a case. The process includes preserving the record, making necessary objections, and exhausting relief at the trial court level. That is what Plaintiff did here. Also, there were numerous discovery decisions issued by Magistrate Teresa Goldner for which Plaintiff had considered seeking writ relief.

(Doc. 451 at 12:2-12:5.)

Plaintiff is awarded eight hours for these tasks. Plaintiff is entitled to conduct reasonable research concerning appellate law, however, the billed time and his "new" explanation for this research conflict. Most of the alleged time spent researching appellate procedure occurred in April 2009, after the dispositive motion rulings in this case. Plaintiff's counsel incurred the rest of the time in 2010, an entire year after trial. It is unclear how Magistrate Judge Goldner's "numerous" rulings are relevant to these entries. Magistrate Judge Goldner resigned from the bench on April 6, 2009 and did not rule on any dispositive motions. No other explanation of the purpose of this research is provided.

h. Spoliation

Defendant argues that the Court should reduce the 25 hours Plaintiff spent researching "spoliation" issues. According to Defendant, Plaintiff attempted to build a spoliation claim based on the conduct of *1114 Barbara Patrick, a member of the Kern County Board of Supervisors. Ms. Patrick left her position on the Board on January 8, 2007, two days after Plaintiff filed this action. It is undisputed that she shredded all Kern-related documentation when she left her Board position.

Plaintiff does not specifically dispute Defendant's factual summary, however, he argues that the 25 hour

calculation is "wrong." Rather, Plaintiff asserts that the correct hourly total is 11.5 hours. This is a reasonable figure. Plaintiff's figure of 11.5 hours for purposes of calculating time spent researching spoliation is adopted.

i. Whistleblowing

Defendant argues that all time spent on the whistleblowing claims should be excluded:

Th[e] claims were legally deficient. Competent, experienced counsel should have known it. Plaintiff's claim was under a new version of California Health & Safety Code § 1278.5, enacted after the underlying events took place. The version in effect at the time the events occurred did not cover an entity that owns or operates a health facility (such as the County), did not extend protection to members of the medical staff, and did not cover "reports." It is the responsibility of competent counsel to know the law before commencing litigation.

(Doc. 450 at 17:14-17:23.)

Defendant advances two additional arguments to support a reduction. One, Plaintiff could not establish a prima facie case under California Labor Code § 1102.5 because the "time span between the protected activity and the adverse employment actions was too great. Two, Plaintiff wasted countless hours requesting over 10,000 documents to explore the unmeritorious whistleblower claims. He requests a reduction of over 75 hours.

Plaintiff responds that he is entitled to recover all of the time spent researching, preparing and arguing his whistleblower claims. He does not identify the number of hours spent litigating these claims. According to Plaintiff, because the Court did not make a specific finding that the claims were "frivolous," he is entitled to all of his fees:

Plaintiff's position was not as insinuated by Defendant. As the Court noted: "Plaintiff argues that, not-withstanding all the textual changes, the amended version of California Health & Safety Code § 1278.5 merely clarified the original meaning of the statute

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and, as such, it can be applied in this case. Citing Mendiondo, Plaintiff suggests that the Ninth Circuit has already determined that the amended version of the statute applies to whistleblowing and retaliation that occurred prior to its enactment into law." There was never any finding that Plaintiff's contention was frivolous.

(Doc. 450 at 22:13-22:19) (citation omitted).

Plaintiff advances a similar argument regarding § 1102.5, that the claim was not declared "frivolous" by the Court. He also asserts that the discovery was necessary and, in any event, Defendant did not "indicate how it reached the arbitrary number of 75 hours [the reduction]." Plaintiff is correct on this point. Defendant proposes a reduction, but does not provide a task calculation or an analytical starting point.

Plaintiff is guilty of the same offense, which controls the analysis. See Falcon Waterfree Tech., LLC v. Janssen, No. 1:05-cv-551, 2008 WL 4534119, at *4 (W.D.Mich. Oct. 6, 2008) ("Where, as here, the fee petition makes it impossible to clearly differentiate between compensable and non-compensable attorney time, the onus of that lack of clarity falls on the moving party."). Plaintiff again fails to understand the relevant legal standard to *1115 support a fee motion. Here, Defendant's figure appears arbitrary because Plaintiff's counsel did not provide adequate billing documentation or task totals of the hours spent on each task in the first instance. Even when confronted with Defendant's figure, Plaintiff does not provide a "rebuttal" number of hours—his fourth attempt to do so. FN53

FN53. (Docs. 425, 436, 448, 451)

[29] An accurate lodestar figure for "whistleblower" tasks cannot be determined given the current state of the briefing. The whistleblower claims and a number of other claims advanced by Plaintiff shared common issues of fact, however, it was Plaintiff's burden to: (1) produce accurate/adequate billing records to support its fee motion, i.e., remove any ambiguity that impedes the calculation of an accurate lodestar; and (2) to "establish that the fees sought

are 'associated' with a successful claim." Signature Flight Support Corp. v. Landow Aviation Ltd. Partnership, 730 F.Supp.2d 513, 528 (E.D.Va.2010). Plaintiff did neither in this case. FN54

FN54. As discussed in detail in the April 3 and April 8, 2009 Memorandum Decisions, the claims did not survive the dispositive motion stage. (Docs. 310 & 311.)

For these reasons, among others, it is impossible to deduce a lodestar figure for these tasks with any accuracy $^{\text{FN55}}$

FN55. A number of the "whistleblower" entries are too vague to permit the Court to determine whether such fees are justified. See Ravet v. Stern, 2010 WL 3076290, at *6.

j. Motions to Compel

According to Defendant, Plaintiff spent an "incredible" 319 hours preparing ten motions to compel or for protective orders. Defendant claims that the Court should reduce this amount because: three of the motions were withdrawn; several of the motions concerned Plaintiff's "frivolous" whistleblowing claims; and Plaintiff chose not to reconvene the deposition of Patricia Perez. FN36

FN56. With respect to Ms. Perez's deposition, Plaintiff's motion was granted. However, Plaintiff's counsel chose not to further depose Ms. Perez.

Plaintiff contends that all of the hours are reasonable. He represents that two of the motions were withdrawn, not three, and "none of the motions were focused on whistleblowing claims, as Defendant contends, or any other claim, for that matter [...] they focused on adverse employment actions and/or rebuttal of Defendant's Fifth Affirmative Defense." (Doc. 451 at 25:17–25:19.)

[30] For the most part, these topics have been addressed. Most of the time spent preparing the motions to compel were required by the deterioration of Mr. Lee's and Mr. Wasser's professional relationship. Plaintiff's

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counsel, however, was unduly contentious and combative during discovery, which resulted in unnecessary discovery motions and court involvement. To account for this conduct, the withdrawn motions, the lack of documentation (and vagueness) to support the whistleblowing claims and the excessive number of hours spent drafting the motions to compel, among other reasons, Plaintiff is awarded 160 hours, the equivalent of four work weeks, for these tasks.

k. Background Investigations and Administrative Filings, Undisclosed Experts

Defendant next asserts that none of the time spent on administrative filings, undisclosed experts and background filings is recoverable. According to Defendant, Plaintiff spent 34 hours on administrative *1116 filings, 104 hours on undisclosed experts and 121 hours on background investigations.

With respect to undisclosed experts, Plaintiff represents that his counsel spent 18.6 hours. Plaintiff's figure is reasonable and is accepted to calculate an accurate lodestar.

With respect to the other two categories, Plaintiff repeats his boilerplate argument that there is no "particularized challenge" to his evidence, thus Defendant's calculation fails. This argument assumes that the documentation used to support the motion for attorney's fees is accurate, which is not the case. Instead, Plaintiff's failure to provide adequate documentation and explanation necessitated Defendant's calculations/ methodology. The failure to document fees continues in the present motion as Plaintiff does not provide a corrected figure despite Defendant's specific challenge.

[31] However, it is undisputed that Plaintiff was required to satisfy certain administrative prerequisites to commence litigation against the County. All of these hours cannot be excluded. With respect to the undisclosed experts, several of the individuals were on Plaintiff's expert list, (see, e.g., Doc. 320). Although Plaintiff's documentation is inadequate, Defendant's inability to recollect these individuals does not control the analysis. To account for these deficiencies, among others, 18 hours are awarded for administrative filings and

60 hours for background investigations. No additional time is warranted due to the failure to provide specific task descriptions, time increments or background documentation.

1. Motions for Summary Judgment

The dispute over the motions for summary judgment encompasses three discrete tasks: (1) reviewing Defendant's motion for summary judgment; (2) preparing Plaintiff's motion for summary judgment; and (3) attendance/preparation for oral argument.

Defendant claims that Mr. Lee and Ms. Herrington spent approximately 863 hours on these tasks. Plaintiff disagrees, stating that counsel only spent 712.4 hours, 545.5 hours (Mr. Lee) and 166.9 hours (Ms. Herrington). Plaintiff's total is accepted as a starting point for the lodestar analysis.

Plaintiff argues that the time billed on each of these tasks was reasonable, in many cases directing the Court to the actual motion documents. According to Plaintiff, "the complexity was reflected in Plaintiff's MSJ/MSA which was over 1,000 pages, Defendant's MSJ was nearly 1,200 pages, and Plaintiff's opposition to Defendant's MSJ which was over 1,000 pages." (Id. at 36:24–37:1.) Plaintiff also claims that this case "was extremely complex, involving 13 counts, 5 years of events, tens of thousands, of documents produced in discovery, more than 50 depositions, and more than 20 witnesses called at trial that last nearly 4 weeks." (Doc. 451 at 37:24–36:24.)

The true complexity of this case has been appraised throughout this Memorandum Decision. While the case required counsel to martial facts and establish an employment time-line, the legal theories and arguments were neither novel nor innovative. Plaintiff also incorrectly correlates motion length with legal complexity. The majority of the dispositive motion briefing consisted of deposition testimony and discovery responses, which were attached as exhibits to Mr. Lee's and Mr. Wasser's declarations. The actual "legal" briefing was less than 8% of the total pages. While necessary to review this material, it takes less time to process and configure factual information, mostly deposition testimony,

into a responsive briefing and/or trial strategy. In addition, as discussed*1117 in detail in the Memorandum Decisions and Orders in this case, Plaintiff's counsel's inexperience with the federal rules, trial practice and procedure, and the relevant legal authority inflated the total hours expended. (See, e.g., Doc. 321.)

[32] After careful review of the summary judgment and post-trial briefing, the hours requested by Plaintiff's counsel are unreasonable. The motions were important for resolving the central issues in this case and the attorneys who worked on them should be compensated accordingly, however, billing the equivalent of eighteen work weeks—more than four working months—is excessive.

To be clear, each party's motion was granted in part and denied in part. Plaintiff's motion, for the most part, was not a success. FNST Further, the portion granted in his favor, the County's ability to assert a number of affirmative defenses, was not a significant portion of the motion. FNSS Plaintiff, however, successfully defeated the FMLA and FEHA portions of Defendant's motion. The dispositive motion-related tasks should have taken no more than 300 hours. FNSS See Ryan M. v. Board of Educ. of City of Chicago, Dist. 299, 731 F.Supp.2d 776, 790 (N.D.III.2010) ("Using its discretion, the Court may reduce an attorneys' fee award when the hours billed are excessive in light of the attorneys' experience and the work produced.") (citations omitted).

FN57. The Court's April 28, 2009 Order, 2009 WL 1139987, provides, in relevant part:

Plaintiff moved for summary judgment on the whole of his action and summary adjudication on each one of his claims, asserting that liability is established leaving only damages for trial. Plaintiff also moved for summary adjudication on certain affirmative defenses.

The court painstakingly went through each of Plaintiff's claims and determined that Plaintiff was not entitled to judgment as a matter of law on his claims. Some of

Plaintiff's claims did not survive Defendants' cross-motion.

(Doc. 321 at 5:8-5:15.)

FN58. The brief discussion re: Plaintiff's motion to exclude Defendant's affirmative defenses can be found in Doc. 311, pgs. 133–138.

FN59. The hours awarded for dispositive motion-related tasks are broken down as follows (applying Plaintiff's counsel's work ratio): Mr. Lee is awarded 229.5 and Ms. Herrington is awarded 70.5.

Mr. Lee claims that he spent 31.7 hours preparing for and attending the oral argument on these motions and 20.5 hours reviewing the April 8, 2009 Memorandum Decision, of which 35 hours are reasonable. Ms. Herrington asserts she spent 1.1 hours attending the hearing. All of Ms. Herrington's time is reasonable.

The final dispute concerning the summary judgment motions is Defendant's complaint about Mr. Lee's alleged "insistence to treat language in the Court's summary judgment decisions as 'undisputed facts.' " (Doc. 450 at 15:21–15:22.) According to Defendant, Mr. Lee unreasonably "transformed" the Court's Memorandum Decision into a statement of undisputed facts, which made it impossible to draft the joint pretrial statement. Defendant claims that the 89 hours expended by Mr. Lee in connection with the pretrial statement should be excluded.

For the reasons discussed in the April 29, 2009 Order, Plaintiff is awarded 15 hours in connection with the preparation of the pretrial statement: FN60

FN60. This point is also discussed in the Court's April 22, 2009 Order, (Doc. 317).

The Supreme Court has stated that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether *1118 there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d

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202 (1986). This rule applies whether summary judgment on the whole of the action or partial summary judgment on a claim therein is at issue. See, e.g., Washington v. Garrett, 10 F.3d 1421, 1424, 1428 (9th Cir.1993). In ruling on such motions, "[t]he evidence of the non-movant is to be believed" by the court, "and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 254 [106 S.Ct. 2505] (emphasis added.) Accordingly, in analyzing such motions, a court does not decide or determine facts for purposes of trial. The Ninth Circuit recognizes "[t]here is no such thing as findings of fact, on a summary judgment motion." Minidoka Irrigation Dist. v. Dep't of Interior, 406 F.3d 567, 575 (9th Cir.2005) (internal quotation marks omitted). Although, in the course of ruling on such motions, courts will discuss facts or matters that are "undisputed," indisputable, not seriously disputed, appear "undisputed" or established, or use words of like import when discussing the record evidence and briefing, this does mean that a court has thereby usurped the function of the trier of fact and done something more than provide the context for the motion or articulate and explain the basis for the decision or a step in the analytical process [...]

Accordingly, Plaintiff's attempt to take passages from the court's order on the cross-motions and assert that they represent undisputed facts that have already been established for purposes of trial is misguided. No factual findings for purposes of trial were made. Of more concern is Plaintiff's intransigence in refusing to know and follow the law.

More serious is Plaintiff's intentional misrepresentation that the court did not rule on the "cross-motions for summary adjudication." Plaintiff moved for summary judgment on the whole of his action and summary adjudication on each one of his claims, asserting that liability is established leaving only damages for trial. Plaintiff also moved for summary adjudication on certain affirmative defenses. The court painstakingly went through each of Plaintiff's claims and determined that Plaintiff was not entitled to judgment as a matter of law on his claims. Some of Plaintiff's claims did not survive Defendants' cross-motion.

What Plaintiff appears to be arguing, although he does not specifically say it, is that the court should now establish facts under Rule 56(d)(1) [...]

Given the unnecessary complexity of this case and the impending trial date (which has already been rescheduled three times before), it is not "practicable" to comb the massive record to prepare an order under Rule 56(d)(1). In light of the inflated motion practice in this case and the apparent contentiousness between the parties, it is decidedly contrary to the interests of justice that yet another round of debate and further delay in these proceedings occurs. The case will proceed to jury trial on the present schedule. The parties are now ORDERED to comply with the court's instruction to move all the facts they cannot agree on to disputed. The parties have until 10:00 a.m. on April 30, 2009, to do so.

The absence of knowledge of the law, inexperience, and refusal to follow the directions of the court vexatiously multiply the proceedings under 28 U.S.C. § 1927. In the event compliance with this order is not effectuated, appropriate sanctions will be considered.

(Doc. 321 at 3:14-6:13.)

Plaintiff is awarded 21.2 hours total for all pretrial statement activities, including *1119 Mr. Lee's attendance at the pretrial conference.

m. Motions in Limine, Jury Instructions and Verdict Form
Defendant argues that the time spent preparing the
jury instruction, motions in limine and the verdict form
should be reduced. With respect to the preparation of
the jury instructions, Defendant explains:

Mr. Lee and Ms. Herrington refused to work with the Court in the preparation of jury instructions. After the County filed its proposed jury instructions, Mr. Lee filed 114 pages of objections. Since the County's instructions were simply proposed jury instructions, Mr. Lee's filings were unnecessary, Mr. Lee and Ms. Herrington, together, spent 67 hours on the jury instructions—far more time than was justified.

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. (Doc. 450 at 16:25-17:1.)

Defendant additionally states that the motions in limine were "straightforward and simple" and the time entries are "inflated." Lastly, Defendant argues no time should be awarded concerning the Plaintiff's proposed verdict form because "the Court prepared the verdict form."

Plaintiff only responds to the motions in limine dispute. Plaintiff argues that his in limine fees are reasonable because "the Court granted all 17 of Dr. Jadwin's motions in limine." (Doc. 425 at 7:14–7:15.) In addition, according to Plaintiff, the 108 hours (89 hours by Mr. Lee/Ms. Herrington and 18 hours by Ms. Minger) are reasonable because the motions "addressed several fact intensive and controversial issues, such as admissibility of the radiologist tie-pulling incident as character evidence and exclusion of speculative expert opinion." (Doc. 451 at 38:26–38:28.)

[33] With respect to this dispute, Plaintiff holds the weaker hand. First, as explained during the July 28, 2010 hearing, the Order granting Plaintiff's motions in limine was docketed in error. It was vacated during the July 28, 2010 hearing. (See Doc. 440, Minute Order, "Order Granting Plaintiff's Motions in Limine 1-17 was STRICKEN for reasons as stated on the record.") It is undisputed that Plaintiff was not as successful as he claims to be. Second, on the most difficult and "fact-intensive" motions, Plaintiff did not prevail. This includes the "tie-pulling incident" and the testimony of Defendant's expert, Thomas McAfee, M.D., motions 13 and 16. The majority of Plaintiff's motions in limine were boilerplate motions, i.e., to exclude non-party witnesses, to limit expert testimony to stated opinions, to exclude references to Plaintiff's claim for attorney's fees and to exclude evidence in support of unpleaded defenses. The drafting of these motions required very little time; they were undisputed, not "fact intensive" or legally "complex."

For these reasons, and to address excessive and duplicative billing, Mr. Lee and Ms. Herrington's requested time is reduced from 89 hours to 50 hours. ^{FN61} Ms. Minger's time for drafting two motions in limine is

reduced from 18 hours to 10 hours. FN62

FN61. The hours awarded for researching/drafting the motions in limine is broken down as follows (applying Plaintiff's counsel's work ratio): Ms. Herrington is awarded 32.5 hours and Mr. Lee 17.5 hours.

FN62. Plaintiff again cites *Emery v. Hunt.* 272 F.3d 1042, for the proposition that "prevailing plaintiffs [are] entitled to fees on unsuccessful motions." (Id. at 36:2.)

With respect to the fees requested for preparing the jury instructions and verdict form, neither of which Plaintiff addresses, Plaintiff's counsel are awarded 40 hours (preparing draft jury instructions) and 10 hours (verdict form). As Plaintiff did not *1120 address these tasks, no accurate allocation can be made between counsel. As such, the 40 hours and 10 hours are added to Mr. Lee's time, the counsel with the lower hourly rate.

n. Miscellaneous Tasks

Defendant argues that the time spent on three "miscellaneous" tasks should be excluded. One, the time spent drafting a "reply and sur-reply" to its opposition to the motion for liquidated damages and prejudgment interest. Defendant claims that these responses were not "authorized." Two, the ten hours spent preparing an 88-page opposition to Defendant's ex parte motion, which was granted on March 7, 2008. (See Doc. 122.) Three, Mr. Lee's preparing and submitting a Proposed Order on Defendant's Motions in limine.

[34] Defendant's first objection is without merit. The Court addressed the topic in the March 31, 2010 Memorandum Decision, (Doc. 408). The time is not excluded in its entirety. However, it was unreasonable to bill almost 22 hours to prepare unauthorized response briefs, FN63 which multiplied the proceedings. As discussed in that Memorandum Decision, the reply was not entirely helpful and contained very little legal analysis. Mr. Lee is permitted ten hours for this task. In addition, Mr. Lee is permitted twenty hours total for researching, drafting, and editing the "motion for additional findings

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of fact and conclusions of law," which included requests for liquidated damages and prejudgment interest. These motions were denied on March 31, 2010.

FN63. To the extent it can be ascertained, Mr. Lee billed 21.7 hours preparing the reply brief. (Doc. 451-1 at pgs. 350-352.)

The second objection focuses on Plaintiff's opposition to Defendant's "Ex Parte Motion for an Order Shortening Time Re Motion for Permission to Serve Expert Reports After May 5, 2008." Defendant claims that the ten hours spent drafting an 88-page opposition should be excluded. According to Defendant, its motion was "immediately granted."

Defendant is half right. Although the motion was successful, there is nothing in the record to support a complete reduction of fees. Plaintiffs opposition was lengthy and largely unnecessary, but it was not capricious or frivolous. Mr. Lee is permitted five hours for this task.

The general confusion over the motions in limine was discussed in § III(B)(3)(1), supra. As to the dispute, the Court instructed each party to submit a proposed order on their own motions in limine following the May 8, 2009 oral argument. The Local Rules provided Plaintiff an opportunity to counter Defendant's Proposed Order, however, the two Proposed Orders were identical, except for language concerning motion in limine No. 10. Plaintiff's version incorrectly characterized the ruling and was inaccurate. (Compare Doc. 351, MIL No. 10, pg. 3 with Doc. 347, MIL No. 10, pg. 2.) Defendant's Proposed Order was adopted in its entirety. The claimed 1.1 hours spent preparing Plaintiff's Proposed Order (on Defendant's motions in limine) are excluded.

o. Trial Time

Defendant also objects to the amount of time spent by Plaintiff's counsel preparing for and attending trial. Defendant requests a reduction of approximately 20%.

FN64. Defendant identifies a number of pro-

posed trial reductions in Doc. 450, Exh. F.

Ms. Herrington claims she spent 60.5 hours on trial-related tasks. Mr. Lee, however, does not provide a total for trial-related tasks.

A painstaking independent review of Mr. Lee's declarations, (Docs. 425-1, 448-1 and 451-1), reveals that Mr. Lee spent 321.8 hours on all trial-related tasks, including *1121 reviewing depositions transcripts, corresponding with jury consultants, the client and "trial team," selecting impeachment evidence, organizing exhibits, preparing his opening/closing statements and arguments, outlining/drafting witness examinations, attending trial and reviewing the filings in this case (jury instructions, verdict form, jury verdict). All correspondence and time spent with television/print media reporters is included in this global amount.

[35] Defendant's proposed reduction of approximately 20% is high. Rather, a 15% downward adjustment of trial time and fees is warranted. Based on the Court's familiarity with this action and trial experience in over 500 jury trials to verdict, the duplication of effort, the sheer number of hours spent corresponding with cocounsel and on clerical/admin tasks and after reviewing all of the time entries in detail, among other reasons, a reduction of fifteen percent is appropriate.

Ms. Herrington is awarded 51.4 hours for trial-related tasks. Mr. Lee is awarded 273.5 hours.

p. Bill of Costs

Defendant objects to the 115 hours Plaintiff's counsel spent preparing the Bill of Costs, filed June 29, 2009. Defendant also objects to Plaintiff's filing of a reply, arguing that a reply brief is not allowed under the Local Rules.

Plaintiff responds that the time spent composing the Bill of Costs is reasonable based on the "complexity" of the case. As to the filing of a reply, Plaintiff states: "Defendant never filed an objection [] [n]or did Defendant raise this issue once at the post trial motions hearing [on July 28, 2010] [...] Defendant's objection is waived." (Doc. 451 at 21:6-21:9.)

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As the "Bill of Costs" is addressed by separate Memorandum Decision, it is unnecessary to address the reasonableness of those charges here. Any fees reasonably incurred in preparing a cost bill are addressed—and awarded—separately.

q. Graphical Representation 1. Plaintiff's Lead Counsel, Mr. Eugene Lee

Task	Hours Requested	D's Proposed Reduction	Hours Awarded
All Complaint-related tasks	Not separately delin- eated	"Substantial"	80
Travel	Not separately delineated	No time should be awar-ded	13.8 & Task Totals
Fifth Affirmative De- fense	68.6 (D's approx was 91 hours for all counsel)	No time should be awar- ded	25
Reconsideration	59 (D's approx)	No time should be awar- ded	29.5
Depositions	327.2 (453.8 for all counsel)	329 for all counsel (reduced from 657 hrs) s	229 (317.7 for all coun- rel)
Non-Litigation	57.2 (D's approx)	"Manifestly Ineligible"	51.5
Clerical Work	169.1 (D's approx)	"Manifestly Ineligible"	100
Appellate Research	14.5 (D's approx)	"Manifestly Ineligible"	8
Spoliation	11.5 (D's approx)	"Substantial"	11.5
Whistleblowing	N/A	No time should be awar- ded	0
Motions to Compel	319 (D's approx)	No time should be awar- ded	160
Undisclosed Experts	18.6 (P's approx)	No time should be awar- ded	18.6
Administrative Filings	34 (D's approx—P agrees)	No time should be awar- ded	18
Background Investiga- tions	121 (D's approx-P agrees)	No time should be awar- ded	60
Preparing/Opposing Dispositive Motions	545.5 (712.4 hours for all counsel)	"Substantial"	229.5
Preparing for & Attending Hearing	52.2	"Substantial"	35
re: Dispositive Motions, Reviewing Court Order			
Pretrial	89 (D's approx—P agrees)	No time should be awar- ded	21.2
Motions in limine	89 (Mr. Lee and Ms.	50	17.5

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	Herrington, 108 hours total)	
Jury Instructions	67	"Substantial"	40
Verdict Form	17	"Substantial"	10
All trial-related time	Not Provided	20% reduction	273.5
Liquidates Damages "Sur-Reply"	22 (D's approx—P agrees)	No time should be awar- ded	10.
Motion for Additional Findings of Fact and Conclu- sions of Law		,	20
Opposition to Ex Parte Application	10 (D's approx)	No time should be awar- ded	5
Proposed Order re: De- fendant's Motions in Limine	1.1 (P's approx)	No time should be awar- ded	0
Bill of Costs	N/A	N/A	N/A
Post-Trial Motions and "Fees-on-Fees" (See Below)	N/A	N/A	25
Preparation of Supple- mental Fee Motions	N/A	N/A	0
Total:			1491.6
*1122 2. Plaintiff's Co-Co			77 . A
Task	Requested	D's Proposed Reduction	Hours Awarded
All Complaint-related tasks	59.8	"Substantial"	40
Motion to Strike Fifth Affirmative Defense (first draft)	22.4	No time should be awar- ded	15
			20.5

Task	Requested	D's Proposed Reduction	Hours Awarded
All Complaint-related tasks	59.8	"Substantial"	40
Motion to Strike Fifth Affirmative Defense (first draft)	22.4	No time should be awar- ded	15
Depositions	126.6	329 for all counsel (reduced from 657 hrs)	88.7
Retaining Experts	7.3	n/a	7.3
Preparing/Opposing Dispositive Motions	166.9	"Substantial"	70.5
Motions in Limine	57.7	50 for all counsel	32.5
Jury Instructions	34.8	"Substantial"	See Above
Verdict Form	17.7	"Substantial"	See Above
Court Attendance (MSJ and Trial)	61.6	20% Reduction	52.5
Correspondence	230.8 (all correspondence and client up-	"Substantial"	See Above. Included in subtotals, e.g.,

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dates—"given to M

dates—"given to Ms. Her- rington")		"non-litigation" and "preparing/opposing dispos- itive motions"	
Fee Petition	56.3	N/A	20
Travel	39	None	39
Total:	880.9		365.5
*1123 3. Plaintiff's Cont	ract Counsel, Ms. Minger		

Task	Requested	D's Proposed Reduction	Hours Awarded
Motions in Limine	18	"Substantial" ·	10
Total:	18		10

e. Lodestar—Rates 1. Introduction

Plaintiff's counsels' claimed theoretical rates are as follows: Eugene Lee, lead counsel, \$400 per hour; Joan Herrington, co-counsel, \$450 per hour; Marilyn Minger, contract counsel, \$385 per hour; and David Hicks, fee counsel, \$660/hr. All of the fees requested are based on out-of-district hourly rates, namely the Los Angeles and Bay Area markets, not the Fresno Division of the Eastern District of California.

Plaintiff filed his motion for attorney's fees on June 1, 2010. In support Plaintiff submitted: (1) a Memorandum of Points and Authorities; (2) the declaration of Mr. Eugene Lee; (3) the declaration of Joan Herrington; (4) the declaration of Marilyn Minger; (4) the declaration of David Hicks; (5) the declaration of Michelle Reinglass; (6) the declaration of Paul Greenberg; (7) the declaration of Chris Whelan; (8) the declaration of Jean Hyams; (9) the declaration of Lee Feldman; and (10) the declaration of Dean Gordon.

The County opposed the motion on July 8, 2010. Oral argument was held on July 28, 2010, at which time supplemental briefing was requested to give Plaintiff an opportunity to properly and adequately support his fee motion. The parties were also *1124 requested to address several post-trial issues, including whether federal or state law controlled the hourly rate analysis. The parties filed supplemental briefing on August 16, 2010, Doc. 448, and September 3, 2010, Doc. 450. On

September 16, 2010, Plaintiff filed a 410-page reply to Defendant's supplemental opposition.

2. Specific Legal Standards

[36] "To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—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." Blum v. Stenson. 465 U.S. 886, 896 n. 11, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984); Dang v. Cross. 422 F.3d 800, 814 (9th Cir.2005). The Ninth Circuit requires:

Once the number of hours is set, 'the district court must determine a reasonable hourly rate considering the experience, skill, and reputation of the attorney requesting fees.' Chalmers v. City of Los Angeles. 796 F.2d 1205, 1210 (9th Cir.1986). This determination 'is not made by reference to rates actually charged by the prevailing party.' Id. The court should use the prevailing market rate in the community for similar services of lawyers 'of reasonably comparable skill, experience, and reputation.' Id. at 1210-11. Either current or historical prevailing rates may be used. Missouri v. Jenkins, 491 U.S. 274, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989). The use of current rates may be necessary to adjust for inflation if the fee amount would otherwise be unreasonable; the district court must look to the 'totality of the circumstances and the relevant factors, including delay in

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payment.' Jordan v. Mulinomah County, 815 F.2d 1258, 1262 n. 7 (9th Cir.1987).

D'Emanuele v. Montgomery Ward & Co., Inc., 904 F.2d 1379, 1384 (9th Cir.1990) overruled on other grounds by Burlington v. Dague, 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992).

[37] The "relevant legal community" in the lodestar calculation is generally the forum in which the district court sits. Mendenhall. 213 F.3d at 471; Barjon v. Dalton. 132 F.3d 496, 500 (9th Cir.1997); Deukmejian. 987 F.2d at 1405. Another forum may be the proper relevant community, however, "if local counsel was unavailable, either because they are unwilling or unable to perform because they lack the degree of experience, expertise, or specialization required to handle properly the case." Barjon v. Dalton. 132 F.3d 496, 500 (9th Cir.1997) (citation omitted). The court may rely on rates outside the local forum if the plaintiff establishes either unwillingness or inability; "[t]here is no requirement that plaintiffs prove both." Id. at 502.

3. Merits

On July 28, 2010, the Court expressed its tentative view that the Eastern District of California, Fresno Division, was the appropriate forum to establish the lode-star hourly rate in this case:

Now, inferentially, I've already ruled on what is described as continuing misconduct and unprofessional behavior. I have noted that the case was contentious, the case was hotly disputed on both sides, and that there was a lot of work done on this case that, in a perfect world, wouldn't have been necessary.

To make a specific charge of either vexatiousness or fee multiplication, there has to be a specific example of the date, a time and a description of the conduct and the hours sought to be reduced. That's what's now required in the Ninth Circuit.

*1125 And I will tell you that in the City of Sacramento case [Moreno], Judge Levy basically said as far as he was concerned, the prevailing rate was \$250 an hour per the Civil Rights Bar and he wasn't going

to go above it. And although \$300 had been requested, he reduced it across the board to \$250 an hour. And that was found to be an abuse of discretion because he didn't give any other reasons or cite any studies for reducing the hourly rate.

The applicable hourly rate in this case is the Eastern District of California, Fresno Division. The Court does pay close attention to the plaintiff's assertions that no lawyers would accept this case. Except at their rates. But that doesn't answer the entirety of the question. Rather, the question is at what prevailing rate would competent attorney accept the case. And besides the declarations of counsel and one or two others about their unwillingness to accept cases against the County of Kern, the Court notes that the issue of local bias is almost totally dissipated by the fact that the case was tried in Fresno, over 100 miles distant from Kern County, or Bakersfield.

That the jury pool even further diluted the potential for local bias, because, as the parties know, the venire was drawn from all over the Fresno division, which extends as far north as the Northern Stanislaus County line, Tuolumne and Calaveras Counties, to Inyo County on the east, the Nevada border, Los Angeles County on the south. And so there was a wide geographic diversity. And nobody on our jury panel who sat had ever heard of the case or any of the parties.

In civil rights cases and employment cases in this Court, the Court has moved up from \$250 an hour and has awarded, in some cases, for experienced, highly competent counsel—and by experienced, I'm talking about more than 20 jury trials to verdict and at least ten years experience as a lawyer. The prevailing rate has been \$300 an hour. I know that in Judge Ishii's court, in one or two cases, up to \$350 an hour has been awarded, again, for attorneys with in excess of 20 years experience and more jury trials to verdict in the relevant field.

(RT, July 28, 2010 at 119:1-120:24.)

[38] In his supplemental brief, Plaintiff argues that

the tentative ruling is incorrect for a number of reasons, all of which lack merit and further demonstrate inexperience in trial work. Plaintiff first argues that "the Court should use the rates awarded to the plaintiff's employment law bar in Sacramento," i.e., employ Sacramento Division hourly rates. (Doc. 448 at 6:3.) It is suggested that because Defendant retained Sacramento counsel, Plaintiff is therefore entitled to Sacramento hourly rates. (See id. at 6:5-6:6 ("Defendant Kern County, itself, found it necessary to retain counsel from Sacramento.").) This argument has no merit. The only case cited in support is Moreno v. City of Sacramento, 534 F.3d 1106, which is factually distinguishable and not helpful to Plaintiff's arguments on this issue. Plaintiff has been unable to present any applicable or persuasive authority for the proposition that opposing counsel's billing region/forum furnishes the hourly billing rate for all counsel in a dispute overly the applicable hourly rate.

Plaintiff next argues that the tentative ruling is infirm because California law, not Federal law, controls the hourly rate analysis in this case. FN65 Plaintiff claims that under California law, the "prevailing plaintiff*1126 need only show that hiring local counsel was 'impracticable' in order to justify an award of out-of-town hourly rates." (Doc. 448 at 3:26–3:27.) According to Plaintiff, his alleged "massive search" for local counsel in September 2006 satisfies California's "impracticable" standard. He cites, but does not address or analyze, the federal standard in his briefing.

FN65. The parties sharply disagree over whether state or federal law controls the hourly rate analysis. Plaintiff contends that the Court must apply California law, where the "prevailing plaintiff need only show that hiring local counsel was 'impracticable' in order to justify an award of out-of-town hourly rates." (Doc. 448 at 3:26–3:27.) Plaintiff argues that "it would be an abuse of discretion to apply federal rather than state law regarding attorney fees." (Id. at 1:5–1:6.) The County disagrees. According to the County, Ninth Circuit law establishes that in "mixed cases" involving federal and state

claims, "federal law applies to the award of attorney's fees on the federal claims and state law applies to the award of attorney's fees on the pendent [supplemental] state law claims." (Doc. 450 at 3:18–3:19.) The County also argues that the lack of detail in the billing documentation renders it is impossible to differentiate between the work performed on the different claims, i.e., the FMLA and FEHA/CFRA claims.

Plaintiff relies on, but does not fully analyze, a number of Ninth Circuit cases to support his argument that California law controls the hourly rate analysis: Plaintiff correctly observes that Mangold v. California Public Utilities Commission, 67 F.3d 1470, 1477 (9th Cir.1995) held that "[w]here a plaintiff moves for attorney fees on the basis of success on a state law claim, a federal court is to follow state law regarding both a party's right to fees and in the method of calculating fees." (Doc. 448 at 1:12-1:13.) Plaintiff, however, overlooks that, in Mangold, the Ninth Circuit did not analyze hourly rates generally or whether state law governs that analysis in circumstances applicable here and in a dual jurisdiction case. The Ninth Circuit's analysis in Mangold was limited to whether Plaintiff was entitled to a multiplier under California law. FN66

> FN66. Mangold addressed whether state or federal law controls the method of calculating an attorney's fee awarded under state law, when contingency-fee multipliers are unavailable under federal fee-shifting statutes but state law permits such enhancements under state feeshifting statutes, 67 F.3d 1470 (9th Cir.1995). There, the plaintiffs had succeeded on both federal and state claims. Crommie v. State of Cal., Public Utilities Com'n, 840 F.Supp. 719, 725-726 (N.D.Cal.1994). Applying state law, the district court enhanced the fee award by a multiplier of 2.0 based on the contingency basis of the case, the exceptional result in light of defense counsel's "excessively vexatious and often unreasonable opposition to plaintiff's counsel," and difficulties in preparation. Id. at

726. After reviewing the applicable law, the Ninth Circuit found that the district court did not err in applying the multiplier allowed under state law. Mangold. 67 F.3d at 1478-1479. Because Plaintiff in this case also prevailed on his state law claim (the FEHA), and state law provides for a broad application of a multiplier, it is proper to apply the state law standard for a fee multiplier. However, for the reasons explained, a deeper analysis of the "hourly rate" issue was required, but not provided. Plaintiff does not mention or analyze the impact of the jury's failure to allocate the amount of damages attributable to the federal (FMLA) or state (FEHA or CFRA) violations. Here, it is possible that the entire jury award is based on federal law, not state law. If that is the case, California law would not govern the hourly rate analysis. Second, in Mangold, the Ninth Circuit delineated why adopting federal law on the multiplier issue encouraged forum shopping and inequitable administration of the law. See Mangold, 67 F.3d at 1473 ("if a multiplier is procedural, a significant difference in fees would be available in state court but not in federal court-an 'inequitable administration of the law.' "). Plaintiff's string citation concerning this issue does not improve his argument, it only amplifies the lack of legal analysis. To the extent understood, Plaintiff argues that California law governs the hourly rate analysis because, like multipliers, the "twin aims" of Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) are satisfied: discouragement of forum shopping and avoidance of inequitable administration of the law. Plaintiff's analysis ends there. He does not explain why an adoption of California law in the hourly rate context satisfies Erle, especially given the unique circumstances of this case.

*1127 Assuming, arguendo, that Mangold applies, Plaintiff's evidence does not establish justification for "out-of-town" rates. Plaintiff's lead counsel, Mr. Eugene Lee, states in his declaration that he "had no success" in

his attempts to locate local counsel. (Doc. 425-1 at ¶ 29.) Mr. Lee represents that he "emailed various members of the California Employment Lawyers Association ("CELA"), including lawyers from Fresno, Bakersfield, Modesto, and Sacramento." (Id.) He lists several law firms, but does not include the names of specific partners, of counsel, associates or staff he personally contacted, or whether the email was received or routed into a trash or spam folder. No details are provided as to any direct communication other than an electronic communication was allegedly sent by Mr. Lee's law office. FN67 None of the alleged electronic communications are attached as exhibits to Mr. Lee's declaration. FN62 (Compare Doc. 121 at pgs. 12, 28-29, 35-39, 41-45, 47-52, 54-55 and 57-59) (email communications between Mr. Lee and opposing counsel attached to Plaintiff's motion). Nor do Mr. Lee's time records, which span several hundred pages and three rounds of briefing, contain a single entry concerning his "massive search" for local counsel.

> FN67. The non-specific and unsupported "reasons" cited in paragraph thirty of Mr. Lee's declaration are similarly deficient. Mr. Lee states that "lawyers cited the difficulty of litigating against Kern County, the undesirability of the jury pool in the Eastern District, the unanimous jury requirement in federal court, the sheer size and complexity of the case, etc." However, Mr. Lee does not attribute these nonspecific criticisms to a law firm, lawyer or individual. None of these alleged criticisms were included in declarations to Mr. Lee's papers, which included declarations of Plaintiffs' experts. The Court also addressed the slight impact of these cited "criticisms" during oral argument on July 29, 2010.

Mr. Lee states that he contacted a "Mr. Andrew Jones" by telephone. (Doc. 425–1 at ¶ 29.) Mr. Jones allegedly declined to act as local counsel. (Id.) Mr. Lee provides no further explanation or discussion. (Id.) Mr. Jones did not provide a declaration in this case.

FN68. Plaintiff frequently emailed the Court and attached emails to his briefing. For example, the May 28, 2009 Order provides, in relevant part: "The court received an e-mail correspondence (dated April 23, 2009) from Mark Wasser, counsel for Defendant County of Kern, and an e-mail correspondence (dated April 23, 2009) from Eugene Lee, counsel for Plaintiff David Jadwin, D.O. On both of these e-mails, the opposing counsel was copied." (Doc. 321 at 1:12-1:16.)

The inadequacy of the "massive search" is further demonstrated by Mr. Lee's July 11, 2007 declaration, filed in conjunction with Plaintiff's unsuccessful motion to strike Defendant's fifth affirmative defense. In his declaration, which delineates his search to retain local counsel, Mr. Lee states that his search consisted of a mass email to CELA members, nothing more:

On September 18, 2006, I sent an email to over 600 members of the California Employment Lawyers Association seeking co-counsel. No attorneys from Fresno responded.

(Doc. 33 at ¶ 20.)

Such a limited and one-sided query does not satisfy the relevant "out-of-town" legal standards, federal or state. It is entirely possible, even probable, that Mr. Lee's bulk email was batched into a trash/junk folder or mistaken for spam and deleted by the recipient. Either explains the lack of response. However, this issue cannot be fully addressed as Mr. Lee did not follow-up with the intended recipients by any direct contact to any specific attorneys.

That is not the end of the analysis. A close review of the evidentiary support also reveals several inaccuracies and/or unconfirmed*1128 assertions that undermine the evidentiary merit of the fee motion. Plaintiff argues that it is not "surprising" that his query for local counsel was unsuccessful because "only a small handful of members of the California Employment Lawyers Association practice in the Eastern District of California." (Doc. 448 at 5:17-5:19.) First,

Plaintiff's representation that there are "very few employment counsel" in the Eastern District of California is contrary to the Court's experience with the number of lawyers practicing employment law in the EDCA. This is especially true in cases involving traditional employment law theories of recovery and conventional evidentiary issues, as were presented here. This case was contentious and factually detailed, but it was not legally complex. Second, the CELA database is not the ultimate authority or complete universe of employment counsel in the Eastern District of California. A substantial number of available employment counsel choose not to participate in CELA/NELA for any number of reasons, including lack of synergy, high cost or attendance requirements. Third, Plaintiff had local counsel in Bakersfield, however, that counsel was removed/relieved after Mr. Lee became involved in the case. Plaintiff makes no mention of the original local counsel and it is unclear how it impacted the "massive search" for local counsel, especially in Kern County. In Fresno County alone, there are over 2,000 licensed and practicing lawyers.

A substantial portion of Plaintiff's "lack of local counsel" argument is based on a review of CELA's database in 2010, not in 2006. (Doc. 448-4, Decl. of C. Krasomil, ¶¶ 4-6.) It is unclear how a review of CELA members in Sacramento County in 2010 is relevant to Plaintiff's "massive search" for local counsel in September 2006 in the Fresno Division.

Kochenderfer v. Reliance Standard Life Ins. Co., No. 06-CV-620-JLS-NLS, 2010 WL 1912867 (S.D.Cal. Apr. 21, 2010) addressed a prevailing plaintiff's motion for attorney's fees. There, the Court found that the plaintiff's documentary evidence—including sworn declarations from numerous attorneys—was insufficient to support the requested hourly rates:

Although Plaintiff submits numerous attorney declarations, those declarations fail to carry Plaintiff's burden. First, having reviewed all of the declarations, the Court finds that they do not establish that a paying client would pay Ms. Horner or Mr. Monson their requested rate for legal work of similar complexity. Neither Ms. Horner's declaration nor Mr. Monson's

declaration states that a paying client has ever paid them their requested rate for this type of work. As to the other declarations, they either do not offer evidence of what a paying client would actually pay or they do not indicate that a paying client had paid this rate for comparable work or they do not indicate that these rates are reasonable within the Southern District of California.

Second, the value of these declarations is questionable because they are both self-serving and self-perpetuating. Each of these attorneys works on ERISA matters and claiming that the rates charged by Plaintiff's counsel, no matter how high, is in their own interest. A high award in this case would support the declarants' own high hourly rate requests in the future. Ultimately, the rates Plaintiff's attorneys request appear to have little basis in what an arms-length agreement with a paying client would produce.

Id. at *3-4 (citations omitted).

Although Kochenderfer is not factually identical to this case, there are similarities. *1129 It analyzed the evidentiary showing needed to support a prevailing party's request for legal fees, including the claimed hourly rates. For the reasons discussed in Kochenderfer, Plaintiff's documentary evidence is insufficient to support the requested hourly rates in this case. FN69

FN69. Because the hourly rate issue is resolved on different grounds, it is unnecessary to fully analyze whether the declarations attached to Plaintiff's motion are sufficient to support the hourly rates in this case. However, assuming, arguendo, that the motion is properly supported, the declarations are inadequate to support a \$400 hourly rate for Mr. Lee. Mr. Lee supports his hourly rate request with the declarations of Michelle Reinglass, Paul Greenberg, and Lee Feldman. These boilerplate declarations indicate that they are familiar with Mr. Lee through his work with two employment law associations-NELA and CELA. Two of these individuals are familiar with Mr. Lee's legal performance in 2010, several years after the lion's share of litigation occurred in this case (filed case in 2007, discovery in 2007 and 2008, Rule 56 motions in 2008, trial in 2009). For example, Mr. Greenberg states that he and Mr. Lee worked together in a number of "harassment and disability" cases. He also opines that this case involved "substantial complexities and the need for exhaustive discovery." (Doc. 425-6 at ¶ 13.) However, Mr. Greenberg's core opinion is based on the following: Mr. Lee satisfactorily drafted motions/ jury instructions and attended depositions (conducting one). No time-frame is provided for these tasks, which are commonly performed by associates at much lower hourly rates. Mr. Greenberg's second opinion is based on "numerous" conversations with Mr. Lee in 2009 and 2010, nothing more. This is not a proper basis to opine on overall case complexity and the alleged need for "exhaustive discovery." As discussed in detail throughout this Memorandum Decision, this case was grossly overlitigated due to unnecessarily contentious attorney conduct with huge expenditures of unnecessary time resulting from Mr. Lee and Mr. Wasser's inability to extend rudimentary professional courtesy to each other and to employ reasonable efforts to cooperate in preparing the case for trial. Any added complexity was based on counsel's inexperience and unfamiliarity with the Federal Rules and governing legal standards. Taking Mr. Greenberg's hourly scale as representative of the Los Angeles market-where "rates tend to be particularly high"—there is no evidence to support his opinion that Mr. Lee, who had no trial experience and associated Ms. Herrington, is entitled to \$400/hr (or even the \$475.00/hour also mentioned by Mr. Greenberg). Assuming Plaintiff's position is legally and factually supported, which it is not, Mr. Lee's "out-of-town" hourly rate would be substantially reduced.

The Eastern District of California, Fresno Division, is the appropriate forum to establish the lodestar hourly

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rate in this case. Plaintiff, who carries the burden on a fee motion, has not fully analyzed why Sacramento hourly rates are appropriate or why California law exclusively controls the hourly rate analysis in this case, especially in light of the general verdict form. In addition, Plaintiff has not provided adequate evidentiary support to demonstrate that the use of an attorney from outside the relevant community was necessary for purposes of charging another community's higher hourly rates. See, e.g., Welch v. Metropolitan Life Ins. Co., 480 F.3d 942, 945-46 (9th Cir.2007) (the party seeking fees "bears the burden of documenting the hours expended in the litigation and must submit evidence supporting those hours and the rates claimed. ") (emphasis added) (citation omitted). For all of these reasons, as well as those discussed in open court on July 28, 2010, the Fresno Division is the appropriate forum to determine hourly rates.

1. Attorneys a. Eugene Lee

Plaintiff requests an hourly rate of \$400/hr for the services of attorney Eugene Lee. Mr. Lee graduated from law school in 1995 and was admitted to the New York State Bar in 1996. (Doc. 425–1 at ¶ 3.) Mr. Lee took a two-year hiatus from the practice of law in 1997. In 1999, Mr. Lee worked as counsel to a technology *1130 startup in Northern California. (Id.) In 2002, he took an associate position with a law firm in South Korea, where he worked until 2004. (Id.) In 2005, Mr. Lee was admitted to the California State Bar. He has been the principal attorney in his own practice, the Law Office of Eugene Lee, since he was admitted to practice law in California. (Id.)

Mr. Lee self-describes that he is an attorney with thirteen years of experience and has "an excellent reputation in the California employment law community and demonstrated skill and success." (Id. at ¶ 40.) He reiterates that he went to undergraduate school at Harvard University and that he successfully litigated a "a waiter's employment lawsuit in Los Angeles Superior Court for \$350,000, even though the waiter had economic damages of only \$50,000 and no significant emotional distress damages." (Id. at ¶¶ 41–42.) Mr. Lee de-

clares that his hourly rate is \$400 and "in fact [I have] been paid this rate by my clients since 2006 [...] Dr. Jadwin has paid me \$400 per hour in the past for my legal services." (Id. at \P 44.)

Mr. Lee also represents that this "litigation proved to be extraordinarily complex, difficult and onerous for me." (Id. at ¶ 7.) It is undisputed that according to Mr. Lee this was his first trial in any court. (See RT, June 2, 2009 at 35:10–35:12) ("I must emphasize this is really my first trial and a lot of stuff is going on.").

[39] In this Circuit, the reasonable hourly rate "is not made by reference to rates actually charged by the prevailing party," an attorney's undergraduate institution, or by the number of years spent as a practicing lawyer. See, e.g., Welch v. Metro. Life Ins. Co.. 480 F.3d 942, 946 (9th Cir.2007); see also Chalmers v. Ciry of Los Angeles, 796 F.2d 1205, 1210 (9th Cir.1986). Rather, a reasonable hourly rate is determined by "experience, skill, and reputation." Welch, 480 F.3d at 946

In a recent fee motion before the Court, Schultz v. Ichimoto, No. 1:08-CV-526-OWW-SMS, 2010 WL 3504781 (E.D.Cal. Sep. 7, 2010), it was determined that two very experienced employment litigation counsel-with more than twenty years of litigation experience each—were entitled to hourly rates of \$305.00 and \$255.00, respectively. To reach the hourly rates in Schultz, the Court catalogued the recent attorney's fee decisions in the Eastern District of California, Fresno Division, including Ruff v. County of Kings, 700 F.Supp.2d 1225 (E.D.Cal.2010), Beauford v. E.W.H. Group Inc., 2009 WL 3162249 (E.D.Cal. Sept. 29, 2009) and Wells Fargo Bank, Nat. Ass'n v. PACCAR Financial Corp., 2009 WL 211386 (E.D.Cal. Jan. 28, 2009). In those cases, it was determined that hourly rates of \$350 (Beauford), \$ 315 (PACCAR) and \$300 (Ruff) were reasonable for "experienced and competent counsel."

The most reliable factor in determining a reasonable hourly rate is the ability and skill demonstrated by counsel. Mr. Lee was able to secure a jury verdict in his client's favor, but recovery was limited to approxim-

ately 12% of the economic damages he requested from the jury. Mr. Lee also asserted a number of unsuccessful claims in multiple amended complaints, which were eliminated by dispositive motion or rejected by the jury/Court; named numerous defendants who were later voluntarily eliminated from amended pleadings without explanation; displayed a tendency to take contrary legal positions (often in the same brief); and filed numerous unnecessary motions/supporting material. In all stages of this case, Mr. Lee exhibited inexperience with the Federal Rules of Civil Procedure, the Rules of Evidence, the federal and state legal frameworks and, notably, found it difficult *1131 to comply with the Court's rulings.^{FN70}

FN70. Several, but not all, of these instances are discussed in this Memorandum Decision.

Mr. Lee was exceedingly contentious, unduly adversarial and expended inordinate time in personal conflicts and arguments with opposing counsel, many of which resulted in needless discovery and logistic motions which burdened scarce judicial resources. Some of Mr. Lee's conduct or confusion could be attributed to a skilled legal technician's attempts to preserve his case and foil opposing counsel. But that is not the case here. The unnecessary court proceedings and confusion were, for the most part, due to inexperience. FN71 Mr. Lee caused countless problems for the Court's staff, was rude on occasion, without explanation or apology. Nonetheless, Mr. Lee was afforded full opportunity to try his client's case in what was a fair trial.

FN71. For example, the repeated failure to follow the Federal Rules of Evidence during trial reveals that Plaintiff's attorney was inexperienced and lacked a practical knowledge of the Federal Rules of Evidence. Many times Mr. Lee reacted in an incredulous or hostile manner to the Court's rulings on objections and motions during trial. Plaintiff's attorney also had a practice of not raisesing all ground or basis for his legal positions in oral argument and then raising them in motions for reconsideration.

[40] In light of the recent attorney's fee rulings in

the Eastern District of California, Fresno Division, FN72 the Court's comprehensive familiarity with this action, its experience, prevailing attorney rates in the employment law field, and after reviewing supporting declarations in detail, a rate of \$275 per hour for Mr. Lee constitutes a reasonable rate for this case and is based on similar work performed by attorneys of comparable experience and skill to Mr. Lee in the Fresno Division of the Eastern District of California.

FN72. Mr. Lee is not as experienced as any of the counsel in *Beauford*, *PACCAR*, *Schultz* or *Ruff*. He is not as skilled as any of the counsel in *Schultz* or *Ruff*, two cases recently litigated in this Court. The Court evaluates counsel's performance and ability based on over nineteen years on the bench and over five hundred jury trials to verdict.

A further consideration is Mr. Lee's unprofessional conduct throughout this case. He was unjustifiably rude, argumentative, and unreasonable in his dealings with opposing counsel, some of which entered into papers filed with the court and his interactions with court staff and the magistrate judge. Mr. Lee was treated with patience and courtesy. The Court has not based its fee award on this ground, although for the purpose of providing guidance and a example to counsel, it would be reasonable to do so.

b. Joan Herrington

Plaintiff requests an hourly rate of \$450/hr for the services of attorney Joan Herrington, co-lead counsel. Ms. Herrington is a 1995 law graduate of Golden Gate University and has practiced employment law since she was admitted to practice in California that same year. (Doc. 425–2 at ¶¶ 3–6.) Ms. Herrington has worked as a workers' compensation associate and as principal in her own employment law firm. (Id. at ¶¶ 5–6.) According to Ms. Herrington, she "ha [s] been forced to proceed to trial in only eight cases [and] participated in four appeals as attorney of record, and one as a contract attorney." (Id. at ¶ 6.)

To support her motion, Ms. Herrington submits her own declaration as well as those of Christopher Whelan,

Jean Hyams and Lee Feldman, all California employment law attorneys. These declarations set forth the following: (1) Ms. Herrington spent 839.9 hours on this case at a rate of \$450/hr, including 413.6 hours drafting and reviewing pleadings, 126.6 hours attending depositions, and 61.6 hours attending court *1132 proceedings; (2) Ms. Herrington incurred 39 hours of travel time at \$200 per hour; and (3) Ms. Herrington is an experienced employment law attorney and is entitled to her hourly rate of \$450/hr, which is the "market rate" for similar attorneys in Sacramento and/or the Bay Area.

In support of her fee motion, Ms. Herrington provides the declaration of Christopher Whelan. Mr. Whelan, a trial attorney and Ms. Herrington's CELA colleague, provides a summary of his trial history, including a number of sizeable verdicts obtained in Yolo and Sacramento County Superior Courts. Mr. Whelan provides a range for experienced counsel in the Eastern District, Sacramento Division, however, he does not provide a lodestar rate/range for attorneys with Ms. Herrington's experience in the Fresno Division. (See Doc. 425-7 at ¶ 9 ("\$450.00 to \$595.00 per hour for employment law trial counsel in Central and Northern California, including the Sacramento area.")) In addition, based on his declaration, Mr. Whelan's experience is limited to the state court system in Northern California, Alameda, Yolo, and Sacramento Counties. (Id. at ¶ 's 5-8.) His declaration does not indicate litigation experience in any federal forum or in Calaveras, Fresno, Inyo, Kern, Kings, Madera, Mariposa, Merced, Stanislaus, Tulare or Tuolumne counties, the Fresno Divi-sion.

[41] As discussed above, several district courts in the Eastern District of California, Fresno Division, have determined that hourly rates of \$350 (Beauford), \$315 (PACCAR), \$305 (Schultz) and \$300 (Ruff) were reasonable for "experienced and competent trial counsel." FN73 In light of these decisions and the evidence submitted by Plaintiff, a reasonable hourly rate for the services of attorney Joan Herrington is \$350/hr, more than the (very) experienced and skilled trial counsel in Schultz and Ruff. Ms. Herrington was competent but

prepared no independent work product and appeared before the Court only in a limited role. The \$350/hr figure is near the top of the range of hourly rates charged by the other attorneys and consistent with the hourly rates other courts in the Fresno Division have approved for similar services performed by Ms. Herrington in this case.

FN73. These decisions include Schultz v. Ichimoto, 2010 WL 3504781, Ruff v. County of Kings, 700 F.Supp.2d 1225, Beauford v. E.W.H. Group Inc., 2009 WL 3162249 and Wells Fargo Bank, Nat. Ass'n v. PACCAR Financial Corp., 2009 WL 211386.

Ms. Herrington's travel rate of \$200 is not reduced.

c. Marilyn Minger

Plaintiff requests an hourly rate of \$385/hr for the services of contract counsel Marilyn Minger. Plaintiff contracted with Ms. Minger to draft two motions in limine, to exclude the testimony of two defense experts: Thomas McAfee, M.D. and Rick Sarkisian, Ph.D. Ms. Minger spent 20.4 hours drafting the motions for a total of \$7,854.00. (Doc. 425-3 at ¶ 7.) Ms. Minger contends that "[b]oth motions were granted by court order dated July 29, 2009," however, that inadvertently electronically signed Order was vacated during the July 28, 2010 hearing. (Doc. 440, Minute Order, ("Order Granting Plaintiff's Motions in Limine 1-17 was STRICKEN for reasons as stated on the record.").) The Order granting the motions in limine was docketed in error, seven weeks after the jury returned their verdicts and is VA-CATED.

Ms. Minger is a 1991 law graduate of University of California at Davis and has practiced in the area of litigation since 1991, when she was admitted to practice in California. (Doc. 425–3 at ¶ 3.) Ms. Minger*1133 has "conducted" a single bench trial in both federal and state court, as well as a jury trial in state court. (Id. at ¶ 5.) She has "second chaired" two trials. (Id.) It is unknown when Ms. Minger participated in these trials.

[42] In light of Schultz v. Ichimoto, 2010 WL 3504781 and Ruff v. County of Kings, 700 F.Supp.2d

1225, among other Fresno Division cases, as well as the evidence submitted by Plaintiff, a reasonable hourly rate for the services of contract attorney Ms. Minger, performing research attorney services, is \$295/hour. This figure is within the range of hourly rates charged by the other attorneys as stated by Ms. Minger and consistent with the hourly rates other courts have approved for the services of attorney Ms. Minger. Ms. Minger's involvement was limited to drafting two motions in limine, which she did under contract. She has limited trial experience and does not indicate whether she has drafted motions in limine in the past or, alternatively, whether she has substantial motion experience. The July 29, 2009 Order granting the motions in limine was erroneously entered seven weeks after the jury returned their verdicts. It had no effect on the trial.

d. David Hicks

Plaintiff requests an hourly rate of \$660/hr for the services of fee counsel David Hicks. Plaintiff retained Mr. Hicks to opine on the range of hourly rates in the various California forums, federal and state. Mr. Hicks spent 6.5 hours on this case, however, he reduced this amount to five hours based on billing judgment. (Doc. 425–4 at ¶ 20.)

Mr. Hicks is a 1972 law graduate of University of California at Davis and has practiced in the area of employment litigation for more than thirty years. (Id. at ¶ 3.) Mr. Hicks is an experienced expert witness. (Id. at ¶ 4.) Mr. Hicks' declaration provides rate and survey information for the following venues/law firms: San Francisco Superior Court, Los Angeles County Superior Court, U.S. District Court, Northern District of California, U.S. District Court, Eastern District of California, Sacra-

mento Division, U.S. District Court, Central District of California, Bingham McCutcheon, Chavez & Gertler, Cohelan, Khoury, & Singer, Goldstein, Demchak, Baller, Borgen & Dardarian, Morrison Foerster, Quinn Emanuel LLP, Rosen, Bien & Galvan, Schneider Wallace Cottrell Konecky & Brayton, and Sturdevant Law Firm. (Id. at ¶ 18.) The ranges in Mr. Hicks' declaration are delineated by his experience only; he provides no knowledge of hourly ranges/rates in the Fresno Division. No Fresno Division law firms or employment lawyers were surveyed.

[43] In light of the authorities discussed above and the evidence provided by Plaintiff, a reasonable hourly rate for the services of attorney David Hicks is \$380/hour. This figure is within the range of hourly rates charged by the other attorneys and consistent with the hourly rates other courts have approved for the services of fee counsel with similar experience to Mr. Hicks. The closest comparable to Mr. Hicks is the lead counsel for the prevailing party in Schultz v. Ichimoto, 2010 WL 3504781. Counsel in that case was 31-year lawyer, a preferred shareholder at a large Fresno law firm, and specialized in complex civil litigation and environmental law. Id. at *6-7. That individual was awarded a reasonable hourly rate of \$305, substantially less than the rate Mr. Hicks is awarded in this case.

e. Summary of Rates

A graphical representation of the reasonable hourly rates for the legal services provided by Plaintiff's counsel in this case:

	Туре	Years Practi- cing (as of 2009)	Trial Experi- e n ce	Rate Sought	Rate Awardea
Eugene Lee	Lead	11	None	\$ 400	\$275
Joan Herrington	Co/Trial Coun-	14	Minimal—8 trials	\$450	\$350
Marilyn Minger	Contract	18	Minor—2 tri- als	\$385	\$295
David Hicks	Fee	30+	N/A	\$660	\$380

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*1134 f. Multiplier

Plaintiff seeks a multiplier of 2.0 times the lodestar. Plaintiff contends that a multiplier is necessary to the determination of a reasonable fee because the case involved "arcane and intellectually challenging" claims, was undesirable and precluded other employment. Plaintiff also asserts that counsel displayed great skill and "attained an outstanding result in this action."

Defendant vehemently disagrees with Plaintiff on each ground. FN74 In particular, Defendant argues that Plaintiff is not entitled to a multiplier because counsel did not demonstrate exceptional skill, the case was not exceedingly complex and "Plaintiff's counsel's behavior throughout the case was far beneath what is expected of an experienced lawyer."

FN74. According to Defendant, the Court should further reduce the lodestar figure based on the limited success at trial and Mr. Lee's "excessive" communications with Plaintiff:

Attorney/client communication is obviously important. Mr Lee needed to keep Plaintiff informed of developments in the case, However, as with everything else, Mr. Lee went overboard. His time records disclose above 400 conferences regarding the status of the case. The time spent on conferences between Mr. Lee and Plaintiff needs to be substantially reduced.

(Doc. 450 at 19:25-19:28.)

Defendant correctly observes that 230.8 hours of claimed correspondence time is "unusually high." See Miller v. Alamo, 983 F.2d 856, 859 (8th Cir.1993) (finding that 95 hours spent on "attorney conferences, telephone calls, and reviewing correspondence from the government and this court" was "an unusually high number of hours."). The time billed for drafting correspondence to Plaintiff/co-counsel and answering Plaintiff's phone calls, among others, is not reasonable

in this case. Moreover, because of the inadequate documentation, Plaintiff's counsel has not explained why such extensive correspondence and status updates were required in the first instance (or why a second, or in some cases third, client contact or update was required). To the extent possible, the time spent corresponding between counsel and client was accounted for in the original lodestar amounts, namely in the "manifestly ineligible" and "dispositive motion" sections of this Memorandum Decision. Contrary to Defendant's arguments, however, there is no reason to further reduce the lodestar amount beyond the original reductions. Any excessive correspondence and communication between Mr. Lee and his client has been accounted for. Any further reduction is duplicative and unnecessary. Defendant's other concerns are adequately addressed in the multiplier analysis.

[44] After making the lodestar computation, Courts sometimes assess whether it is necessary to adjust the presumptively reasonable lodestar figure on the basis of several factors, including: FN73 (1) the results *1135 obtained by plaintiff's counsel; (2) the skill and quality of representation; (3) the novelty and difficulty of the questions involved; (4) the extent to which the litigation precluded other employment by the attorneys; and (5) the contingent nature of the case. See, e.g., Serrano v. Priest, 20 Cal.3d 25, 49, 141 Cal.Rptr. 315, 569 P.2d 1303 (1977); Lealao v. Beneficial California, Inc., 82 Cal.App.4th 19, 45, 97 Cal.Rptr.2d 797 (2000); see also Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir.1975).FN76

FN75. The parties sharply disagree over whether Federal or California law controls the multiplier analysis. (Doc. 425 at 14:15-15:15; Doc. 432 at 14:28-16:4.) Plaintiff argues that California law governs the multiplier analysis. Defendant contends that the discussion is controlled by U.S. Supreme Court precedent, including *Perdue v. Kenny A.*, —U.S. —, 130

S.Ct. 1662, 176 L.Ed.2d 494 (2010). Although the general jury verdicts and other circumstances in this case demand a deeper analysis than provided in Plaintiff's briefing, Perdue ultimately does not control the multiplier analysis in this case. See Bancroft v. Trizechahn Corp., No. 02-CV-2373-SVW-FMO, 2006 WL 5878143, at *6 (C.D.Cal. Jan. 17, 2006) ("Where a plaintiff prevails under both state and federal claims, and where state law permits the award of a multiplier, a federal court may award a multiplier even if such an upward adjustment is not available for the federal claim.") (citing Mangold, 67 F.3d at 1478). However, as discussed during oral argument on July 28, 2010, the Supreme Court's reasoning in Perdue is persuasive, including the "strong presumption" that a lodestar figure provides adequate compensation, provides useful guidance in considering the reasonableness of an award of attorneys' fees.

FN76. The lodestar "adjustment" analysis under federal law is slightly different from that under state law. Specifically, since first articulating twelve relevant enhancement factors in Kerr, the Ninth Circuit subsequently stated that only those Kerr factors-approximately seven-that are not subsumed within the initial lodestar determination (which initial determination coincides with the majority of the factors just listed) are relevant to analyzing the propriety of any upward or downward adjustment. See Morales v. City of San Rafael, 96 F.3d 359, 364 fn. 9 (9th Cir.1996). Additionally, the viability of the "contingent fee" factor has been called into question by the Supreme Court's decision in City of Burlington v. Dague, 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992). Because the court must construe the applicability of California's fee-shifting statutes under state law, however, the foregoing listed factors nonetheless remain relevant to the enhancement determination here.

[45] At the outset, the requested fee multiplier is rejected for all the reasons cumulatively discussed in this Memorandum Decision and during oral argument on July 28, 2010. See Keichum, 24 Cal.4th 1122, 104 Cal.Rptr.2d 377, 17 P.3d 735 ("the trial court is not required to include a fee enhancement to the basic lodestar figure for contingent risk, exceptional skill, or other factors, although it retains discretion to do so in the appropriate case."). Plaintiff has not come close to meeting his burden to demonstrate that the issuance of a multiplier-in addition to the requested lodestar amount-represents a "reasonable" award of attorney's fees in consideration of the claims for which an award of fee's is permitted. See Ketchum, 24 Cal.4th at 1138, 104 Cal. Rptr.2d 377, 17 P.3d 735 (the party seeking a fee enhancement bears the burden of proof).

Plaintiff has not established that he is entitled to a lodestar multiplier based on exceptional results. FN77 Although counsel in this case secured a jury verdict in Plaintiff's favor, the recovery was limited to approximately 12% of the economic damages he requested from the jury. (See Doc. 451 at 39:24-39:25) ("Total Past and Present Value of Future Losses Net of Offsets [is] \$4,241,670.") As support for the "exceptional success" factor, Plaintiff submits the declaration of attorney Paul *1136 Greenberg. However, for the reasons discussed supra, and others, Mr. Greenberg's declaration is unpersuasive and fails to demonstrate that the verdict in this matter was an exceptional result. Compare Leuzinger v. County of Lake, No. C-06-00398 SBA, 2009 WL 839056, at 10 (N.D.Cal. Mar. 30, 2009) ("[Plaintiff] proffered declarations from two attorneys with extensive employment law litigation experience, one of whom also reviewed verdict databases, and each of which declares that the \$1.67 million verdict in this matter was an exceptional result."). This factor does not support a multiplier.FN78

FN77. Relevant to the skill and results factors, Plaintiff's motion mischaracterizes the record: "Counsel achieved this result despite the fact that highly prejudicial evidence was admitted which violated the Court's post-trial order granting all of Dr. Jadwin's motions in limine."

(Doc. 425 at 21:17–21:18.) As explained, this evidence was admitted over Plaintiff's objection during oral argument on the motions in limine. The erroneous order upon which Plaintiff relies, docketed seven weeks after trial, was vacated on July 28, 2010.

FN78. In Maher v. City of Fresno, No. 08–CV-00050–OWW-SMS, the jury returned a \$2,500,000 verdict for a female firefighter candidate wrongfully discharged from the firefighter academy. There, Plaintiff's very experienced and highly competent counsel, with over 30 years of trial experience, recovered approximately \$900,000 in attorney's fees after a settlement on appeal. Plaintiff's counsel had tried many employment and civil rights cases to verdict, receiving a number of multimillion jury awards, as high as \$19 million.

The next factor is the skill in presenting the various relevant legal arguments. In Ketchum v. Moses, 24 Cal.4th 1122, 104 Cal.Rptr.2d 377, 17 P.3d 735, the California Supreme Court stated that: "Courts should only award multipliers for exceptional representation when the quality of representation exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience." For the reasons discussed throughout this Memorandum Decision and other Orders/Memorandum Decisions on file in this case, Plaintiff's counsel's representation was far from exceptional. His inexperience and unduly disputatious nature required special judicial attention as evidenced by the post trial motions it engendered. The qualifications and skill level of Plaintiff's counsel were fully considered in determining the original lodestar figure. Based on conduct, experience, and success rate on all motions and trial, Mr. Lee is in the lowest quartile of trial attorneys appearing in this Court. This factor weighs heavily against awarding a multiplier.

The same reasoning applies to Plaintiff's characterization of this case as novel and "inherently challenging." A review of the record indicates that the case was a garden-variety employment case involving mental disability under state and federal Family Leave Acts and

constructive termination claims. Before the lawsuit, Plaintiff was paid his full contract compensation, except as department Chair and additional professional fee income he could not earn because was on medical leave. The litigation and trial were contentious and required fact gathering, but did not involve any novel or particularly complex legal issues. The employment and disability issues inherent to this litigation have been litigated many times and the law on the subject is well-es-A disproportionate amount of the tablished. "complexity" in this case was a direct result of Plaintiff's counsel's difficulty grasping the relevant legal principles (and the Court's Orders) and his total inability to observe his professional responsibilities to aid the court, be courteous and respectful to all, and not to unnecessarily multiply the proceedings. Plaintiff's lead counsel, Mr. Eugene Lee, provides the last word: "[This] litigation proved to be extraordinarily complex, difficult and onerous for me. " (Doc. 425-1 at ¶ 7) (emphasis added). No multiplier to the lodestar amount is justified based on the alleged uniqueness or complexity of the case.

Plaintiff also argues that he is entitled to a multiplier because of the contingent risk of the litigation. The Court in *Weeks v. Baker & McKenzie*. 63 Cal.App.4th 1128, 74 Cal.Rptr.2d 510 (1998), a case involving a request for attorney's fees and a multiplier*1137 based on the FEHA, reconciled the Serrano cases and discussed the "contingency" factor of the multiplier analysis:

Looking first to the contingent nature of the award, as has already been discussed, the situation here is unlike that in the Serrano cases, where it was uncertain that the attorneys would be entitled to an award of fees even if they prevailed. Government Code section 12965, subdivision (b) created a reasonable expectation that attorney fees would not be limited by the extent of Weeks's recovery and that Weeks's attorneys would receive full compensation for their efforts. The contingent nature of the litigation, therefore, was the risk that Weeks would not prevail. Such a risk is inherent in any contingency fee case and is managed by the decision of the attorney to take the case and the steps taken in pursuing it.

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Id. at 1175, 74 Cal. Rptr.2d 510.

That language applies with equal force to the facts of this case. Cf. Ketchun, 24 Cal.4th at 1138, 104 Cal.Rptr.2d 377, 17 P.3d 735 ("[t]he trial court is not required to include a fee enhancement to the basic lode-star figure for contingent risk."). Moreover, Plaintiff's lead counsel has mentioned in his declarations that Dr. Jadwin, who continued to receive his contract rate of compensation thru the end of the term of his contract, has paid Plaintiff's counsel for legal services, although the full amount paid is not described.

Plaintiff argues that a multiplier is justified because counsel had to turn down other work for handling this case. But Plaintiff's counsel have not provided any specific examples for work they turned away. Mr. Lee has identified no cases or prospective clients. In any event, the hours counsel spent on this case will be compensated.

Applying these factors, a multiplier is not appropriate under the totality of the circumstances in this case. The litigation was not exceedingly novel and counsel did not demonstrate "exceptional skill." Plaintiff prevailed on nine causes of action, however, it translated into a monetary award of less than 12% of the amount he requested the jury award. Even if there was some contingency risk involved, it in no way merits a multiplier.

Plaintiff's string citation to "reasonable fee" and "multiplier" cases does not assist. For example, Plaintiff cites Green v. City of Los Angeles, a Los Angeles Superior Court decision, stating: "the court [in Green] awarded costs of \$35,000 and attorney's fees of \$461,500.00, using a multiplier of 2.0." (Doc. 425 at 23:9–23:10.) This citation—and others—are unpersuasive. Courts in California (federal and state) have awarded multipliers greater than one for successful cases brought under federal and state law, placing special emphasis on the exceptional results obtained. See, e.g., Leuzinger v. County of Lake, 2009 WL 839056, at *10–11 (in a disability and employment discrimination case, awarding a 2.0 multiplier based on exceptional results-jury award of \$1,679,001); Donovan v. Poway

Unified School Dist., 167 Cal.App.4th 567, 628, 84 Cal.Rptr.3d 285 (2008) (awarding a 1.25 multiplier in light of the case's difficulty and risk, but declining to grant the 1.7 multiplier plaintiffs had requested). However, when a case did not present novel or complex issues or counsel's skill was unexceptional, the courts have not awarded a multiplier. See, e.g., James v. Car-Health 200 Inc., ED-CV-09-00695-JRG-SHx, 2010 WL 4796931. at *4 (C.D.Cal. Nov. 22, 2010) ("The plaintiff has not established that she is entitled to a lodestar multiplier [] [a] review of the record indicates that the case did not involve any novel or particularly complex issues."); see also Perez v. Safety-Kleen Systems, Inc., No. C-05-5338 PJH, 2010 WL 934100, at *9 (N.D.Cal. Mar. 15, 2010) *1138 ("court cannot conclude that the quality of counsel's representation exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience, such that a multiplier should be awarded"); Schultz. 2010 WL 3504781, at *11 (declining to award a multiplier because "this litigation was not unusually complex or risky, nor were there 'exceptional circumstances.' "); Corp., Trizechahn Bancroft 02-CV-2373-SVW-FMO, 2006 WL 5878143, at *6 (C.D.Cal. Jan. 17, 2006) (declining a multiplier because "Plaintiffs' counsel have not established that there was a novel issue involved or that the case was particularly difficult [] [n]or have Plaintiffs shown that counsel used skill above and beyond what is normally expected of attorneys with their level of experience."). Here, counsel's trial performance, skill, and decorum was deficient compared to that of attorneys regularly trying cases in this court. This was acknowledged during trial by a number of apologies by Mr. Lee for lack of experience and not following the rules.

Three trial exchanges are illustrative. The first took place on June 2, 2009, during Mr. Lee's cross-examination of Mr. Robert Burchuk, the County's forensic psychiatrist:

Q: The point is: Is that you had Dr. Reading's full report, which disclosed all of this Fort Hood information. You had that. Okay? If Dr. Jadwin wasn't forth-

coming with it, wasn't it incumbent on you to draw that information out for him? Knowing you had his report.

A: A standard approach to psychiatric interviewing is to begin with open-ended questions. To invite an individual to share information based on a general question and then to more specifically ask questions based on what they disclose. And then on other sources of information that you may have that may contradict information that they've provided you.

Q: And your success in eliciting that information from Dr. Jadwin, can you automatically ascribe that to being Dr. Jadwin's fault or could it have been due to your lack of skill as an examiner?

A: I don't believe that to have been the case.

Q: Naturally. And-

THE COURT: Now, do you realize what you just did, Mr. Lee?

MR. LEE: I apologize, Your Honor. I'll-

THE COURT: I'm going to ask you, please-

MR. LEE: Yes, Your Honor. Absolutely.

THE COURT:—to follow the rules.

MR. LEE: Yes, Your Honor.

(RT, June 2, 2009, 24:15-25:13) (emphasis added).

A short time later, after excusing the jury, Mr. Lee was instructed on the rules of courtroom decorum and tenets of professionalism relevant to cross-examination, in particular, that examining counsel shall not repeat, echo or comment on the witness' statements:

Court: Now, we're outside the presence of the jury. And Mr. Lee, I want to remind you that as part of the [written] courtroom decorum rules, and I have mentioned this to you before. That the examination of witnesses includes number 13, "In examining a witness, counsel shall not repeat, comment on or echo the an-

swer given by the witness." And I—I don't know if you're doing this intentionally, though, because I have mentioned it to you before. But candidly, bad actor lawyers, this is a tactic to prejudice the witness in the eyes of the jury and to, in effect, to upset the level playing *1139 field. It's misconduct. So I'm not ascribing this to you, but I don't understand why you're unable to follow my direction.

Mr. Lee: Your Honor, I apologize. And it will stop. It's just like with the "removal" versus "demotion." I made a very concerted effort never to say the word "demotion" again and I think I've done that. I will assure you that this conduct will also stop. It's completely inadvertent, Your Honor, and I think it only happened today and I'll stop it.

Court: All right. And the—there is another tendency that you need to work on as well. And that is making a comment like the "Naturally."

Mr. Lee: Yes.

Court: In other words, it was expressed in a sarcastic tone. And what that is, we are governed in our society by the rule of law. And these jurors are here invested with the high purpose of following the law and doing justice. We don't have any chance of that happening if the attorneys who are officers of the Court, and who are bound by professional rules of conduct and ethics, if they do not demonstrate respect for the witness, respect for the process and respect for the law, then we're not going to have a legal system that anybody has any regard for. And the fact that somebody is your adversary and we have an adversarial system, the fact that there are two sides to a lawsuit never means that you lose your professionalism, that you don't extend courtesy, and that you don't treat your adversary with the same respect that you want your client and yourself to be treated with by the Court and by other officers of the Court.

And so candidly, I don't want to have to do something about this, but I do want you to come to your senses and basically be a lawyer. The rules are in writing. They've been given to you. Can you fol-

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low them?

Mr. Lee: Your Honor, I will—I will eliminate the behavior from this point forward. And the only thing I'll say is that, Your Honor, it's completely inadvertent. I must emphasize this is really my first trial and a lot of stuff is going on. But that's not an excuse and it will stop, Your Honor. It will stop.

Court: All right. Thank you. Again, I believe that I have been patient and that I have been indulgent. And as I said, I'm trying to protect your client's rights here as well. Because Dr. Jadwin is just as entitled to a fair trial in this case as the defendants are.

Mr. Lee: Absolutely, Your Honor. Thank you.

(Id. at 33:13-35:19.)

The final illustration is Mr. Lee's "big versus small" reference during closing argument, which improperly appealed to bias and emotion. Mr. Lee's comments and the Court's sua esponte admonition were discussed in section III(A), supra, in the context of the County's motion for a new trial. FN79 Although the statements did not ultimately control the Settlegoode analysis, *1140 they arrived after countless admonitions and warnings, an in-court review of the federal rules of evidence and rules of courtroom decorum, and Mr. Lee's repeated apologies and pronouncements that he would follow the applicable rules of evidence/decorum. These clarifying examples are a narrow sampling of the admonitions/instructions concerning professionalism and courtroom decorum given to Mr. Lee during the different stages of litigation in this case.

FN79. During his closing argument, Mr. Lee stated:

And you know, we've heard Dr. Jadwin, how he is supposedly a millionaire; this and that. You know, in the end, he's just an individual, it's just one person against an entire County and all of its resources that we faced in this case. But I will tell you, it's very important that even a powerful organization such as the County understand that in a court of law,

everybody's equal.

(RT, June 4, 2009, 81:10-81:17.)

The Court, *sua sponte*, immediately instructed the jury to disregard Mr. Lee's statement:

And I must say, ladies and gentleman, that an appeal to status, big versus little, strong versus weak, is improper under the law and you should disregard any such suggestion.

(RT, June 4, 2009, 81:23-82:1.)

Plaintiff's request for application of a 2.0 multiplier is DENIED. No multiplier was earned as not one of the justifying factors is present.

f. Hours Expended in Drafting Fee Motion ("Fees-on-Fees")

Plaintiff requests "reasonable fees" to compensate his counsel for the preparation of the motion for attorney's fees. According to Ms. Herrington, she spent 56.3 preparing the "first" fee petition. Mr. Hicks, Plaintiff's fee counsel, spent five hours preparing his declaration. Mr. Lee, however, does not provide a separate task total or an explanation why one was not included.

For all the reasons discussed in this Memorandum Decision and during July 28, 2010's oral argument, Mr. Lee is awarded no "fees on fees." He is awarded ten hours time for his travel and attendance at the July 28, 2010 hearing, nothing more.

Mr. Lee's post-trial briefing was underdeveloped and willfully, perhaps intentionally, non-responsive to the Court's requests for supplemental billing information, which were expressly made to afford Plaintiff a full opportunity to justify and prove his attorney's fees request and to comply with Ninth Circuit law. The relevant legal standards for fee motions were not addressed or taken into consideration. This course of conduct had a considerable impact on the Court's ability to resolve the fee issues in a correct and timely manner. More critical to the analysis, Mr. Lee did not consider the impact his actions had on the County's ability to oppose the motion. His conduct placed the County at a

considerable disadvantage.

Plaintiff is only entitled to recover fees that are reasonable. See Serrano, 32 Cal.3d at 635, 186 Cal.Rptr. 754, 652 P.2d 985; Ketchum, 24 Cal.4th at 1137, 104 Cal.Rptr.2d 377, 17 P.3d 735. With respect to "fees on fees," that number is ten hours. Mr. Lee, however, is awarded an additional 15 hours for the time spent preparing the other post-trial motions, for a post-trial total of 25 hours.

To account for the general lack of detail and excessive time spent preparing the original fee motion, among other concerns, Ms. Herrington is awarded 20 hours for time spent on the original attorney's fee motion, including travel and attendance at the July 28, 2010 hearing. Mr. Hicks is awarded four hours.

No additional "fee on fee" time is awarded, i.e., no time is awarded to any counsel concerning the supplemental fee motions/replies, which were necessitated by Plaintiff's counsel's failure to properly support and document the motion.

g. Graphical Summary

NAME	HOURS	HOURLY RATE	LODESTAR AMT
Lee	1,477.8 (not including travel)	\$275	\$ 406,395.00
Lee (travel)	13.8	\$200	\$ 2,760.00
Herrington	326.5 (not including travel)	\$350	\$ 114,275.00
Herrington (travel)	39	\$200	\$ 7,800.00
Minger	10.0	\$295	\$ 2,950.00
Hicks	4.0	\$380	\$ 1,520.00
TOTAL .	1,871.1		\$ 535,700.00

*1141 IV. CONCLUSION.

[46] Judges are experts in the matter of attorney's fees. See, e.g., Hancock Laboratories. Inc. v. Admiral Ins. Co., 777 F.2d 520, 525 (9th Cir.1985). FNNO In over 43 years in jury trials and almost 20 years on the bench, in cases of monumental complexity with exceptionally qualified and experienced counsel, Plaintiffs' fee request is the highest ever made. Contrary to the law's intent to limit attorneys' fee litigation, this motion has become a case within a case.

FN80. A trial court has broad discretion to determine the reasonable amount of an attorney fee award, including whether to increase or decrease the lodestar figure. *Nichols v. City of Taft*, 155 Cal.App.4th 1233, 1240, 66 Cal.Rptr.3d 680 (2007).

For all the reasons stated above:

1. Defendant's Motion to Amend the Judgment has been resolved pursuant to separate ORDER; the judgment is amended to reflect the dismissals with prejudice of Mr. Bryan and Dr. Harris; FN81

FN81. On August 12, 2010, Defendant's motion to amend the judgment was granted as to Defendants Peter Bryan and Irwin Harris only. (Doc. 445.) Defendant's motion was, in all other respects, denied.

- 2. Defendant's Motion for New Trial on all grounds is DENIED;
- 3. Plaintiff's Motion for Pre-Judgment Interest is GRANTED in part in the amount of \$15,022.27;

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- 4. The judgment is AMENDED to include an award of post-judgment interest at the federal treasury rate, from the date of the judgment to the date of satisfaction of the judgment.
- 5. The Bill of Costs is decided by separate memorandum decision;
- 6. Plaintiff's motion for attorneys' fees is GRANTED.
- 7. Plaintiff is awarded \$535,700.00 in attorneys' fees as follows:
 - a. Eugene Lee-\$ 409,155.00
 - b. Joan Herrington-\$122,075.00.
 - c. Marilyn Minger-\$2,950.
 - d. David Hicks-\$1,520.

Plaintiff shall submit a form of order consistent with, and within five (5) days following electronic service of, this Memorandum Decision.

SO ORDERED.

E.D.Cal.,2011. Jadwin v. County of Kern 767 F.Supp.2d 1069

END OF DOCUMENT

EXHIBIT

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Westlaw.

Slip Copy, 2011 WL 2078004 (E.D.Cal.) (Cite as: 2011 WL 2078004 (E.D.Cal.))

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Only the Westlaw citation is currently available.

United States District Court, E.D. California. Antonia LUNA, Plaintiff,

HOA TRUNG VO Dba Save More 98 Discount Store; Bliatout LLC; and Does 1–10 inclusive, Defendants.

No. CV F 08-1962 AWI SMS. May 25, 2011.

Catherine M. Cabalo, Celia L. McGuinness, Paul L. Rein, Law Offices Of Paul L. Rein, Oakland, CA, for Plaintiff.

Robert Carl Lorbeer, Robert C. Lorbeer Attorney at Law, Sacramento, CA, Joseph Donald Cooper, Cooper and Cooper, Fresno, CA, for Defendants.

ORDER ON PLAINTIFF'S REQUEST FOR ATTORNEY'S FEES, EXPENSES AND COSTS

ANTHONY W. ISHII, Chief Judge.

*1 In this action for damages and injunctive relief, the court entered judgment in favor of plaintiff Antonia Luna ("Plaintiff") and awarded statutory damages pursuant to a stipulated order of judgment that was filed on January 4, 2011. In the instant motion, Plaintiff requests award of attorney's fees, expenses and costs pursuant to 42 U.S.C. § 12205. Defendants do not dispute the entitlement of Plaintiff to attorney's fees, costs and expenses in general but do dispute the hourly rates asserted by Plaintiff for computation of fees. Defendants also dispute the reasonability and necessity of work time claimed by Plaintiff for certain services.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The complaint in this action was filed pursuant to the Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq. ("ADA") on December 23, 2008. The complaint alleged that Plaintiff, a quadriplegic who relies on a motorized wheelchair for mobility, en-

countered conditions in the parking lot of the Asian Village Shopping Center in Fresno, and in the Save More 98 Discount Store located in the shopping center, that constituted violations of accessibility standards required by the ADA. On August 21, 2009, Defendant Blaitout, LLC filed a statement of settlement conference in which they indicated that a survey had been made of the parking lot and premises in question to identify non-ADA compliant features and to identify suggested fixes. The settlement conference statement indicated that further settlement negotiations would be required to reach an agreed upon list of remedial changes.

On August 27, 2010, the parties entered into a consent decree and order wherein Defendants did not admit "liability" but entered into the Decree and Order "for the purpose of resolving this lawsuit without the need for protracted litigation and without the admission of any liability." Doc. # 24 at 2:17-19. In the Consent Decree and Order, the parties agreed that the terms of the Decree represented "full, complete and final disposition and settlement of Plaintiff's claims against Defendants for injunctive relief that have arisen out of the subject Complaint." Doc. # 25 at 2:11-13 (italics added). The Consent Decree and Order provided a description of the items of work to be accomplished and the time within which the work that would bring the subject property into compliance with the ADA would be completed. The Decree and Order specifically provided that the Decree "does not resolve Plaintiff's claims for damages, attorney fees, litigation expenses and costs...." Doc. # 24. at 5:14-15.

On October 8, 2010, Plaintiff filed a motion for summary judgment as to all claims. Defendant Blaitout filed a response on October 28, 2010. The response was a three-page document that was essentially a statement of non-opposition. Defendant Hoa Trung Vo submitted a very similar response the following day. Plaintiff filed a reply brief on November 2010. On November 17, 2010, the court denied Plaintiff's motion for summary judgment without prejudice. The primary reason for the court's denial was that Plaintiff's motion for summary judgment failed to set forth each of the facts relied upon

in support of the motion in "a statement of undisputed facts" in violation of Local Rule 260(a). The court also noted that although the motion was dismissed without prejudice, the fact that there appeared to be no factual or legal dispute indicated to the court that resolution of the action should be achievable by the more efficient and less expensive expedient of stipulated judgment. The court also opined that, to the extent Defendants had asked the court to impose damages less than the statutory amount, the court could find no legal basis for a downward departure from the statutory amount of \$4,000.00 per violation.

*2 The parties filed a stipulation and proposed order of judgment on January 3, 2011. The stipulated order of judgment was filed the following day. The instant motion for attorney fees was filed on April 4, 2011. Defendant Blaitout, LLC filed objections to Plaintiff's motion for attorney's fees on April 18, 2011, and Plaintiff filed a reply on April 26, 2011. On April 26, 2011, Defendant Vo filed a document that the court construes to be a notice of non-opposition to Defendant Blaitout's opposition to Plaintiff's motion for attorney's fees. Plaintiff filed a motion to strike Defendant Vo's pleading on April 27, 2011. The motion for attorney's fees was taken under submission as of May 9, 2011.

LEGAL STANDARD

Pursuant to 42 U.S.C. § 12205, a prevailing party, other than the United States, is entitled to "a reasonable attorney's fee, including litigation expenses and costs." As noted above, neither party disputes that Plaintiff is a "prevailing party" within the meaning of section 12205. An award of reasonable attorney's fees is determined through the hybrid lodestar multiplier approach. Van Gerwen v. Guarantee Mut. Life Co., 214 F.3d 1041, 1045 (9th Cir.2000); McElwaine v. U.S. West, Inc., 176 F.3d 1167, 1173 (9th Cir.1999); cf. Ketchum v. Moses, 24 Cal.4th 1122, 1133–36, 104 Cal.Rptr.2d 377, 17 P.3d 735 (2001) (discussing the lodestar approach in California). The Ninth Circuit has explained the hybrid lodestar approach as follows:

The lodestar/multiplier approach has two parts. First, a court determines the "lodestar" amount by multiplying the number of hours reasonably expended on the

litigation by a reasonable hourly rate. D'Emanuelle [v. Montgomery Ward & Co., Inc., 904 F.2d 1379, 1383 (9th Cir.1990)]; Hensley [v. Eckerhart, 461 U.S. 424,] 461, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). The party seeking an award of fees must submit evidence supporting the hours worked and the rates claimed. See Hensley, 461 U.S. at 433. A district court should exclude from the lodestar amount hours that are not reasonably expended because they are "excessive, redundant, or otherwise unnecessary." Id. at 434. Second, a court may adjust the lodestar upward or downward using a "multiplier" based on factors not subsumed in the initial calculation of the lodestar. See Blum v. Stenson, 465 U.S. 886, 898-901, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) (reversing upward multiplier based on factors subsumed in the lodestar determination); Hensley, 461 U.S. at 434 n. 9 (noting that courts may look at "results obtained" and other factors but should consider that many of these factors are subsumed in the lodestar calculation). The lodestar amount is presumptively the reasonable fee amount, and thus a multiplier may be used to adjust the lodestar amount upward or downward only in " 'rare' and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings by the lower courts" that the lodestar amount is unreasonably low or unreasonably high. See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986) (quoting Blum, 465 U.S. at 898-901); Blum, 465 U.S. at 897; D'Emanuele, 904 F.2d at 1384, 1386; Cunningham v. County of Los Angeles, 879 F.2d 481, 487 (9th Cir.1989).

*3 Van Gerwen, 214 F.3d at 1045; cf. Ketchum, 24 Cal.4th at 1132-39, 104 Cal.Rptr.2d 377, 17 P.3d 735 (discussing lodestar and multipliers in California).

The fee applicant "has the burden of producing satisfactory evidence, in addition to the affidavits of its counsel, that the requested rates are in line with those prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation." Blum, 465 U.S. at 896 n. 11; Dang v. Cross, 422 F.3d 800, 814 (9th Cir.2005); Schwarz v. Secretary of Health

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and Human Servs., 73 F.3d 895, 908 (9th Cir.1995). The Ninth Circuit has elaborated that:

Once the number of hours is set, "the district court must determine a reasonable hourly rate considering the experience, skill, and reputation of the attorney requesting fees." [Chalmers v. City of Los Angeles, 796 F.2d 796 F.2d 1205, 1210.] This determination "is not made by reference to rates actually charged by the prevailing party." Id. The court should use the prevailing market rate in the community for similar services of lawyers "of reasonably comparable skill, experience, and reputation." Id. at 1210-11. Either current or historical rates prevailing rates may be used. Missouri v. Jenkins, 491 U.S. 271 (1984). The use of current rates may be necessary to adjust for inflation if the fee amount would otherwise be unreasonable; the district court must look to the "totality of the circumstances and the relevant factors, including delay in payment." [Jordan v. Multnomah County, 815 F.2d 1258, 1262 (9th Cir.1987).]

D'Emanuelle v. Montgomery Ward & Co., Inc., 904 F.2d 1379, 1384 (9th Cir.1990); cf. Ketchum, 24 Cal.4th at 1139, 104 Cal.Rptr.2d 377, 17 P.3d 735 ("Indeed, the 'reasonable hourly rate [used to calculate the lodestar] is the product of a multiplicity of factors ... the level of skill necessary, time limitations, the amount to be obtained in the litigation, the attorney's reputation, and the undesirability of the case.' "). The "relevant legal community" in the lodestar calculation is generally the forum in which the district court sits. FNI Mendenhall v. NTSB, 213 F.3d 464, 471 (9th Cir.2000); Barjon v. Dalton, 132 F.3d 496, 500 (9th Cir.1997); Schwarz, 73 F.3d at 906; Deukmejian, 987 F.2d at 1405; Davis v. Mason County, 927 F.2d 1473, 1488 (9th Cir.1991); cf. Childrens Hospital and Medical Center v. Belshe, 97 Cal.App.4th 740, 782-783, 118 Cal.Rptr.2d 629 (2002) (upholding rate in a case tried in San Francisco after trial court reviewed rates of attorneys in the San Francisco Bay area); A & S Air Conditioning v. John J. Moore Co., 184 Cal.App.2d 617, 621, 7 Cal.Rptr. 592 (1960) ("The determination of reasonable attorneys' fees is

(1) Paul L. Rein, lead attorney,

controlled by the amounts customarily charged in the locale of the action, here Alameda County.").

FN1. There are narrow exceptions to the general rule that the relevant legal community is the forum in which the court sits. See Schwarz, 73 F.3d at 907; cf. Horsford v. Board of Trustee of California State Univ., 132 Cal.App.4th 359, 396–97, 33 Cal.Rptr.3d 644 (2005) (finding court abused discretion in not considering "out of town" San Francisco rates where plaintiff was unable to obtain local counsel). Plaintiff, however, does not argue that a recognized exception to the general rule applies.

DISCUSSION

Plaintiff is represented by attorneys from the Law Offices of Paul L. Rein, located in Oakland, California. Representation involved a total of five personnel; three attorneys and two paralegals, who billed a total of 351.4 hours at a total cost of \$138,761 in attorney's fees and an additional \$19,284 in litigation expenses and costs. Defendants dispute the hourly rate billed by the three attorneys from the Rein law firm. Defendants also contend that two major activities for which Plaintiff's attorneys submitted claims—the motion for summary judgment and the deposition of Defendant Hoa Trung Vo and Bobby T. Vang, a representative of Blaitout, LLC-were unnecessary and therefore subject to exclusion. Defendant Blaitout also contends that certain billed costs are attributable to Defendant Vo and should be apportioned accordingly. Finally, Defendants seek a discount as to the amount billed for preparation of Plaintiff's motion for attorney's fees. The court will consider each of Defendants' objections in turn.

I. Billing Rates

*4 Plaintiff requests that the legal staff representing her be compensated for time spent at the following hourly

\$495.00

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- (2) Celia McGuinness, senior associate
- (3) Catherine Cabalo, associate
- (4) Aaron Clefton, senior paralegal
- (5) Katherine Castro, paralegal

A. Paul L. Rein

Paul L. Rein ("Rein") is the lead attorney in this action. He has more than 40 years of experience as an attorney and has specialized in disability-related litigation. Plaintiff submits a number of case examples to substantiate Rein's assertion that \$495 per hour has been held a reasonable rate by reviewing courts in fairly recent disability rights cases. It is significant that each of the case examples listed come from courts in the Northern District. The court has also reviewed the declarations submitted by Mr. Rein from attorneys Sid Wolinski, John Burris and Christopher Welan. With the exception of Mr. Welan, all of the declarations of attorneys practicing in the area of disability law attest to billing rates that are prevalent in the San Francisco bay area or in similar major metropolitan areas. Mr. Welan's declaration attests to rates he has billed in the Sacramento area and in Contra Costa County.

As noted above, the relevant forum for purposes of compensation is the forum in which the district court sits; in this case the Eastern District of California and specifically the southern division of that District. Mendenhall, 213 F.3d at 471. As this court has previously held, case comparisons and evidentiary support citing prevailing hourly rates in the Northern District, Central District, Southern District and anywhere else outside the Eastern District-Fresno Division is irrelevant to the determination of prevailing rates. See Beauford v. E.W.H. Group, Inc., 2009 WL 3162249 (E.D.Cal.2009). As noted, Plaintiff has provided a number of affidavits and case examples that support Rein's request for an hourly rate of \$495 per hour, but none of the cases or declarations provide any evidence of prevailing rated in the forum covered by the Fresno Division of the Eastern District. Plaintiff asserts, without authority, that he would be able to bill \$495 per hour in the Fresno community as well.

Defendants cite a number of cases, most from this

\$395.00 \$330.00 \$165.00 \$100.00

court, that establish maximum rates for very experienced attorneys practicing in the Fresno area are in the neighborhood of \$300 to \$350 per hour. The billing range urged by Defendants corresponds to what this court has been able to determine in its own research. In Jones v. McGill, 2009 WL 1862457 (E.D.Cal.2009), a fully contested civil rights case, the attorney for the prevailing party requested attorney fees at the rate of \$425 per hour. As in this case, the requesting attorney provided affidavits concerning prevailing rates in the San Francisco Bay Area, but failed to provide any proof of prevailing rates in the Fresno area. Id. at *2. After consideration of the information available the court found that \$350 per hour was the prevailing rate charged by attorneys with 20+ years of experience and established reputations within the Fresno Area. Id. at *3. In Beauford v. E.W.H. Group, Inc., 2009 WL3162249 (E.D.Cal.2009) FN2, this court addressed fees requested by the plaintiff's attorney who successfully moved for remand after the class action case was improperly removed from state court. The prevailing attorney requested an hourly rate of \$425 per hour which he supported by case examples both from within and without the Fresno practice area. Id. at *4. This court held all case examples from outside the Fresno practice area were irrelevant to the determination of prevailing hourly rates and found that the evidence submitted supported an hourly rate of \$350 per hour. Id. at *5.

FN2. While the adjustment of historical rate data for inflation is appropriate, Jordan, 815 F.2d at 1262, Plaintiff has not provided any information to indicate that inflation has had much of an influence on rates since 2008, nor is the court subjectively aware of any significant increase in prevailing rates in the past few years.

*5 The most recent case from this court giving extensive consideration to the issue of prevailing rates for purposes of computing attorney's fees is Jadwin v.

County of Kern, 2011 WL 240695 (E.D.Cal.2011). In Jadwin, the court considered requests for fees at the rates of \$660 per hour for a consulting attorney with 30+ years of experience, \$450 per hour for co-counsel with 14 years of experience and \$400 per hour for a lead counsel with relatively little experience. As with other cases noted, the court rejected evidence pertaining to compensation rates outside the Fresno area and, in addition, rejected the requesting attorney's arguments for application of out-of-town rates. Id. at *43-*46. After making a fairly extensive review of recent cases from this district, the court reduced that hourly rates requested to \$380 per hour for the consulting attorney, \$350 per hour for co-counsel, and \$275 per hour for lead counsel. Id. at *51.

Although Plaintiff contends that Defendants have failed to show that the rates requested by Plaintiff's attorneys are inappropriate, the court finds that Plaintiff has failed to meet her burden to provide evidence in the form of declarations or case authority to show that the rates requested are prevailing rates for the Fresno area. Plaintiff has also failed to provide any evidence that out-of-area rates should apply.

"In this circuit, the reasonable hourly rate 'is not made by reference to rates actually charged by the prevailing party,' an attorney's undergraduate institution or by the number of years spent as a practicing lawyer. [citations.] Rather, a reasonable hourly rate is determined by 'experience, skill and reputation." Jadwin, 2011 WL 240695 at *47 (quoting Welch v. Metro. Life Ins. Co., 480 F.3d 942, 946 (9 Cir.2007). "The most reliable factor in determining a reasonable hourly rate is the ability and skill demonstrated by counsel." Id. at *48. There is no question that Mr. Rein is an attorney of more than 40 years of experience and that he has a reputation of competence in the field of disability law. By the same token, there is no indication that Mr. Rein's expertise, experience or reputation is significantly greater than or less than his position would otherwise indicate; that is, Mr. Rein appears to fall within the expected range of experience, skill and reputation that one would expect to find within the cohort of experienced lead attorneys who would be expected to command the highest rates applicable for this community. There is nothing that has come before the court during the course of this action that would indicate any talent or capability beyond what would be expected in an attorney of Mr. Rein's years of experience. Nor is there anything about this case to suggest that Mr. Rein or other members of his law firm experienced legal or factual issues that were out of the ordinary.

The court can find no basis to extend the rate of compensation for Mr. Rein beyond what the court has identified as the top of the compensation range for attorneys practicing in the Fresno area—\$375 per hour for a senior lead attorney. The court finds this rate is commensurate with the prevailing rates in the Fresno area for attorneys of similar experience, expertise and reputation. Plaintiff does not request that any factor be applied to the prevailing rate in this case. In any event, the court cannot find anything about this case that would tend to indicate that the prevailing hourly rate that has been determined by this court would be unjust if applied in this case. Mr. Rein's compensation will be calculated at an hourly rate of \$375 per hour.

B. Attorneys Catherine Cabalo and Celia McGuinness

*6 Of the two associate attorneys Celia McGuinness is the more senior, having twenty years of litigation experience as opposed to ten years of experience for Catherine Cabalo. Both associate attorneys appear to have exemplary educational credentials. Celia McGuinness apparently has specialized in disability law for the last two or three years. There is no representation that Catherine Cabalo has similarly specialized. Plaintiff's argument with regard to reasonable pay rates centers primarily on Mr. Rein and, in any event, contains no comparisons for attorney rates at any level of expertise that pertain to the Fresno area market. The request by Ms. McGuinness for a compensation rate of \$395 per hour is supported by the declaration of Brian Gearinger which, like the other declarations filed in support of hourly rate claims by Plaintiffs generally, focuses on prevailing rates in the Northern District and, in particular, in the San Francisco area.

The court has found it necessary to reduce the rate requested by Mr. Rein by approximately 26%. While

the rates requested by associates Cabalo and McGuinness are not above the prevailing rates to the same extent as those requested by Mr. Rein, it is nonetheless clear that the Fresno area market would not support the rates requested. The case examples cited above support hourly rates from about \$200 per hour to about \$350 per hour depending on experience and responsibility. See Jones, 2009 WL 1862457 at *3. Given the levels of experience and responsibility in this case of the two associates, the court finds that a rate of \$315 per hour for associate McGuinness and \$295 per hour for associate Cabalo are appropriate and within the range of prevailing rates for this community.

Defendants do not contest the claimed rates for paralegal employees of the law firm and data on rates for paralegals appears less abundant. The court will use the hourly rates for the two paralegals that was requested by Plaintiff; \$165 per hour for Aaron Clefton, Sr. and \$100 per hour for Katherine Castro.

II. Reasonable Hours

Defendants challenge the hours claimed by Plaintiff with regard to three major segments of this action. First, Defendants challenge the reasonableness of the hours and fees associated with Plaintiff's preparation of their motion for summary judgment. Defendants contend that the motion was unnecessary and unnecessarily verbose. Second, Defendants challenge the reasonableness of the hours and fees associated with the depositions of individual Defendant Hoa Trung Vo and Bobby T. Vang, representative of Defendant Bliatout, LLC. Defendants contend that neither deposition was necessary because the consent decree stipulated the extent of injunctive relief that would be available to Plaintiff and liability had already been admitted. Third, Defendants dispute the reasonableness of the hours and fees associated with Plaintiff's motion for attorney's fees. The court will consider each in turn.

A. Plaintiff's Motion for Summary Judgment

*7 Plaintiff filed her motion for summary judgment on October 8, 2010. Plaintiff contends that the motion was necessary because Defendants had not "admitted liability" up to that point and because Defendants had insisted on a "global settlement" approach in which they consistently offered a sum insufficient to cover both Plaintiff's statutory damages and the amount of costs and fees that had been incurred by Plaintiff up to the point of the offer. Plaintiff contends that Defendants did not "admit liability" until after the motion for summary judgment had been filed and served. Defendants, on the other hand contend that "[a]s a practical matter, [D]efendants' liability had been established by the consent decree under which [D]efendants performed remedial work in compliance with the ADA." Doc. # 63 at 9:23-25.

Plaintiff's motion for summary judgment was submitted on the deadline date established by the Scheduling Conference Order filed February 5, 2010 (the "Scheduling Order"). Two aspects of the Magistrate Judge's Scheduling Order are significant for purposes of this discussion. First, the Scheduling Order recognized that it was Plaintiff's contention that Plaintiff's were the prevailing party as a matter of law based on Defendants' acceptance of responsibility to conform the property to ADA requirements in the consent decree. Second, the Pretrial Order contains a provision that a party intending to file a motion for summary judgment must:

[M]eet, in person or by telephone, [with opposing party] and confer to discuss the issues to be raised in the motion. ¶ The purpose of the meeting shall be to: (1) avoid filing motions for summary judgment where a question of fact exists; (2) determine whether the respondent agrees that the motion has merit in whole or in part; (3) discuss whether issues can be resolved without the necessity of briefing; (4) narrow the issues for review by the court; (5) explore the possibility of settlement before the parties incur the expense of briefing a summary judgment motion; (6) arrive at a joint statement of undisputed facts.

In the notice of motion, the moving party shall certify that the parties have met and conferred as ordered above or set forth a statement of good cause for the failure to meet and confer.

Doc. # 33 at11:20-12:9. The court has examined the entirety of Plaintiff's motion for summary judgment, including the notice of motion, and cannot find any cer-

tification of compliance with the magistrate judge's order.

In examining the reasonableness of requested attorney's fees and costs, "[t]he district court should exclude from [its] fee calculation hours that were not 'reasonably expended.' [....] Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fees submission." Hensley, 461 U.S. at 434.

*8 Plaintiff offers two arguments to counter Defendants' contention that the motion for summary judgment was unnecessary. First Plaintiffs argue that the motion for summary judgment was necessary to establish Defendants' liability. Second, Plaintiff contends that the motion was necessary to spur Defendants into a more receptive posture with respect to settlement. Two considerations bring Plaintiff's argument into question.

First, Plaintiff's concerns about Defendants' refusal to "admit liability" are dubious given that Plaintiff can easily demonstrate conclusively that she is the "prevailing party" as a matter of law for purposes of both attorney's fees and entitlement to statutory damages. In its order denying Plaintiff's motion for summary judgment, the court noted that Plaintiff was entitled to statutory damages as a matter of law. That argument discussion need not be repeated here. Pursuant to 42 U.S.C. § 12205, the prevailing party in an ADA action is entitled to reasonable attorney's fees. "The standard for making this threshold determination has been framed in various ways. A typical formulation is that 'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit.' [Citation.]" Hensley v. Eckerhart, 461 U.S. 424, 432, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-279 (1st Cir.1978)). FN3 In general, a plaintiff in a civil rights-related case prevails for purposes of award of attorney's fees if she "succeeds in obtaining an injunction under that Title." Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400,

402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968). This general standard has been applied to actions under the ADA. See, e.g., Karraker v. Rent-A-Center, Inc., 492 F.3d 896, 898-899 (7th Dist.2007) (members of class action prevailed where they were awarded injunctive relief even though none of the class except the class representative received monetary damages).

FN3. Although *Hensley* concerned the award of attorney's fees under 42 U.S.C. § 1988, the Court noted that the standards set forth in the opinion "are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.' "*Hensley*, 461 U.S. 432 n. 7.

Second, the Magistrate Judge's Scheduling Order provides that the moving party certify in their notice of motion for summary judgment that they have met and conferred with the opposing party. This provides both the opportunity and the obligation of the moving party to demonstrate the necessity of its motion. As the court noted, there is no certification in Plaintiff's moving papers that meet and confer did occur. There is a sharp difference of opinion between the parties whether the required "meet and confer" did, in fact, occur. Defendants infer that meet and confer did not take place. In their reply brief, Plaintiff contends that a "meet and confer" did take place on October 1, 2010. In support of their allegation that "meet and confer" did occur, Plaintiff submits a communication dated October 1, 2010, sent by Catherine Cabalo to Joe Cooper, attorney for Defendant Bliatout LLC which stated as follows, in pertinent part:

*9 This letter memorializes out telephone conversation today, during which you reiterated defendant Bliatout LLC's settlement offer of \$35,000. After discussing out clients' respective positions and the costs of further litigating these issues, I communicated to you a counterdemand on behalf of Antonia Luna of \$45,000. This amount includes damages for Ms. Luna and my office's attorneys' fees and costs. This offer will remain open until 5:00 p. m. on Monday, October 4, 2010, at which point all settlement offers will be rescinded and we will finalize our Motion for

Summary Judgment.

Doc. #65, Decl. of Catherine Cabalo, Exh. #40.

The instant action is precisely the sort of action that the Magistrate Judge's order requiring meet and confer prior to the filing of a motion for summary judgment is intended to benefit. As the court noted in its order denying Plaintiff's motion for summary judgment, there was nothing in the motion that indicated its necessity. Plaintiff's argument that Defendants did not agree to accept "liability" until after the motion was filed misses the point. "Liability" and Plaintiff's and counsels' entitlements pursuant to that liability are, in this case easily determined as a matter of law. Pursuant to the Magistrate Judge's order, it was the duty of Plaintiff's attorneys to meet and confer with Defendants with the specific intent in mind to, inter alia, determine whether the respondent agrees that the motion has merit in whole or in part, discuss whether issues can be resolved without the necessity of briefing, and narrow the issues for review by the court. Practically speaking, this means it was up to Plaintiff to confront Defendants with the legal basis for Plaintiff's claim that Plaintiff is entitled to statutory damages and attorney's fees and costs. Plaintiff's contention that Defendants were "liable" could easily and convincingly set forth in a two page letter rather than a 21-page motion for summary judgment. Unfortunately, so far as the available evidence indicates, the exchange that did occur consisted of nothing more than a simple exchange of offer and counter-offer. From the evidence available, it appears to the court that the sort of meaningful "meet and confer" contemplated by the Magistrate Judge's scheduling order did not occur.

Finally, the court notes briefly that Plaintiff's motion for summary judgment had no legal impact on the resolution of this action because it was denied without prejudice for technical reasons related to failure to follow local rules. "Reasonable costs" are those that are incurred in efforts that materially advance the action toward resolution. See Jadwin, 2011 WL 240695 at *56 (attorney not awarded fees for ineffective briefing not in conformity with court's order). The court finds that, in any event, the hours claimed for preparation of Plaintiff's motion for summary judgment would, if gran-

ted, result in an unjust award of fees.

"The fee applicant bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked." Gates v. Deukmejian, 987 F.2d 1392, 1397 (9th Cir.1992). The court finds that, pursuant to the Magistrate Judge's Scheduling Order, an element of the proof required of Plaintiff to sustain the claim for hours billed for the summary judgment motion was both certification and evidence of the parties' efforts to resolve the issues outstanding through the meet and confer process. The court also finds that the necessary evidence is lacking and no other evidence indicating the necessity of Plaintiff's motion for summary judgement is apparent. from pleadings or from other evidence submitted by Plaintiff. The court will therefore disallow the hours billed by Plaintiff for the preparation of their motion for summary judgment.

B. Depositions of Bobby T. Vang and Hoa Trung Vo

*10 Defendant contends that the depositions of Bobby T. Vang and Hoa Trung Vo were unnecessary inasmuch and they were intended only to establish liability, an issue that was not necessary to prove in light of the Consent Decree. Plaintiff's motion for attorney's fees states that "[a]lthough Defendants agreed to the Consent Decree ordered by the Court on August 27, 2009, this Consent Decree did not contain any admissions of liability. [....] In order to recover damages, plaintiff was required to prove liability through discovery." Doc. # 54 at 20:20-23.

As previously discussed, "liability," insofar as that term is intended to indicate an entitlement to damages and attorney's fees, was determinable as a matter of law as of the time the Consent Decree was entered into by Defendants. While discovery is not burdened with the same meet-and-confer obligations that were imposed on Plaintiff's motion for summary judgment, Plaintiff does have the burden, in the face of Defendants' challenge to the necessity of the depositions, to show that the disputed depositions were not unnecessary. Plaintiff's reply brief does not address Plaintiff's contentions regarding the depositions at all. The only relevance that is asserted with regard to the depositions is found in Plaintiff's

moving papers asserting that the depositions were necessary to establish Defendants' liability.

If Plaintiff had a purpose in taking the depositions of Bobby Vang and Hoa Trung Vo beyond the establishment of "liability," then Plaintiff was required to point to some evidence of that purpose when challenged by Defendants. Since Plaintiff did not meet that challenge, the fees that are attributable to the depositions of Bobby Vang and Hoa Trung Vo are not reasonable and will not be compensated.

C. Apportionment

Defendant Bliatout contends that certain of Plaintiff's attorney's fees are attributable to co-Defendant Vo and should be apportioned accordingly. In particular Defendant Bliatout contends that the fees that are attributable to Defendant Vo's allegedly abusive behavior and to the second site inspection should be taxed to Vo and not to Bliatout. As Plaintiff correctly points out, the "allocation of responsibility between the landlord and a tenant by lease is effective only '[a]s between the parties.' 28 C.F.R. § 36.201(b). Thus, contractual allocation of responsibility has no effect on the rights of third parties." Botosan v. Paul McNally Realty, 216 F.3d 827, 833 (9th Cir.2000). Nothing prevents Bliatout from seeking contribution or indemnification from Vo, however such claims are not properly a consideration in the context of Plaintiff's action. See id. Any claim that Bliatout may have against Vo for contribution or indemnification must be addressed in a separate action or cross-claim.

D. Miscellaneous Fees and Expenses

Defendants object to certain fees and costs in the amount of \$181 .50 attributed to paralegal Aaron Clefton on the ground that the items billed were secretarial and not properly charged as paralegal work. Defendants also object to fees in the amount of \$2,428.44 attributable to a fourth site visit by Plaintiff's expert Barry Atwood on the ground there was no apparent reason for the expert's fourth visit. Plaintiff contends that the fees billed by Aaron Clifton represent reasonable costs for activities within the scope of a paralegal. Plaintiff alleges that the fourth visit by Aaron Clifton was crucial to the support of Plaintiff's position during

settlement conference at the August 27, 2009, settlement conference.

*11 The court concludes that Defendant has failed to demonstrate that the fees were unnecessary. The fees for Aaron Clefton and Barry Atwood will be allowed to the extent not otherwise excluded by this order.

E. Fees on Motion for Attorney's Fees

There is no dispute that the prevailing party in an ADA case is entitled to reasonable attorney's fees including a reasonable fee for the time expended in the attorney's fees application. See Serrano, 32 Cal.3d at 631, 186 Cal.Rptr. 754, 652 P.2d 985 ("the time expended by attorneys in obtaining a reasonable fee is justifiably included in the attorneys' fee application, and in the court's fee award"). Defendants' contentions regarding "fees on fees" are somewhat vague. While Defendants are generally critical of the verbosity of Plaintiff's motion for attorney's fees and the time expended on it, Plaintiff's central contention appears to be that attorney's fees pertaining to preparation of the motion for attorney's fees should be either reduced by the proportion of attorney's fees actually awarded to attorney's fees requested and/or reduced by a factor of ten percent.

In Thompson v. Gomez, 45 F.3d 1365 (9th Cir.1995) the Ninth Circuit Court of Appeals held that an approach that resulted in a reduction of the prevailing party's request for "fees on fees" by the same percentage as the court reduced "fees on merits" was compatible with the Supreme Court's decision in Hensley and was not an abuse of the district court's discretion. See id. at 1368 (percentage of the total award for merits fees is an arithmetic formulation reflecting the extent to which plaintiff is fees motion is successful and is an appropriate consideration in setting fees on fees). "Fees for fee litigation are excludable, not only when the applicant has had 'extremely limited success on merits fees,' as plaintiffs argue, but in all cases 'to the extent the applicant ultimately fails to prevail in such litigation.' [Citation]." Id . (quoting Comissioner, I.N.S. v. Jean, 496 U.S. 154, 163 n. 10, 110 S.Ct. 2316, 110 L.Ed.2d 134 (1990) (italics added in Thompson)).

Plaintiff agrees to a 10% reduction in "fees on

Slip Copy, 2011 WL 2078004 (E.D.Cal.) (Cite as: 2011 WL 2078004 (E.D.Cal.))

fees." Defendants, somewhat confusingly, cite Overbo v. Loews California Theaters, a case from the Northern District, submitted by Plaintiff at Exhibit # 16 of Paul Rein, Doc. # 55 in support of Plaintiff's request for attorney's fees. In Overbo, the district court, noting sloppy and duplicative billing practice on the part of the Law Offices of Paul Rein, ordered a global 10% reduction in attorney's fees for services on the merits and applied the same percentage reduction to the amount requested for fees on fees. The court mentions this case in order to avoid any confusion as to the proper approach for the determination of "fees on fees." Although the approach used by the court in Overbo is not incompatible with the approach set forth in Thompson, there may be some tendency to believe that the 10% reduction figure was an amount more or less randomly chosen to compensate for the inherent inefficiency in managing case work. To the extent it might be Plaintiff's contention that a court may impose a 10% "haircut" in leu of the approach set forth in Thompson, there is no basis for such contention. The request of Plaintiff's attorneys for "fees on fees" will be reduced pursuant to Thompson in

Paul Rein Celia McGuinness Catherine Cabalo

The reasonable hourly rates for the requesting paralegals are as follows:

Aaron Clefton, Sr. Katherine Castro

2. The court finds the hours claimed by Plaintiffs for the preparation of the motion for summary judgment were not reasonable. No hours will be allowed for time spent in preparation for that motion. The total

Paul Rein Celia McGuinness Catherine Cabalo Aaron Clefton proportion to the amount the fees on merits was reduced; that is, by a factor of 0.36.

*12 In the instant case, Plaintiff will be awarded \$78, 149 for attorney's fees exclusive of the fees associated with the preparation of the motion for attorney's fees. The amount requested was \$121,912. The reduction of the amount awarded from the amount requested is 36%. The total amount requested by Plaintiff's attorneys for preparation of the motion for attorney's fees was \$16,849. A reduction of 36% from that amount would result in an allowable fee of \$10,783.

CONCLUSION AND ORDER

Plaintiff's request for attorney's fees is hereby GRAN-TED with the following modifications:

1. The court finds reasonable hourly rates for the requesting attorneys are as follows:

\$375 per hour \$315 per hour \$295 per hour

\$165 per hour \$100 per hour

number of hours claimed by each legal staff member shall be REDUCED as follows:

(8.7 hours) (0.5 hours) (13.2 hours) (2.0 hours)

3. The court finds the hours claimed by Plaintiffs for

the depositions of Hoa Trung Vo and Bobby T. Vang, or preparation therefore, were not reasonable. No hours will be allowed for time spent for the preparation or conduct of those depositions. The total number of hours claimed by each legal staff member shall be

REDUCED as follows:

Paul Rein Celia McGuinness Catherine Cabalo (3.4 hours) (N.A.) (39.4 hours)

4. The hours and compensation awarded to each of Plaintiff's legal personnel EXCLUDING time charged to the preparation of the motion for attorney's fees

are:

Attorney/Staff Member	Allowed Hours	Adjusted Rate	Total
Mr. Paul Rein	120.2 hours	\$375/hr.	\$45,075
Ms. Celia McGuinness	45.4 hours	\$315/hr	\$14,310
Ms. Catherine Cabalo	52.6 hours	\$295/hr	\$15,517
Mr. Aaron Clifton	16.1 hours	\$165/hr	\$ 2,657
Ms. Katherine Castro	5.9 hours	\$100/hr	\$ 590

TOTALS:

240.2 hours

\$78,149

- 5. Plaintiff's attorney's are awarded \$10,783 for fees incurred for the preparation of the instant motion for attorney's fees.
- 7. Total Fees and Expenses payable by Defendants to Plaintiff are:
- Litigation fees and expenses payable by Defendants to Plaintiff total \$19, 284.

Total Attorney's Fee on Merits:	\$78,149
Total Attorney's Fees on Fees:	\$10,783
Total Litigation Expenses and Costs:	\$19,284
TOTAL	\$108,216

*13 8. It is hereby ORDERED that Defendants shall, jointly and severally, pay to Plaintiff the sum of \$108,216.00. Such payment is to be made within thirty (30) days of the date of service of this order. IT IS SO ORDERED.

Luna v. Hoa Trung Vo Slip Copy, 2011 WL 2078004 (E.D.Cal.)

END OF DOCUMENT

E.D.Cal.,2011.

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name:

Sheriff Clay Parker, et al. v. The State of California

No.:

10CECG02116

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On July 13, 2011, I served the attached

- (1) THE STATE'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES; and (2) DECLARATION OF PETER A. KRAUSE
- (1) THE STATE'S OBJECTIONS TO THE DECLARATION OF CLINTON MONFORT SUBMITTED IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES; (2) [PROPOSED] ORDER THEREON

THE STATE'S NOTICE OF LODGING FEDERAL AUTHORITIES AND NON-CALIFORNIA AUTHORITIES CITED IN THE STATE'S OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES

by placing a true copy thereof enclosed in a sealed envelope with the Golden State Overnight courier service, addressed as follows:

C.D. Michel Michel & Associates, P.C. 180 E. Ocean Boulevard, Suite 200 Long Beach, CA 90802

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 13, 2011, at Sacramento, California.

Brenda Apodaca

Declarant

Signature

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