4

United States Court of Appeals,
Ninth Circuit.
Mario R. MORENO, Plaintiff-Appellant,
v.
CITY OF SACRAMENTO; Max Fernandez; Joshua Pino; John Vanella, Defendants-Appellees,
and
Voluntary Dispute Resolution Neutral, Defendant.

No. 06-15021.
Argued & Submitted Dec. 5, 2007.
Submission Deferred Dec. 5, 2007.
Submitted July 28, 2008.
Filed July 28, 2008.

Background: After owner prevailed in § 1983 suit against city on claims of inverse condemnation, substantive due process, unreasonable search and seizure, and procedural due process violations, in connection with city's demolishing of owner's building, owner requested award of attorney fees. The United States District Court for the Eastern District of California, David F. Levi, J., awarded fees but reduced jury award to 40% lower than requested. Appeal was taken.

Holdings: The Court of Appeals, Kozinski, Chief Judge, held that:
(1) 25% reduction in requested hours for legal research lacked clear explanation;
(2) 50% reduction in trial preparation hours lacked clear explanation;
(3) 33% reduction in appeal preparation hours lacked clear explanation;
(4) 50% reduction for hours spent interviewing and investigating lacked clear explanation;
(5) $50 per hour reduction in hourly rate was based on impermissible considerations; and
(6) reduction in hourly rate was impermissibly double counted.

Vacated and remanded.

West Headnotes

[1] Civil Rights 78 ⇐1487

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1487 k. Amount and Computation. Most Cited Cases
Because attorney fee awards are not negotiated at arm's length, there is a risk of overcompensation for successful plaintiffs in a civil rights action, and thus, a district court awards only the fee deemed reasonable. 42 U.S.C.A. § 1988.

[2] Civil Rights 78 ⇐1488

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1488 k. Time Expended; Hourly Rates. Most Cited Cases
In awarding attorney fees to a prevailing plaintiff in a civil rights action, the district court must strike a balance between granting sufficient fees to attract qualified counsel to civil rights cases and avoiding a windfall to counsel, by compensating counsel at the prevailing rate in the community for similar work, but no more and no less. 42 U.S.C.A. § 1988.

[3] Civil Rights 78 ⇐1487

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

78k1487 k. Amount and Computation. Most Cited Cases

Under the "lodestar method" of calculating an attorney fee award, for a prevailing plaintiff in a civil rights action, a district court must start by determining how many hours were reasonably expended on the litigation, and then multiply those hours by the prevailing local rate for an attorney of the skill required to perform the litigation; the district court may then adjust upward or downward based on a variety of factors. 42 U.S.C.A. § 1988.

[4] Civil Rights 78 ⚿1488

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1488 k. Time Expended; Hourly Rates. Most Cited Cases

Under the lodestar method of calculating an attorney fee award, for a prevailing plaintiff in a civil rights action, the number of hours to be compensated is calculated by considering whether, in light of the circumstances, the time could reasonably have been billed to a private client. 42 U.S.C.A. § 1988.

[5] 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 for abuse of discretion the district court's calculation of the reasonable hours and hourly rate for award of attorney fees to prevailing plaintiff in a civil rights action. 42 U.S.C.A. § 1988.

[6] Civil Rights 78 ⚿1490

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

When the district court awards attorney fees to a prevailing plaintiff in a civil rights action, the court must explain how it came up with the amount; the explanation need not be elaborate, but it must be comprehensible, or in other words, the explanation must be concise but clear. 42 U.S.C.A. § 1988.

[7] Civil Rights 78 ⚿1490

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

Where the difference between the lawyer's request for attorney fees, after prevailing in a civil rights action, and the district court's award is relatively small, a somewhat cursory explanation by the court will suffice; but where the disparity is larger, a more specific articulation of the court's reasoning is expected. 42 U.S.C.A. § 1988.

[8] Federal Courts 170B ⚿776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases

Court of Appeals reviews de novo the legal principles underlying the attorney fee

award to a prevailing plaintiff in a civil rights action. 42 U.S.C.A. § 1988.

[9] Civil Rights 78 ⚿1490

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

District court's explanation of attorney fee award to prevailing plaintiff in civil rights action that reduced requested hours for legal research by 25%, on grounds that work was duplicative due to substantial time spent preparing motions and briefs dealing with similar issues, provided insufficient reasoning to sustain substantial 25% reduction, which required specific and clear explanation as to which fees were duplicative or why; counsel had already cut her fees by 9%, so additional cut of 25% would amount to almost one-third of requested fees, and previous appeal of district court's grant of summary judgment would have added to delay and rendered research stale. 42 U.S.C.A. § 1988.

[10] Civil Rights 78 ⚿1488

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1488 k. Time Expended; Hourly Rates. Most Cited Cases

The district court may reduce the number of hours awarded to prevailing plaintiff in civil rights action because the lawyer performed unnecessarily duplicative work. 42 U.S.C.A. § 1988.

[11] 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

A lawyer's time spent getting up to speed with previously performed research due to stale work product from litigation that has gone on for many years is duplication of work, but necessary duplication, when considering award of attorney fees for prevailing plaintiff in civil rights action. 42 U.S.C.A. § 1988.

[12] Civil Rights 78 ⚿1488

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1488 k. Time Expended; Hourly Rates. Most Cited Cases

Generally, for award of attorney fees, the district court should defer to the winning lawyer's professional judgment as to how much time he was required to spend to prevail in a civil rights action. 42 U.S.C.A. § 1988.

[13] 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 ⚿1490

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

For award of attorney fees to prevailing plaintiff in a civil rights action, the district court can impose a small reduction, no greater than a 10 percent "haircut" based on its exercise of discretion and without a

more specific explanation. 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

District court's sole opaque explanation as "excessive," to support 50% reduction in requested hours for counsel's preparation for first two trial dates, while not reducing requested hours for third trial date, in awarding attorney fees to prevailing plaintiff in civil rights action, was insufficiently clear reasoning to sustain substantial 50% reduction; reduction of 50% amounted to 20% of total fees billed for trial, counsel had already cut her fees by 9%, and time spent preparing for first trial would have been of relatively little use by time case was actually presented to jury three years later. 42 U.S.C.A. § 1988.

[15] Civil Rights 78 ⇐1488

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1488 k. Time Expended; Hourly Rates. Most Cited Cases

In calculating an attorney fee award for prevailing plaintiff in civil rights action, necessary duplication of attorney hours, based on the vicissitudes of the litigation process, cannot be a legitimate basis for a fee reduction; it is only where the lawyer does unnecessarily duplicative work that the district court may legitimately cut the hours. 42 U.S.C.A. § 1988.

[16] Civil Rights 78 ⇐1492

78 Civil Rights
78III Federal Remedies in General
78k1492 k. Costs and Fees on Appeal. Most Cited Cases

District court's explanation for 33% reduction in requested hours for counsel's preparation for first appeal, on grounds that counsel spent twice as long on appeal than on summary judgment, was insufficiently clear reasoning to sustain substantial 33% reduction in awarding attorney fees to prevailing plaintiff in civil rights action; plaintiff lost summary judgment, but ultimately won on appeal, and counsel had already cut her fees by 9%. 42 U.S.C.A. § 1988.

[17] Civil Rights 78 ⇐1492

78 Civil Rights
78III Federal Remedies in General
78k1492 k. Costs and Fees on Appeal. Most Cited Cases

Federal Courts 170B ⇐878

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)5 Questions of Fact, Verdicts and Findings
170Bk870 Particular Issues and Questions
170Bk878 k. Costs and Attorney Fees. Most Cited Cases

Court of Appeals looks more closely at fee awards involving appeals in civil rights actions. 42 U.S.C.A. § 1988.

[18] Civil Rights 78 ⇐1490

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

If the district court believes the overall attorney fee award to a prevailing plaintiff in a civil rights action is too high, the court needs to say so and explain why, rather than making summary cuts in various components of the award. 42 U.S.C.A. § 1988.

[19] Federal Courts 170B ⚿878

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)5 Questions of Fact, Verdicts and Findings
170Bk870 Particular Issues and Questions
170Bk878 k. Costs and Attorney Fees. Most Cited Cases

While the Court of Appeals accords deference to the district court's explanation of why a requested attorney fee is excessive, in reducing requested fees for a prevailing plaintiff in a civil rights action, deference is required only if the district court provides an explanation that can be meaningfully reviewed. 42 U.S.C.A. § 1988.

[20] Civil Rights 78 ⚿1490

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

Findings of duplicative work should not become a shortcut for reducing an award of attorney fees to prevailing plaintiff in a civil rights action without identifying just why the requested fee was excessive and by how much. 42 U.S.C.A. § 1988.

[21] Civil Rights 78 ⚿1490

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

District court's conclusory explanation for 50% reduction in requested hours for counsel's time spent performing interviews and investigation, on grounds that counsel spent unreasonable amount of time engaged in such activities, despite finding that activities were appropriate, was insufficiently clear reasoning to sustain substantial 33% reduction, in awarding attorney fees to prevailing plaintiff in civil rights action. 42 U.S.C.A. § 1988.

[22] Federal Courts 170B ⚿761

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk759 Theory and Grounds of Decision of Lower Court
170Bk761 k. Reasons for Decision. Most Cited Cases

While hour-by-hour explanations are not required from the district court, in awarding attorney fees to prevailing plaintiffs in civil rights actions, conclusory findings do not allow for meaningful appellate review. 42 U.S.C.A. § 1988.

[23] Civil Rights 78 ⚿1488

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1488 k. Time Expended; Hourly Rates. Most Cited Cases

The hourly rate for successful civil rights attorneys is to be calculated by considering certain factors, including the novelty and difficulty of the issues, the skill required to try the case, whether or not the fee is contingent, the experience held by

counsel, and fee awards in similar cases. 42 U.S.C.A. § 1988.

[24] 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

District court's speculation that other law firms would have used less skilled attorney rather than lead counsel to perform document review was impermissible consideration for reducing successful counsel's rate by $50 dollars, from $300 to $250 per hour, based on improper policy of awarding such rate to prevailing plaintiffs in civil rights actions. 42 U.S.C.A. § 1988.

[25] 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

While it is appropriate to consider the skill required to perform a task, in awarding attorney fees to prevailing plaintiff in civil rights action the district court may not set the attorney's fee based on speculation as to how other firms would have staffed the case. 42 U.S.C.A. § 1988.

[26] Civil Rights 78 ⚿1487

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

In calculating an award of attorney fees for prevailing plaintiffs in a civil rights action, the district court's inquiry must be limited to determining whether the fees requested by the particular legal team are justified for the particular work performed and the results achieved in that particular case. 42 U.S.C.A. § 1988.

[27] 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

In calculating an award of attorney fees for prevailing plaintiffs in a civil rights action, the district court may permissibly look to the hourly rates charged by comparable attorneys for similar work, but may not attempt to impose its own judgment regarding the best way to operate a law firm, nor to determine if different staffing decisions might have led to different fee requests. 42 U.S.C.A. § 1988.

[28] Civil Rights 78 ⚿1488

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1488 k. Time Expended; Hourly Rates. Most Cited Cases

In calculating an award of attorney fees for prevailing plaintiffs in a civil rights action, the difficulty and skill level of the work performed, and the result achieved, not whether it would have been cheaper to delegate the work to other attorneys, must drive the district court's decision. 42 U.S.C.A. § 1988.

[29] Civil Rights 78 ⇐1488

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1488 k. Time Expended; Hourly Rates. Most Cited Cases

In calculating an award of attorney fees for prevailing plaintiffs in a civil rights action, district judges can consider the fees awarded by other judges in the same locality in similar cases, but adopting a court-wide policy, even an informal one, of "holding the line" on fees at a certain level goes well beyond the discretion of the district court. 42 U.S.C.A. § 1988.

[30] Civil Rights 78 ⇐1488

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1488 k. Time Expended; Hourly Rates. Most Cited Cases

In calculating an award of attorney fees for prevailing plaintiffs in a civil rights action, if the lodestar leads to an hourly rate that is higher than past practice, the district court must award that rate without regard to any contrary practice. 42 U.S.C.A. § 1988.

[31] Civil Rights 78 ⇐1488

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1488 k. Time Expended; Hourly Rates. Most Cited Cases

In calculating an award of attorney fees for prevailing plaintiffs in a civil rights action, double counting of reductions of the hourly rate for some tasks is impermissible. 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

District court's double counting of reduction in hourly rate of attorney fees for summarizing depositions was impermissible in granting fee award to prevailing plaintiff in civil rights action. 42 U.S.C.A. § 1988.

***1110** Andrea M. Miller, Nageley, Meredith & Miller, Inc., Sacramento, CA, for the appellant.

Thomas A. Cregger, Randolph Cregger & Chalfant LLP, Sacramento, CA, for the appellees.

Appeal from the United States District Court for the Eastern District of California; David F. Levi, District Judge, Presiding. D.C. No. CV-01-00725-DFL/DAD.

Before: ALEX KOZINSKI, Chief Judge, ROBERT E. COWEN [FN*] and HAWKINS, Circuit Judges.

FN* The Honorable Robert E.

Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

KOZINSKI, Chief Judge:

We consider various issues pertaining to the district court's award of attorneys' fees under 42 U.S.C. § 1988.

Facts

Moreno sued the City of Sacramento and several other defendants, alleging that they violated his civil rights by seizing and destroying his property without due process. After lengthy pre-trial proceedings and a previous appeal, a jury awarded Moreno $717,000 in compensatory and punitive damages. Moreno's principal trial counsel, Andrea Miller, sought an award of attorneys' fees under 42 U.S.C. § 1988. Miller requested $704,858.07 for herself and her staff, including compensation for 1,973.6 hours of her own time, at a rate of $300 per hour. This request excluded around 9 percent of the total hours actually spent on the case.

The district court reduced the hours further, concluding that around a quarter to a third of the time spent on research, appeal and trial preparation and half the time spent on investigation was unnecessary. ***1111** The district court also reduced Miller's hourly rate to that of a paralegal for the time she spent summarizing depositions. Finally, the district court reduced Miller's hourly rate from $300 to $250 an hour. The resulting award was $428,053.00, around 40 percent lower than requested.

Analysis

[1] Lawyers must eat, so they generally won't take cases without a reasonable prospect of getting paid. Congress thus 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 who violate the Nation['s] fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." S.Rep. No. 94-1011, at 2 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5910.[FN1] At the same time, fee awards are not negotiated at arm's length, so there is a risk of overcompensation. A district court thus awards only the fee that it deems reasonable. *See Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). The client is free to make up any difference, but few do. As a practical matter, what the district court awards is what the lawyer gets.

FN1. Congress emphasized the importance of attorneys' fees in cases seeking injunctive relief, where there is no monetary light at the end of the litigation tunnel: "If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts." S.Rep. No. 94-1011, at 3 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5910.

[2] In making the award, the district court must strike a balance between granting sufficient fees to attract qualified counsel to civil rights cases, *City of Riverside v. Rivera,* 477 U.S. 561, 579-80, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986), and avoiding a windfall to counsel, *see Blum v. Stenson,* 465 U.S. 886, 897, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) (quoting S.Rep. No. 94-1011, at 6 (1976)). The way to do so is

to compensate counsel at the prevailing rate in the community for similar work; no more, no less.

[3][4][5] In this case, the district court used the lodestar method to calculate fees. Under this method, a district court must start by determining how many hours were reasonably expended on the litigation, and then multiply those hours by the prevailing local rate for an attorney of the skill required to perform the litigation. *See Blum,* 465 U.S. at 895, 104 S.Ct. 1541. The district court may then adjust upward or downward based on a variety of factors. *Hensley,* 461 U.S. at 434, 103 S.Ct. 1933. The number of hours to be compensated is calculated by considering whether, in light of the circumstances, the time could reasonably have been billed to a private client. *Id.* We review the district court's calculation of the reasonable hours and hourly rate for abuse of discretion. *See Camacho v. Bridgeport Fin., Inc.,* 523 F.3d 973, 977-78 (9th Cir.2008).

[6][7][8] When the district court makes its award, it must explain how it came up with the amount. The explanation need not be elaborate, but it must be comprehensible. As *Hensley* described it, the explanation must be "concise but *clear.* " 461 U.S. at 437, 103 S.Ct. 1933 (emphasis added). Where the difference between the lawyer's request and the court's award is relatively small, a somewhat cursory explanation will suffice. But where the disparity is larger, a more specific articulation of the court's reasoning is expected. *See Bogan v. City of Boston,* 489 F.3d 417, 430 (1st Cir.2007). We review the legal principles underlying the fee award de novo. ***1112***Ferland v. Conrad Credit Corp.,* 244 F.3d 1145, 1148 (9th Cir.2001).

[9] **1. Reduction for Duplicative Work:** Plaintiff requested fees for 227.9 hours of research, and the district court awarded fees for 171 hours. The district court found the hours requested to be excessive, suggesting that some of the research was duplicative because counsel spent substantial time preparing motions and briefs dealing with similar issues.

[10][11] The court may reduce the number of hours awarded because the lawyer performed unnecessarily duplicative work, but determining whether work is unnecessarily duplicative is no easy task. When a case goes on for many years, a lot of legal work product will grow stale; a competent lawyer won't rely entirely on last year's, or even last month's, research: Cases are decided; statutes are enacted; regulations are promulgated and amended. A lawyer also needs to get up to speed with the research previously performed. All this is duplication, of course, but it's *necessary* duplication; it is inherent in the process of litigating over time. Here, there was a previous appeal (of the district court's grant of summary judgment) which would have added to the delay and rendered much of the research stale. One certainly expects *some* degree of duplication as an inherent part of the process. There is no reason why the lawyer should perform this necessary work for free.

[12] It must also be kept in mind that lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee. It would therefore be the highly atypical civil rights case where plaintiff's lawyer engages in churning. By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the

case; after all, he won, and might not have, had he been more of a slacker.

[13] The district court has a greater familiarity with the case than we do, but even the district court cannot tell by a cursory examination which hours are unnecessarily duplicative. Nevertheless, the 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. Here, however, the district court cut the number of hours by 25 percent, and gave no specific explanation as to which fees it thought were duplicative, or why. While we don't require the explanation to be elaborate, it must be clear, and this one isn't. Plaintiff's counsel had already cut her fees by 9 percent, so an additional 25 percent cut would amount to almost one third. The court has discretion to make such an adjustment, but we cannot sustain a cut that substantial unless the district court articulates its reasoning with more specificity. We therefore conclude that the district court's explanation is insufficient to sustain a 25 percent cut based on duplication.

[14] Plaintiff also requested fees for 266.6 hours of preparation for the first two trial dates, July 2002 and February 2005, without indicating how much time was spent preparing for each date. Plaintiff requested fees for 340.7 hours for the third trial date, May 2005. The district court awarded the full hours for the third trial date, but reduced the hours for the first two dates by half, to 133.3. As with the research hours, the cut here is substantial, amounting to 20 percent of the total fees billed for trial, in addition to the 9 percent already cut by plaintiff's counsel.

[15] The district court did not explain the necessity or degree of the cut, other than to say that the amount of time plaintiff's***1113** counsel spent was "excessive." We also find it curious-and somewhat arbitrary-that the district court simply cut the costs of preparation for the first two trials by 50 percent. The first two trial dates were three years apart; the time spent preparing for the first trial would be of relatively little use by the time the case was actually presented to the jury, so it is difficult to understand how a cut of those fees would be justified, much less a cut of a full 50 percent. The second and third trial dates were only about three months apart, so it is possible there was some duplication. After all, duplication always happens when a task is started, stopped and then taken up again later. But necessary duplication-based on the vicissitudes of the litigation process-cannot be a legitimate basis for a fee reduction. It is only where the lawyer does *unnecessarily* duplicative work that the court may legitimately cut the hours.

Of course, the court might have some specific reason for believing that work is excessive or duplicative, but it must explain why. We cannot sustain a 50 percent cut, over and above the 9 percent cut plaintiff's counsel already imposed on herself, without a clear explanation that we can review. The opaque explanation provided here is an insufficient basis for the district court's Draconian cut.

[16][17] The district court awarded fees for 180 hours of time spent preparing the earlier appeal. Plaintiff requested 269.3 hours. We "look more closely" at fee awards involving appeals, *Suzuki v. Yuen,* 678 F.2d 761, 762-63 (9th Cir.1982), and can find no justification for a cut of 33 percent, on top of plaintiff's counsel's own cut. The district court noted that plaintiff's

counsel spent twice as long on the appeal than on the summary judgment, but this does not mean the additional time spent on appeal was unjustified; after all, plaintiff lost claims at summary judgment that he won on appeal. More fundamentally, preparing summary judgment motions and appeals are not commensurate tasks, though they have some elements in common. What matters is whether spending more time winning on appeal than losing on summary judgment was an imprudent use of hours. The district court points to nothing to support the conclusion that it was.

[18][19][20] Cutting fees for "duplication of effort" appears to have been an easy way for the district court to reduce an award it may have felt was too high. But if the court believes the overall award is too high, it needs to say so and explain why, rather than making summary cuts in various components of the award. While we accord deference to the district court's explanation of why a requested fee is excessive, we can only do so if the district court provides an explanation that we can meaningfully review. Findings of duplicative work should not become a shortcut for reducing an award without identifying just why the requested fee was excessive and by how much. As the reduction passes well beyond the safety zone of a haircut, which plaintiff's counsel seems to have given herself already, the district court's justification for the cuts must be weightier and more specific.

[21][22] **2. Interviews and Investigation:** For many of the same reasons, the district court failed to adequately justify its reduction of the time spent performing interviews and investigation, from 137.3 hours to 68.7 hours. This 50 percent reduction is not supported by the district court's cursory explanation. The district court apparently rejected defendant's argument for the cut-that the interviews and investigation were unnecessary because much of the information was not used at trial-and held that the work was "appropriate." But the court then ***1114** concluded that counsel "spent an unreasonable amount of time engaged in this activity," and that "[t]his time should be reduced by 50%," without further explaining this dramatic reduction. *See Gates v. Deukmejian,* 987 F.2d 1392, 1400 (9th Cir.1993) (as amended) ("the use of percentages" does not "discharge[ ] the district court from its responsibility to set forth a 'concise but clear' explanation of its reason for choosing a given percentage reduction"). While we do not require hour-by-hour explanations from the district court, the conclusory finding of the court here does not allow for meaningful appellate review.

[23][24] **3. Impermissible Methodologies:** The hourly rate for successful civil rights attorneys is to be calculated by considering certain factors, including the novelty and difficulty of the issues, the skill required to try the case, whether or not the fee is contingent, the experience held by counsel and fee awards in similar cases. *See Hensley,* 461 U.S. at 430 n. 3, 103 S.Ct. 1933 (citing *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir.1974)). Here, the district court properly considered the difficulty of trying the case, the rates charged by other attorneys in similar lawsuits, the skill of plaintiff's counsel, that plaintiff obtained excellent results and that counsel was to be compensated only if the lawsuit was successful. The district court suggested that an appropriate rate in light of these factors would be $300 an hour. So far, so good.

[25] But the district court went on to consider impermissible factors. The district court reduced the hourly rate from $300 an hour to $250 an hour, in part because it thought that other firms could have staffed the case differently. The court speculated that other firms would have used a less skilled attorney, rather than the lead counsel, to perform document review. While it is appropriate to consider the skill required to perform a task, *Hensley,* 461 U.S. at 430 n. 3, 103 S.Ct. 1933, the district court may not set the fee based on speculation as to how other firms would have staffed the case.

The cost effectiveness of various law firm models is an open question, [FN2] and it is by no means clear whether a larger law firm would have billed more or less for the entire case. The district court may have ***1115** been right that a larger firm would employ junior associates who bill at a lower rate than plaintiff's counsel, but a larger firm would also employ a partner-likely billing at a higher rate than plaintiff's counsel-to supervise them. And the partner in charge would still have had to familiarize himself with the documents, a step that plaintiff's counsel avoided by reviewing the documents herself. Moreover, lead counsel can doubtless complete the job more quickly, being better informed as to which documents are likely to be irrelevant, and which need to be examined closely. Modeling law firm economics drifts far afield of the *Hensley* calculus and the statutory goal of sufficiently compensating counsel in order to attract qualified attorneys to do civil rights work.

> FN2. Several courts have struggled with this issue. Some have opined that "[n]o rule of court should force a trial attorney to assign the duties of assembling documents and files for trial to an underling upon pain of not being paid for the work," *M.S.R. Imports, Inc. v. R.E. Greenspan Co., Inc.,* 574 F.Supp. 31, 34 (E.D.Pa.1983), or noted that litigation staffed only by senior attorneys might reduce costs, *Soc'y for Good Will to Retarded Children, Inc. v. Cuomo,* 574 F.Supp. 994, 999 (E.D.N.Y.1983), *vacated on other grounds,* 737 F.2d 1253 (2d Cir.1984); *see also United States v. City & County of San Francisco,* 748 F.Supp. 1416, 1432 (N.D.Cal.1990) (noting that the "the efficacy of the pyramidal staffing pattern is a matter of some debate"), *remanded in part on other grounds by Davis v. City & County of San Francisco,* 976 F.2d 1536, 1548 (9th Cir.1992).
>
> Other courts have adhered more to the pyramid structure in measuring fee awards. *See, e.g., Loughner v. Univ. of Pittsburgh,* 260 F.3d 173, 180 (3d Cir.2001) ("A claim by a lawyer for maximum rates for telephone calls with a client, legal research, a letter concerning a discovery request, the drafting of a brief, and trial time in court is neither fair nor reasonable. Many of these tasks are effectively performed by administrative assistants, paralegals, or secretaries."); *Bee v. Greaves,* 669 F.Supp. 372, 377 (D.Utah 1987), *rev'd in part on other grounds,* 910 F.2d 686 (10th Cir.1990) (reducing overall rate awarded because less experienced attorneys could have performed much of the work); *Mautner v. Hirsch,* 831

F.Supp. 1058, 1076 (S.D.N.Y.1993), *rev'd in part on other grounds,* 32 F.3d 37 (2d Cir.1994) (reducing lodestar for using senior attorneys when junior attorneys and paralegals were available).

[26][27][28] The district court's inquiry must be limited to determining whether the fees requested by this particular legal team are justified for the particular work performed and the results achieved in this particular case. The court may permissibly look to the hourly rates charged by comparable attorneys for similar work, but may not attempt to impose its own judgment regarding the best way to operate a law firm, nor to determine if different staffing decisions might have led to different fee requests. The difficulty and skill level of the work performed, and the result achieved-not whether it would have been cheaper to delegate the work to other attorneys-must drive the district court's decision.

The court also erred by applying what appears to be a de facto policy of awarding a rate of $250 an hour to civil rights cases. At the fees hearing, the district court noted that "300 an hour is a fairly big step for me, and I think for the court generally" and that "the court has pretty much held the line at 250 [an hour] for the past ten years." While the district court's final fee order does not reiterate this reasoning, an effort to adhere to this de facto policy probably influenced the final rate awarded, which was $250 an hour. Nothing else supports the $50 an hour reduction.

[29][30] District judges can certainly consider the fees awarded by other judges in the same locality in similar cases. But adopting a court-wide policy-even an informal one-of "holding the line" on fees at a certain level goes well beyond the discretion of the district court. One problem with any such policy is that it becomes difficult to revise over time, as economic conditions change; here the rate apparently hadn't changed for 10 years, and even a $50 increase in the hourly rate was considered a "big step ... for the court generally." Unless carefully administered and updated, any such policy becomes a strait-jacket. More fundamentally, such a policy-no matter how well intentioned or administered-is inconsistent with the methodology for awarding fees that the Supreme Court and our court has adopted. The district court's function is to award fees that reflect economic conditions in the district; it is not to "hold the line" at a particular rate, or to resist a rate because it would be a "big step." If the lodestar leads to an hourly rate that is higher than past practice, the court must award that rate without regard to any contrary practice.

[31][32] The district further erred by double counting the reduction in hourly rate for some tasks; such double counting is impermissible. *See Cunningham v. County of Los Angeles,* 879 F.2d 481, 489 (9th Cir.1988). It is possible, of course, for a district court to reduce both the hours and hourly rate awarded for some tasks. But the district court must exercise extreme care in making such reductions to avoid double counting. Here, the district court reduced the reasonable hourly rate from $300 to $75 an hour, the paralegal ***1116** rate, for 275.2 hours spent summarizing depositions, based on its conclusion that summarizing depositions was simple enough for a paralegal to perform. But the district court then used the simplicity of summarizing depositions to justify its reduction in the reasonable hourly rate for the remainder of the case from $300 to $250 an

hour. Thus, the district court double counted its reduction for summarizing depositions: Each hour spent summarizing depositions was already reduced to $75 an hour, so there was no reason to reduce the overall rate. The district court may properly use the simplicity of a given task as justification for a reduction in the rate for the hours spent performing that task or as justification for a reduction in the overall rate, but not both.

* * *

The district court has discretion to determine the appropriate fee award, because its familiarity with the case allows it to distinguish reasonable from excessive fee requests. But gut feelings are not enough; if the district court is going to make substantial cuts to a winning lawyer's fee request, it needs to explain why with sufficient specificity that the lawyer can meaningfully object and we can meaningfully review the objection. We can't defer to reasoning that we can't review; if all the district court offers is a conclusory statement that a fee request is too high, then we can't tell if the court is applying its superior knowledge to trim an excessive request or if it is randomly lopping off chunks of the winning lawyer's reasonably billed fees.

We are well aware that awarding attorneys' fees to prevailing parties in civil rights cases is a tedious business. And it may be difficult for the district court to identify the precise spot where a fee request is excessive. But the burden of producing a sufficiently cogent explanation can mostly be placed on the shoulders of the losing parties, who not only have the incentive, but also the knowledge of the case to point out such things as excessive or duplicative billing practices. If opposing counsel cannot come up with specific reasons for reducing the fee request that the district court finds persuasive, it should normally grant the award in full, or with no more than a haircut.

The district court's fee award is vacated and the case is remanded with instructions that the court enter a new fee award consistent with this opinion.

VACATED AND REMANDED.

C.A.9 (Cal.),2008.
Moreno v. City of Sacramento
534 F.3d 1106, 08 Cal. Daily Op. Serv. 9624

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960 F.Supp. 1438, 41 U.S.P.Q.2d 1811, 25 Media L. Rep. 1489
(Cite as: 960 F.Supp. 1438)

▷

United States District Court,
C.D. California.

Bettie PAGE, Plaintiff,
v.
SOMETHING WEIRD VIDEO, et al., Defendants.

No. CV 94-2327 RAP (BQRx).
Dec. 3, 1996.

Actress brought action against video cassette distributor, alleging distributor misappropriated her name or likeness by using her image in advertising for video cassettes of films in which she starred. On cross motions for summary judgment, the District Court, Paez, J., held that: (1) distributor's use of actress' artistic likeness in advertising for two motion picture videos in which the actress starred was protected by First Amendment free speech guarantees; (2) distributor's use of artistic likeness of actress to promote video cassettes in which actress did not appear was protected by First Amendment; and (3) distributor's attorneys were entitled to requested fees award of $82,491.25.

Judgment accordingly.

West Headnotes

[1] Torts 379 ⚿385

379 Torts
379IV Privacy and Publicity
379IV(C) Use of Name, Voice or Likeness; Right to Publicity
379k385 k. Elements of the Tort in General. Most Cited Cases
(Formerly 379k8.5(6))
In California, to prevail on cause of action for common-law misappropriation of plaintiff's name or likeness, plaintiff must establish: defendant's use of plaintiff's identity; appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; lack of consent; and resulting injury.

[2] Torts 379 ⚿387

379 Torts
379IV Privacy and Publicity
379IV(C) Use of Name, Voice or Likeness; Right to Publicity
379k386 Conduct or Misappropriation Actionable in General
379k387 k. In General. Most Cited Cases
(Formerly 379k8.5(6))
Unlike statutory cause of action for misappropriation of person's likeness under California law, scope of common-law tort of misappropriation of name or likeness applies not only to person's name or likeness, but also to that which is distinctive or personal to individual, such as professional persona. West's Ann.Cal.Civ.Code § 3344.

[3] Torts 379 ⚿385

379 Torts
379IV Privacy and Publicity
379IV(C) Use of Name, Voice or Likeness; Right to Publicity
379k385 k. Elements of the Tort in General. Most Cited Cases
(Formerly 379k8.5(6))
In addition to common-law elements of tort of misappropriation of name or likeness, California statute providing cause of action for misappropriation of person's likeness requires two further allegations: knowing use; and direct connection between use and commercial purpose.

West's Ann.Cal.Civ.Code § 3344.

[4] Torts 379 ⚿393

379 Torts
379IV Privacy and Publicity
379IV(C) Use of Name, Voice or Likeness; Right to Publicity
379k392 Matters of Public Interest or Public Record; Newsworthiness
379k393 k. In General. Most Cited Cases
(Formerly 379k8.5(7))

Newsworthiness exception to California statute providing cause of action for misappropriation of person's likeness did not apply to use of actress' likeness on advertising for video cassettes of two of her films; although reemergence of the film was newsworthy, and films themselves were newsworthy, pure advertisement of the films, and other video cassettes of the same genre, was not. West's Ann.Cal.Civ.Code § 3344(d).

[5] Constitutional Law 92 ⚿1652

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(E) Advertising and Signs
92XVIII(E)2 Advertising
92k1652 k. Right of Publicity; Misappropriation of Likeness, Name, or Celebrity Status. Most Cited Cases
(Formerly 92k90.3, 92k90.1(6))

Torts 379 ⚿391

379 Torts
379IV Privacy and Publicity
379IV(C) Use of Name, Voice or Likeness; Right to Publicity
379k391 k. Defenses in General. Most Cited Cases
(Formerly 379k8.5(6))

Distributor's use of actress' artistic likeness in advertising for two motion picture videos in which the actress starred was protected by First Amendment free speech guarantees, and did not support claim for misappropriation of actress' name or likeness under California law; videos themselves were protected by First Amendment, and advertising was incidental to protected publication of the videos. U.S.C.A. Const.Amend. 1; West's Ann.Cal.Civ.Code § 3344.

[6] Constitutional Law 92 ⚿1652

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(E) Advertising and Signs
92XVIII(E)2 Advertising
92k1652 k. Right of Publicity; Misappropriation of Likeness, Name, or Celebrity Status. Most Cited Cases
(Formerly 92k90.3)

Advertising for home video cassettes starring actress, which contained actress' likeness, were not "commercial speech" for First Amendment purposes, although distributor of the video cassettes charged for the catalog; distributor did not intend to or in fact make profit from its catalog sales, and catalog was purely form of advertising of distributor's products. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 92 ⚿1652

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(E) Advertising and Signs
92XVIII(E)2 Advertising
92k1652 k. Right of Publicity; Misappropriation of Likeness, Name, or Celebrity Status. Most Cited Cases
(Formerly 92k90.3)

Torts 379 ⚿393

379 Torts
379IV Privacy and Publicity
379IV(C) Use of Name, Voice or Likeness; Right to Publicity
379k392 Matters of Public Interest or Public Record; Newsworthiness
379k393 k. In General. Most Cited Cases
(Formerly 379k8.5(6))
Distributor's use of artistic likeness of actress to promote video cassettes in which actress did not appear was protected by First Amendment free speech guarantees, barring actress' tort claim under California law for misappropriation of name or likeness; promotion of vintage videos was medium for transmission of news, so that use of actress' image to advertise entire line of video products was protected, so long as distributor did not falsely claim that actress endorsed distributor. U.S.C.A. Const.Amend. 1; West's Ann.Cal.Civ.Code § 3344.

[8] Federal Courts 170B ⚿415

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk415 k. Damages, Interest, Costs and Fees. Most Cited Cases
In diversity case, availability of attorney fees is governed by state law.

[9] Federal Courts 170B ⚿415

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk415 k. Damages, Interest, Costs and Fees. Most Cited Cases
Factors considered in calculating attorney fee award in diversity case are governed by state law.

[10] Costs 102 ⚿194.18

102 Costs
102VIII Attorney Fees
102k194.18 k. Items and Amount; Hours; Rate. Most Cited Cases
Under California law, courts calculate award of attorney fees by determining lodestar figure based on time spent and reasonable hourly compensation for each attorney involved in case.

[11] Costs 102 ⚿194.18

102 Costs
102VIII Attorney Fees
102k194.18 k. Items and Amount; Hours; Rate. Most Cited Cases
Under California law, court may, in its discretion, adjust lodestar attorney fee amount according to number of relevant factors including: novelty and difficulty of questions involved and skill displayed in presenting them; extent to which nature of litigation precluded employment by attorneys; contingent nature of fee award, both from point of view of eventual victory on merits and point of view of establishing eligibility for award; fact that award against state would ultimately fall on taxpayers; fact that attorneys in question received public and charitable funding for purpose of bringing law suits of character involved; and fact that monies awarded would inure not to individual benefit of attorneys involved but organizations by which they are employed.

[12] Costs 102 ⚿194.25

102 Costs

102VIII Attorney Fees
102k194.24 Particular Actions or Proceedings
102k194.25 k. In General. Most Cited Cases
Video cassette distributor that prevailed on First Amendment affirmative defense to actress' claim of misappropriation of name or likeness under California law was prevailing party entitled to award of attorney fees under California statute governing claims for misappropriation of likeness, although case was one of first impression and court had not addressed merits of actress' claim. West's Ann.Cal.Civ.Code § 3344.

[13] Costs 102 ⇐194.18

102 Costs
102VIII Attorney Fees
102k194.18 k. Items and Amount; Hours; Rate. Most Cited Cases
Time reasonably spent by successful party in advancing unsuccessful theories should not be excluded from attorney fee award under California law.

[14] Costs 102 ⇐194.25

102 Costs
102VIII Attorney Fees
102k194.24 Particular Actions or Proceedings
102k194.25 k. In General. Most Cited Cases
Attorneys who successfully represent video cassette distributor in action by actress for misappropriation of her name or likeness under California law were entitled to requested fee award of $82,491.25, given novelty and difficulty of questions involved, skill displayed in presenting issues, customary fees, results obtained, and experience, reputation and ability of the attorneys. West's Ann.Cal.Civ.Code § 3344.

[15] Costs 102 ⇐147

102 Costs
102VII Amount, Rate, and Items
102k147 k. Fee Bills and Other Statutory Provisions. Most Cited Cases
Where statute authorizes award of fees and costs but is silent as to which costs are to be awarded, California courts look to statute setting forth those costs that may or may not be recovered in civil action. West's Ann.Cal.C.C.P. § 1033.5.

[16] Costs 102 ⇐193

102 Costs
102VII Amount, Rate, and Items
102k193 k. Discovery; Incidental Expenses. Most Cited Cases
Travel expenses incurred by New York attorney to attend two hearings in California were recoverable under California cost statute, to extent they were reasonably necessary to conduct litigation; however, cost of first class tickets was excessive and would not be allowed in excess of $600. West's Ann.Cal.C.C.P. § 1033.5(c)(2).

***1440** Stanley Fleishman, Robert Moest, David Grosz, Fleishman, Fisher & Moest, Los Angeles, CA, James Bouras, Law Office of James Bouras, New York City, for Defendants.

Martin Singer, Max Sprecher, Lavely & Singer, Los Angeles, CA, for Plaintiff.

AMENDED ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; AND GRANTING DEFENDANTS' MOTION FOR ATTORNEYS' FEES

PAEZ, District Judge.

I.
INTRODUCTION

This diversity action arises out of the alleged misappropriation of plaintiff Bettie Page's ("plaintiff" or "Page") "likeness" in the recent advertising of home video cassettes for two films in which she starred in the 1950s.[FN1] The films starring Page were made in New York when Page was employed by Irving Klaw. The rights to these films were sold or assigned to defendants.

> FN1. Her "likeness" is in the form of "original" art work. Page does not challenge defendants' use of her photographs or the distribution of the video cassettes.

Until recently, the films were thought to be lost. In the 1980s, with the revival of Page's films and popularity, defendants entered into an agreement to re-cut the two films that are the subject of this action. Defendants have been issued a copyright for the new versions of the films. Page alleges that an unauthorized "likeness" in the form of art work was commissioned by defendants in connection with the release of the films on video. The gravamen of plaintiff's complaint is that the defendants misappropriated plaintiff's likeness for commercial gain when they used a drawing of plaintiff (rather than a photograph or still image) in advertisements and on the video box cover. Specifically, plaintiff's complaint alleges violations of California Civil Code § 3344 and the common law right to publicity.

On August 14, 1995, the Court issued an Order ruling that California law applies to this action. *Page v. Something Weird Video,* 908 F.Supp. 714 (C.D.Cal.1995). On August 28, 1996, the Court filed an Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment ("Order"). Judgment for defendants was entered on August 30, 1996.

Pending before the Court are the parties' cross-motions for summary judgment, which the Court revisits after granting plaintiff's Motion for Reconsideration and vacating its original Order, and Defendants' Motion for Attorneys' Fees. After full consideration of the moving, opposition, and reply papers on the original motions; plaintiff's motion for reconsideration; and Defendant's Motion for Attorneys' Fees, the Court **GRANTS** Defendants' Motion for Summary Judgment; **DENIES** Plaintiff's Motion for Summary Judgment, and **GRANTS** Defendants' Motion for Attorneys' Fees.

II.
UNDISPUTED FACTS

For purposes of their cross-motions for summary judgment, the parties stipulated to the following undisputed facts:

***1441** Plaintiff Bettie Page ("Page" or "plaintiff") worked extensively as a professional model, performer, and actress in New York City during the 1950's. Page posed as a model for photos that appeared on the cover or inside dozens of magazines, including *Playboy* and *Art Photography.* Page also appeared in plays, television shows, and motion pictures.

One of Page's employers in the 1950's was Irving Klaw ("Klaw"). Notably, Page appeared as a featured performer in two theatrical motion pictures produced by Klaw, *Varietease* and *Teaserama.* When distributed to theaters by Klaw, the advertising for both *Varietease* and *Teaserama* included Page's name and visual image. [FN2]

> FN2. Plaintiff contends all visual images were photographs, while de-

> fendants contend some of them were drawings. There is no evidence in the record directly supporting either contention.

The only agreement between Page and Klaw produced in this litigation provides, in relevant part:

> I, the undersigned, being of lawful age for and in consideration of $____ received, do release and give all commercial and publication rights to photographs and motion picture films taken of myself with or without the use of may name, solely and exclusively to IRVING KLAW or assignee.

(Declaration of Max Spencer, Exh. A.). The agreement is dated September 22, 1956 and executed by Page. Neither party produced any agreement between Page and Klaw in which Page reserved any copyright or other proprietary interest in either of the two films.

On March 12, 1963, Klaw assigned the copyrights for both *Varietease* and *Teaserama* to Sonney Amusement Enterprises, Inc. ("Sonney"), and also sold Sonney the negatives, prints, still photographs and advertising material for the two films.

The copyrights for the two films were not renewed in the 28th year after their first publication, as required by 17 U.S.C. § 304(a).

At the end of 1957, Page retired from modeling, performing and acting. During the past decade, however, there has been a great deal of public interest in Page. There have been a large number of newspaper and magazine articles, as well as a few books, addressing Page in particular, or with Page as part of a general revival of interest in the 1950's. Page has been characterized as a "cult queen" and a "nostalgic icon." [FN3]

> FN3. Page asserts that her likeness has become "recognized throughout the United States as the quintessential 'pin-up' model, and is now, akin to the likeness of James Dean and Marilyn Monroe, other nostalgic icons." Complaint at ¶ 11.

Defendant Something Weird Video ("SWV") is a manufacturer and distributor of prerecorded home videocassettes of older motion pictures.[FN4] SWV sells the videos directly to consumers through mail order catalogues, to wholesalers, and to certain retailers.

> FN4. According to its own literature, SWV is "the curator and conservator of the nation's consummate collection of eclectic exploitation and sexploitation movie videotapes."

In December of 1992, defendant Friedman entered into an oral agreement with Sonney to distribute *Varietease* and *Teaserama* on home videocassette. Friedman also entered into an agreement with SWV to sublicense the rights he had acquired from Sonney. In return, Sonney gave Friedman and SWV access to the negatives of the two films. The agreement between Friedman and Sonney was reduced to writing on March 1, 1993, and the agreement between Friedman and SWV was reduced to writing on March 8, 1993.

In early January 1993, under the supervision of SWV, the negatives of *Varietease* and *Teaserama* were edited to include "revisions, editing, outtakes, inserts and other previously unpublished cinemato-

graphic material." The edited versions of the two films, which were labeled as "new editions," have been registered with the U.S. Copyright Office.

In late January and early February 1993, SWV placed an advertisement in various publications announcing the release of the home videos of *Varietease* and *Teaserama.* Plaintiff contends this advertisement contains***1442** a drawing ("new artwork") [FN5], which misappropriates plaintiff's likeness. On February 6, 1993, *SWV* began mailing to its previous customers an 18-page "Update" announcing its new releases, including *Varietease* and *Teaserama.* The "Update" also included the advertisements at issue in the current action.

> FN5. By "new artwork," plaintiff means only drawings of Page which were not used prior to 1993. All parties agree that the "new artwork" at issue embodies Page's likeness. SWV admits that it commissioned preparation of the new artwork, and that it placed the new artwork in the advertisements.

The advertisement was also incorporated into SWV's catalog, which was in use from March to July of 1993. Although defendant charges its customers $3.00 for the catalogue, the money charged for the catalogue is not intended to make a profit, nor does it in fact make a profit for SWV.

The first videocassette of the new editions of the two films were shipped to SWV customers on March 22, 1993. The video cassettes were encased in box covers, which according to plaintiff also includes on it new artwork, which improperly misappropriates plaintiff's likeness. SWV admits that it commissioned the new artwork appearing in the advertisements at issue herein, as well as the videocassette box cover.

III.
DISCUSSION

A. *Cross-Motions for Summary Judgment*

At the threshold, it is undisputed that plaintiff was a performer in *Varietease* and *Teaserama;* that plaintiff does not hold and has never held any copyright or other proprietary interest in either of the two films; that defendants have a right to distribute the two films in the form of prerecorded video cassettes; and that SWV's challenged advertisements announced the release of *Varietease* and *Teaserama.* Thus, the issue presented by these cross-motions for summary judgment is whether defendants' use of an artistic likeness of plaintiff ("new artwork") in advertising the two motion picture videos in which plaintiff stars violates either plaintiff's common law right to publicity or California Civil Code § 3344.[FN6]

> FN6. For purposes of this action, Page does not dispute that defendants have the right to distribute the video cassettes or to use still images or photographs lifted from the films to advertise the videos.

1. *California Rights to Publicity*

"California has long recognized a common law right of privacy which includes protection against appropriation for the defendant's advantage, of the plaintiff's name or likeness." *Abdul-Jabbar v. General Motors Corporation,* 85 F.3d 407, 413 (9th Cir.1996) (internal brackets and ellipses omitted) (citing *Eastwood v. Superior Court for Los Angeles County,* 149 Cal.App.3d 409, 417, 198 Cal.Rptr. 342 (1983)).

[1][2] In California, to prevail on a

cause of action for common law misappropriation of plaintiff's name or likeness, plaintiff must establish: "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." *Montana v. San Jose Mercury News, Inc.,* 34 Cal.App.4th 790, 793, 40 Cal.Rptr.2d 639 (1995). Unlike Civil Code § 3344, the scope of the common law tort applies not only to a person's "name or likeness," but also to that which is distinctive or personal to the individual, such as a professional persona. *See Waits v. Frito-Lay, Inc.,* 978 F.2d 1093 (9th Cir.1992), *cert. denied,* 506 U.S. 1080, 113 S.Ct. 1047, 122 L.Ed.2d 355 (1993) (singer's voice); *Midler v. Ford Motor Co.,* 849 F.2d 460 (9th Cir.1988) (singer's voice); *White v. Samsung Electronics America, Inc.,* 971 F.2d 1395 (9th Cir.1992), *cert. denied,* 508 U.S. 951, 113 S.Ct. 2443, 124 L.Ed.2d 660 (1993) (marketable celebrity identity).

California also provides a statutory cause of action for misappropriation of a person's likeness. California Civil Code § 3344. "The statutory cause of action complements rather than codifies common law misappropriation." ***1443***Montana,* 34 Cal.App.4th at 793, 40 Cal.Rptr.2d 639. Civil Code § 3344 provides, in relevant part:

> Any person who knowingly uses another's name, ... or likeness, in any manner, ... for purposes of advertising or selling ... goods or services, without such person's prior consent ... shall be liable for any damages sustained ...

[3] In addition to the common law elements, the statute requires two further allegations: "(1) knowing use; and (2) a direct connection ... between the use and the commercial purpose." *Abdul-Jabbar,* 85 F.3d at 414. The Ninth Circuit has construed section 3344's "protection of 'name, voice, signature, photograph, or likeness' more narrowly than the common law's protection of identity." *Id.* at 1399.

[4] In resolving the current motions the Court need not address the merits of plaintiff's prima facie case because the Court concludes that plaintiff's action is barred by the First Amendment.[FN7]

> FN7. Defendants raise several unmeritorious affirmative defenses which the Court summarily dismisses: plaintiff is not limited to contract remedies and may assert tort claims for misappropriation of her likeness for commercial use; plaintiff states a cognizable injury; plaintiff's claims are not preempted by the Copyright Act or the work for hire doctrine; defendants have not presented evidence that plaintiff consented to defendant's use of her likeness; plaintiff's claims are not barred by the equitable doctrines of waiver, laches or estoppel; and the subject advertisement is not "newsworthy" as defined in California Civil Code § 3344.
>
> The newsworthiness doctrine is inapplicable here because the information was not part of an editorial, a news broadcast or public affairs. As the Ninth Circuit recently held, use of newsworthy information in the context of an advertisement, as opposed to a news or sports account, is not protected by section 3344(d). *Abdul-Jabbar,* 85 F.3d at 416; *compare Dora v. Frontline Video Inc.,* 15

> Cal.App.4th 536, 541, 18 Cal.Rptr.2d 790 (1993) (finding documentary on surfing protected by newsworthy exception to § 3344); *but see Montana,* 34 Cal.App.4th 790, 40 Cal.Rptr.2d 639 (applying newsworthiness doctrine to protect newspaper's right to promote itself by reproducing news stories). In other words, applying the Ninth Circuit's most recent delineation of the scope of the § 3344 newsworthiness doctrine to the facts of this case, the reemergence of the films is newsworthy, and the films themselves are newsworthy, but pure advertisement of the films, and of other videocassettes of the same genre, is not.
>
> Because the Court concludes that the First Amendment affirmative defense is dispositive of the entire action, the Court need not reach the remaining constitutional issues presented in defendants' and plaintiff's motions, namely whether the application of California law violates due process and full faith and credit, and whether plaintiff's claims violate the Commerce Clause or the Supremacy Clause.

2. *First Amendment*

[5][6] Defendants argue that because the advertisements in question are incidental to a constitutionally protected activity, namely publication of the videos *Varietease* and *Teaserama,* the advertisements are likewise protected. In response, plaintiff argues that advertisement is a commercial activity, and is therefore not protected by the First Amendment. Plaintiff argues that because SWV charges its customers for the catalogue in which the advertisements appear, the advertisements constitute "commercial speech." This argument, however, is not supported by the admissible, undisputed evidence. Rather, undisputed evidence establishes that defendant did not intend or in fact make a profit from its catalogue sales. The catalogue was purely a form of advertising defendants' products. However, plaintiff also argues that SWV used Page's likeness to promote its other products.

Promotional speech may be noncommercial if it advertises an activity itself protected by the First Amendment. *Bolger v. Youngs Drug Prods. Corp.,* 463 U.S. 60, 67 n. 14, 103 S.Ct. 2875, 2880 n. 14, 77 L.Ed.2d 469 (1983). "Although 'commercial speech' has not traditionally enjoyed constitutional protection, commercial solicitation or promotion of constitutionally protected ... works is protected as an incident to the First Amendment value of the underlying speech or activity." *People v. Fogelson,* 21 Cal.3d 158, 165 n. 7, 145 Cal.Rptr. 542, 577 P.2d 677 (1978); *see also, Bolger,* 463 U.S. at 68, n. 14, 103 S.Ct. at 2881, n. 14 ("Of course, a different conclusion may be appropriate in a case where the pamphlet advertises an activity itself protected by the First Amendment."); *Cher v. Forum International, Inc.,* 692 F.2d 634, 638 (9th Cir.1982), *cert. denied* ***1444**462 U.S. 1120, 103 S.Ct. 3089, 77 L.Ed.2d 1350 (1983) ("the right of publicity has not been held to outweigh the value of free expression").

This principle has been applied to advertisements for a film:

> Having established that any interest in financial gain in producing the film did not affect the constitutional stature of

> [defendant's] undertaking, it is of no moment that the advertisement may have increased the profitability of the film. It would be illogical to allow [defendants] to exhibit the film but effectively preclude any advance discussion or promotion of their lawful enterprises. Since the use of Valentino's name and likeness in the film was not actionable infringement of Valentino's right of publicity, the use of his identity in advertisements for the film is similarly not actionable.

Guglielmi v. Spelling-Goldberg Productions, 25 Cal.3d 860, 873, 160 Cal.Rptr. 352, 360, 603 P.2d 454 (Bird, J., concurring).

Here, plaintiff challenges defendants' advertising for the two films starring plaintiff. Based on the undisputed facts of this case, defendants' use of plaintiff's likeness in advertising the films *Varietease* and *Teaserama* was "incidental" to the publication of the videos themselves. Defendants' advertising is protected because the videos themselves are protected by the First Amendment, and the advertising is incidental to the protected publication of the videos.

Plaintiff attempts to distinguish her case from the line of authority protecting activities that are incidental to protected speech. First, plaintiff argues that the defendants impermissibly used a drawing of plaintiff (the "new artwork") rather than a still image from the films. This argument is not persuasive. Plaintiff cites no authority, nor did the Court's own research disclose any authority, recognizing the difference between the use of a still image from the film and "new artwork" which depicts the likeness of plaintiff as seen in the films. [FN8] Plaintiff does not argue that the drawings depict anything other than what the viewers can expect to see in the films. Rather, the new artwork is virtually indistinguishable from a still image which could have been used.

> FN8. "It is common practice in the motion picture industry to advertise a picture by means of drawings depicting the advertiser's conception of its dramatic or emotional highlights and quite often, in composite form, by the superimposition of some other scene or something added from the fertile imagination of the artist. Presumably this practice is resorted to when the stills from the picture are not deemed sufficiently exciting to draw the patrons to the box-office...." *Dahl v. Columbia Pictures Corporation,* 12 Misc.2d 574, 575, 166 N.Y.S.2d 708, 710 (1957), *aff'd* 7 A.D.2d 969, 183 N.Y.S.2d 992 (1959) (libel action arising from artists' drawing for advertisement of motion picture); *see also Montana,* 34 Cal.App.4th at 792, 40 Cal.Rptr.2d 639 (explicitly approving newspaper's use of an "artistic rendition" of Montana, in addition to use of actual photographs of him, to promote its newspapers).

[7] Second, plaintiff argues that SWV appropriated her likeness in violation of California law by promoting other videocassette products in the advertisements of the videos in which she starred. The advertisements at issue include information on how to obtain a catalog of SWV's merchandise and state

> DAVID FRIEDMAN'S ROADSHOW RARITIES promises not only to be our most popular series yet, but with over 100-plus volumes in the works it will

> also be the most extensive, the most exhaustive, the most extraordinary collection of titles ever offered on video! And what better way to kick off this gala event than with the 2 most glorious words in glamour ... **BETTY PAGE!**

This language suggests that plaintiff is correct in arguing that the advertisement could be interpreted as an advertisement not only for *Varietease* and *Teaserama,* but for defendant's entire line of products.

Nonetheless, plaintiff's position flies in the face of established Ninth Circuit analysis of the scope of First Amendment protection of advertisement of protected publications.

> Constitutional protection extends to the truthful use of a public figure's name and likeness in advertising which is merely an adjunct of protected publication and promotes only the protected publication. Advertising to promote a news medium, accordingly, is not actionable under an appropriation of publicity theory so long ***1445** as the advertising does not falsely claim that the public figure endorses that news medium.

Montana, 34 Cal.App.4th at 797, 40 Cal.Rptr.2d 639 (protecting newspaper promotion that used photos and an artistic rendition of Montana based on First Amendment right to advertise quality and content of periodical by republishing work as advertisement); *Cher,* 692 F.2d at 639 (holding First Amendment would entitle Forum, upon purchasing an interview with Cher from another magazine, to use Cher's picture for the purpose of indicating the content of its publication).[FN9]

> FN9. Moreover, the undisputed facts state that "SWV placed an advertisement in various publications announcing the release of prerecorded home videocassettes of *Varietease* and *Teaserama.* " Thus, the parties themselves have characterized the advertisement as an announcement of the release of the two videos in which Page starred.

Motion pictures and films generally enjoy the same First Amendment protection as traditional news media. *See, Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 502, 72 S.Ct. 777, 780-81, 96 L.Ed. 1098 (1952) ; *Weaver v. Jordan,* 64 Cal.2d 235, 49 Cal.Rptr. 537, 411 P.2d 289 (1966), *cert. denied,* 385 U.S. 844, 87 S.Ct. 49, 17 L.Ed.2d 75 (1966). As the New York Times article of November 17, 1995, suggests, mail-order videos provide a primary means of obtaining information about the 1950s subculture for which plaintiff has become "a nostalgic icon." In an earlier article, the New York Times recognized that the "orgy of historical revisionism" that has made Betty Page a nostalgic icon "masks a serious purpose: the recovery of forms of expression that were denied by the dominant culture." July 24, 1994, Section 1, page 41, col. 2-4, page 44, col. 1-5.

Thus, the promotion of vintage videos is itself a medium for transmission of news that is of interest not only to marginal groups, but to such mainstream papers as the New York Times. As a result, the First Amendment protection of newspapers and magazines outlined in *Montana* and *Cher* extends to protect SWV's use of Page's image to advertise their entire line of video products so long as they did not falsely claim that Page endorsed SWV. Plaintiff does not argue that SWV falsely claimed that Page endorsed SWV. Consequently, SWV is entitled to promote its medium,

videocassettes, by using Page's likeness in its advertising to demonstrate the quality and content of its videos.

Accordingly, defendants' use of plaintiff's likeness at issue in this action is protected by the First Amendment and defendants are entitled to judgment as a matter of law on plaintiff's causes of action under California's right of publicity laws.

B. *Attorneys' Fees*

1. Legal Standard

[8] In a diversity case, the availability of attorneys' fees is governed by state law. Schwarzer, Tashima, and Wagstaffe, CAL. PRAC. GUIDE: FED. CIV. PRO. BEFORE TRIAL § 1:50.5 (The Rutter Group 1996) (hereinafter Schwarzer); *Mangold v. California Pub. Util. Comm'n,* 67 F.3d 1470, 1478 (9th Cir.1995). This action was brought under California Civil Code § 3344, which includes a prevailing party fee provision. Under that section, "[t]he prevailing party ... shall also be entitled to attorney's fees and costs." Cal. Civ.Code § 3344(a).

[9][10][11] The factors considered in calculating a fee award are also governed by state law. Schwarzer, § 1:50.6 (citing *Mangold,* 67 F.3d at 1478). In general, the standards for calculating attorneys' fees are uniform for all California statutory fee provisions. *Cf. Downey Cares v. Downey Comm. Dev. Com'n,* 196 Cal.App.3d 983, 997, 242 Cal.Rptr. 272 (1987). Under California law, courts calculate an award of attorneys' fees by determining a lodestar figure based on the time spent and reasonable hourly compensation for each attorney involved in the case. *Maria P. v. Riles,* 43 Cal.3d 1281, 1295-96, 240 Cal.Rptr. 872, 743 P.2d 932 (1987) (citing *Serrano v. Priest,* 20 Cal.3d 25, 48-49, 141 Cal.Rptr. 315, 569 P.2d 1303 (1977) (*Serrano III*)). The court may, in its discretion, adjust the lodestar amount according to a number of relevant factors including:

> (1) the novelty and difficulty of the questions involved and the skill displayed in ***1446** presenting them; (2) the extent to which the nature of the litigation precluded employment by the attorneys; (3) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award; (4) the fact that an award against the state would ultimately fall on taxpayers; (5) the fact that the attorneys in question received public and charitable funding for the purpose of bringing the law suits of the character here involved; [and] (6) the fact that the monies awarded would inure not the individual benefit of the attorneys involved but the organizations by which they are employed....

Id. Serrano v. Unruh, 32 Cal.3d 621, 625 n. 6, 186 Cal.Rptr. 754, 652 P.2d 985 (1982) (*Serrano IV*).

2. *Fee Award*

[12] Plaintiff does not challenge defendants' hourly rates, or the number of hours expended on the case. Instead, plaintiff argues that (1) despite the statutory fee provision, fees should be denied because the case is one of first impression; (2) the Court has not addressed the merits, and therefore defendants are not prevailing parties within the meaning of § 3344 (i.e. success on the First Amendment affirmative defense does not make defendants the prevailing party under the statute); (3) each phase of the trial should be assessed separately and plaintiff prevailed on the choice of law phase; and (4) plaintiff should not

be required to pay for defendants' attorneys' fees incurred in preparing defenses on which the Court did not rely in ruling for defendants.

Plaintiff provides no support for any of her arguments. Moreover, her arguments are not supportable. As Witkin puts it: "Obviously the defendant prevails when the plaintiff recovers nothing." 7 B.E. Witkin, *California Procedure, Judgment* § 88 at 524 (3d ed.1985). Thus, plaintiff's first and second arguments fail. On August 30, 1996, the Court entered a judgment ordering "that plaintiff take nothing, that this action be dismissed on the merits and that defendants recover their costs." Although the Court has modified that order to elucidate the Court's reasoning, the Court's judgment remains unmodified. Thus, the only issue properly before the Court on defendants' motion for attorneys' fees is the amount defendants shall recover.

[13] Time reasonably spent by the successful party in advancing unsuccessful theories should not be excluded from the fee award under California law. *Sundance v. Municipal Court,* 192 Cal.App.3d 268, 274-75, 237 Cal.Rptr. 269 (1987) (leaving determination of reasonableness to the trial court). Here, plaintiff contends that defendants unreasonably spent time arguing that New York law should govern and asserting numerous affirmative defenses. Plaintiff has not demonstrated that any of defendants affirmative defenses were unreasonably asserted. Consequently, defendants shall recover for all of their work on the case, not just for the time spent preparing their First Amendment defense during the second phase of the case.

Plaintiff does not challenge defendants' rates or make specific challenges to the number of hours defendants' attorneys claim to have worked on the case. Defendants request an award of attorneys' fees equal to the lodestar amount of $82,491.25 for 47.5 hours expended by Fleishman at $350/hour (his standard rate is $400/hour); 68.39 hours expended by Robert Moest at $250/hour (his standard rate is $285/hour); 185.29 hours expended by David Grosz at $250/hour; and 28.17 hours expended by law clerk Pauline Martin Rosen at $125/hour. With the exception of Rosen, each defense attorney has practiced for at least 18 years and has provided the Court with a declaration explicating his experience and prior fee awards in excess of or equal to the rates requested here. The rates requested by plaintiff's counsel are reasonable. Defendants have not included in their request fees for time their New York counsel spent on the case, despite Mr. Bouras' time arguing both the choice-of-law and summary judgment motions.

[14] Given the novelty and difficulty of the questions involved, the skill displayed in presenting the issues, the customary fees, the results obtained, and the experience, reputation,***1447** and the ability of the defense attorneys, defendants shall receive the requested fee award of $82,491.25.

3. *Award of Costs*

[15] Civil Code § 3344 expressly provides that the prevailing party in an action under that section is entitled to an award of costs. Where a statute authorizes an award of fees and costs, but is silent as to which costs are to be awarded, California courts look to Code of Civil Procedure § 1033.5, which sets forth those costs that may and may not be recovered in a civil action.[FN10] *Davis v. KGO-T.V., Inc.,* 50 Cal.App.4th 772, 777-78, 58 Cal.Rptr.2d 13 (1996). Notable examples of non-

recoverable costs are: fees of experts not ordered by the court; investigation expenses, including computer legal research; postage, telephone, photocopying and fax charges; transcripts of court proceedings not ordered by the court; attorney lunches; trial exhibits not used at trial; local travel expenses; and delivery charges. *See* C.C.P. § 1033.5 as interpreted in *Ladas v. California State Automobile Association,* 19 Cal.App.4th 761, 23 Cal.Rptr.2d 810 (1993). Any costs not detailed in § 1033.5 may be allowed or denied at the Court's discretion. C.C.P. § 1033.5.

> FN10. Section 1033.5 describes those costs allowable under Code of Civil Procedure § 1032, which dictates that "[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs ..." However, § 1033.5(c)(5) clarifies that when any California statute refers to an award of attorney's fees and costs, the attorney's fees are allowable as costs under that section.
>
> In addition to citing inapplicable federal law, defendants cite *Downey Cares,* 196 Cal.App.3d at 999 n. 13, 242 Cal.Rptr. 272, for the proposition that they are entitled to recover "out of pocket" costs of litigation that are ordinarily billed to a client. The *Downey Cares* court found that because the statutory fee provision at issue there provided for "costs of litigation, including reasonable attorney's fees," the costs were included in the award and were not costs pursuant to C.C.P. §§ 1032 and 1033.5. *Id.* By contrast, the statutory fee provision in Civil Code § 3344 simply provides for an award of "attorney's fees and costs," which clearly falls within the ambit of C.C.P. § 1033.5.

[16] Defendants request $2,751.60 for travel expenses incurred for New York attorney Mr. Bouras' to attend the May 13, 1996, and October 31, 1994, hearings. Section 1033.5 does not deal with transportation costs to attend hearings. The Court, in its discretion, GRANTS defendants that portion of Mr. Bouras' costs that was "reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial." See C.C.P. § 1033.5(c)(2). The cost of Mr. Boras' airline tickets is excessive. Flying first-class is not "reasonably necessary" to further litigation. The parties cross-motions for summary judgment were scheduled well in advance, and round-trip airfare from New York City to Los Angeles typically need not exceed $600. Consequently, the Court grants defendants request for Mr. Boras' reasonable transportation costs in the amount of $1,200.

Defendants seek costs totalling $7,365.10. However, defendants' breakdown of claimed costs reveals that nearly all of the costs claimed are impermissible under *Ladas.* Defendants may recover $240 for court fees. Excepting these court fees and $1,200 for Mr. Bouras' reasonable travel expenses, the Court DENIES defendants' request for costs.

IV.
CONCLUSION

After full consideration of the moving, opposition, and reply papers, the admissible evidence submitted by the parties, and the oral arguments of counsel, the Court **GRANTS** Defendants' Motion for Summary Judgment; **DENIES** Plaintiff's Motion for Summary Judgment; and

GRANTS Defendant's Motion for Attorneys' Fees. Judgment in favor of defendants shall be entered forthwith.

IT IS SO ORDERED.

C.D.Cal.,1996.
Page v. Something Weird Video
960 F.Supp. 1438, 41 U.S.P.Q.2d 1811, 25 Media L. Rep. 1489

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748 F.Supp. 1416, 55 Empl. Prac. Dec. P 40,343
(Cite as: 748 F.Supp. 1416)

United States District Court,
N.D. California.

UNITED STATES of America, Plaintiff,
v.
The CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants.
San Francisco Firefighters Local 798, et al., Defendants, In Intervention.
Fontaine DAVIS, et al., Plaintiffs, In Intervention.
v.
CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants.
San Francisco Firefighters Local 798, et al., Defendants, In Intervention.

Nos. C-84-7089 MHP, C-84-1100 MHP.
Sept. 25, 1990.

After prevailing in employment discrimination action against city for use of invalid hiring and promotional procedures in fire department, plaintiffs in intervention sought attorney fees. The District Court, Patel, J., held that plaintiffs were entitled to fees of almost $3.5 million and costs of almost $75,000 as result of difficulty in finding counsel and market treatment of contingency fee cases in city.

Motion for award of attorney fees granted in part and denied in part.

See also, 747 F.Supp. 1370.

West Headnotes

[1] Civil Rights 78 ⚿1590

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1585 Attorney Fees
78k1590 k. Results of litigation; prevailing parties. Most Cited Cases
(Formerly 78k414)
For purposes of awarding attorney fees in Title VII actions, plaintiffs will be considered prevailing if they have indicated important rights or if they succeed on significant issue that achieves some benefits sought by parties in bringing suit. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k) ; 42 U.S.C.A. § 1988.

[2] 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 attorney fees, court considers evidence that hours expended on litigation were reasonable based on detailed time records but may reduce allowable hours on grounds of inadequate documentation, overstaffing, duplicative hours, or excessive or otherwise unnecessary hours.

[3] 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 hours reasonably expended in litigation for purposes of awarding attorney fees, court may refer to relevant context of litigation history and to summaries prepared from notes in files to resolve any vague time records.

[4] Federal Civil Procedure 170A ⚿2737.13

170A Federal Civil Procedure

170AXIX Fees and Costs
170Ak2737 Attorney Fees
170Ak2737.13 k. Class actions; settlements. Most Cited Cases

For purposes of determining attorney fees, litigation team of seven attorneys to represent class bringing employment discrimination claims against city was not "gross overstaffing"; multiple subclasses of litigants warranted number of attorneys.

[5] Civil Rights 78 ⚿1597

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1585 Attorney Fees
78k1597 k. Taxation. Most Cited Cases
(Formerly 78k421)

Counsel for plaintiffs who successfully brought employment discrimination action against city presented evidence in form of agendas, meeting summaries and deposition testimony concerning co-counsel meetings and met burden of proving attendance at co-counsel meetings was not duplicative and did not warrant reduction in requested attorney fees.

[6] 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

Reasonable attorney fees include reasonable travel time compensated at full hourly rate.

[7] Civil Rights 78 ⚿1593

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1585 Attorney Fees
78k1593 k. Services or activities for which fees may be awarded. Most Cited Cases
(Formerly 78k417)

Time spent by counsel for plaintiffs, who prevailed in discrimination action against city, in press conferences and at demonstration staged to foster political support among city board of supervisors was sufficiently focused on fostering litigation goals of clients to be compensable; attaining support of board of supervisors, whose members are elected by city and county of San Francisco, was vital to consent decree.

[8] Civil Rights 78 ⚿1593

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1585 Attorney Fees
78k1593 k. Services or activities for which fees may be awarded. Most Cited Cases
(Formerly 78k417)

Time spent by plaintiffs' counsel, who prevailed in discrimination action against city, in litigating substance abuse screening program of city's fire department was compensable, as far as efforts went to seek stay and to litigate threshold issue of jurisdiction over dispute.

[9] Civil Rights 78 ⚿1593

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1585 Attorney Fees
78k1593 k. Services or activities for which fees may be awarded. Most Cited Cases
(Formerly 78k417)

Although unsuccessful, work of counsel to reverse dismissal of two women from fire college was sufficiently related to claim of employment discrimination by city, on which counsel was successful, to warrant compensation for those hours.

[10] Civil Rights 78 ⚿1593

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1585 Attorney Fees
78k1593 k. Services or activities for which fees may be awarded. Most Cited Cases
(Formerly 78k417)

Attorney was not entitled to compensation for hours spent in state court writ proceedings and disciplinary hearings which were not based on claim of racial discrimination by city on which counsel later prevailed; state writ proceedings and disciplinary hearings were not based on race discrimination but on denial of due process.

[11] Civil Rights 78 ⚿1593

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1585 Attorney Fees
78k1593 k. Services or activities for which fees may be awarded. Most Cited Cases
(Formerly 78k417)

Hours spent by law students and law clerks in preparation for employment discrimination action against city were compensable, other than time billed for xeroxing.

[12] Civil Rights 78 ⚿1584

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1584 k. Costs. Most Cited Cases
(Formerly 78k409)

Civil Rights 78 ⚿1594

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1585 Attorney Fees
78k1594 k. Amount and computation. Most Cited Cases
(Formerly 78k418)

Plaintiffs who prevailed on Title VII employment discrimination claims relating to city's use of invalid hiring and promotional procedures in fire department were entitled to award of attorney fees of almost $3.5 million dollars and costs of almost $75,000; 2.0 multiplier was used in calculating final amount to compensate for plaintiffs' difficulty in finding counsel and to take into account market treatment of contingent fee cases in area.

[13] Civil Rights 78 ⚿1588

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1585 Attorney Fees
78k1588 k. Parties entitled or liable; immunity. Most Cited Cases
(Formerly 78k412)

Prevailing counsel in employment discrimination action against city were not entitled to award of fees against union other than for subset of litigation activity in which union's position was fundamentally misplaced and wholly without authority.

[14] Civil Rights 78 ⚿1584

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1584 k. Costs. Most Cited Cases
(Formerly 78k409)

Fees for expert witnesses in employment discrimination action against city were deemed consulting fees, where fees were not sought for actual in-court attendance, so that $30 per day limit on such fees was inapplicable. 28 U.S.C.A. § 1821; 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)

Civil Rights 78 ⇐1593

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1585 Attorney Fees
78k1593 k. Services or activities for which fees may be awarded. Most Cited Cases
(Formerly 78k417)

Reasonable witness fees, at least for activities other than court attendance, are available as component of attorney fees under Title VII and § 1988; however, fees are limited to testimony which is indispensable to prevailing party's case. Clayton Act, § 4(a), 15 U.S.C.A. § 15(a); 42 U.S.C.A. § 1988; Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k); Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

1417** Eva Jefferson Paterson, San Francisco Lawyers' Committee for Urban Affairs, Shauna I. Marshall, Equal Rights Advocates, William C. McNeill, III, Employment Law Center, Denise M. Hulett, Mexican-American Legal Defense & Educational Fund, San Francisco, Cal., Dennis W. Hayashi, Asian Law Caucus, Oakland, Cal., Mary C. Dunlap, Law Offices of Mary C. Dunlap, San Francisco, Cal., Russell Galloway,1418** Berkeley, Cal., Richard M. Pearl, Law Offices of Richard M. Pearl, San Francisco, Cal., for plaintiffs in intervention.

Robert T. Moore, Richard S. Ugelow, U.S. Dept. of Justice, Civ. Rights Div., Employment Litigation Section, Washington, D.C., Joann Swanson, Dept. of Justice, San Francisco, Cal., for Dept. of Justice.

Duane W. Reno, Cindy O'Hara-Varela, Davis, Reno & Courtney, San Francisco, Cal., for Firefighters Union, Local No. 798.

Louise K. Renne, City Atty., George Riley, Deputy City Atty., Judy Lynch, Deputy City Atty., San Francisco, Cal., for the City & County of San Francisco.

Barbara Y. Phillips, Rosen & Phillips, San Francisco, Cal., Special Monitor.

OPINION

PATEL, District Judge.

These consolidated actions alleging constitutional and statutory violations arising from racial discrimination and harassment in employment practices were settled pursuant to a Consent Decree filed May 20, 1988. The matter is now before the court on plaintiff-intervenors' motion for an award of attorneys' fees under 42 U.S.C. § 2000e-5(k). Having considered the submissions of the parties, the court awards fees as set forth below.

BACKGROUND

These consolidated employment discrimination actions were brought by the United States and various individuals and organizations ("plaintiff-intervenors") against the City and County of San Francisco ("the City") in 1984 under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. § 6701 et seq. (repealed 1986). Although this action was first initiated by the United States, private plaintiffs were allowed to intervene and carried the bulk of the work. The United States entered into an agreement disposing of its interest in the litigation well before entry of the final consent decree. FN1 The provisions of the government's agreement were mainly hortatory. The significant achievements on behalf of class members were accomplished by plaintiff-intervenors.

FN1. The government's claims were completely resolved by virtue of the order granting permanent injunctive relief on February 26, 1987, over a year prior to entry of the final consent decree. *United States v. City and County of San Francisco,* 656 F.Supp. 276 (N.D.Cal.1987) (" *Davis I* "), *aff'd,* 890 F.2d 1438 (9th Cir.1989), *petition for cert. filed* (Aug. 7, 1990) (No. 90-248).

As consolidated, the claims in these actions focused on the City's use of invalid hiring and promotional procedures that had an adverse impact on women and minorities. Certain claims also alleged racial harassment of minority firefighters. All claims were settled as between the City and the plaintiff and plaintiff-intervenors pursuant to a consent decree filed May 20, 1988. *United States v. City and County of San Francisco,* 696 F.Supp. 1287, 1312 (N.D.Cal.1988) (" *Davis III* "), *aff'd,* 890 F.2d 1438 (9th Cir.1989), *petition for cert. filed* (Aug. 7, 1990) (No. 90-248). Although the decree settled all disputes on the merits, it did not resolve attorneys' fees. On December 2, 1988, counsel for plaintiff intervenors ("fee applicants") filed a motion seeking an award of attorney's fees against the City and against defendants-in-intervention, San Francisco Firefighters Union, Local No. 798 ("the Union" or "Local 798") under Title VII, section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k).[FN2]

FN2. The statute provides in pertinent part: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs...." 42 U.S.C. § 2000e-5(k).

LEGAL STANDARD

The standards for attorneys' fee awards for prevailing Title VII plaintiffs are the same as those for fee awards under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. *Hensley v. Eckerhart,* 461 U.S. 424, 433 n. 7, 103 S.Ct. 1933, 1939 n. 7, 76 L.Ed.2d 40 (1983). Accordingly, absent special circumstances, prevailing Title VII plaintiffs should recover attorneys' fees. *Id.* at 429, 103 S.Ct. at 1937.

[1] Ordinarily, plaintiffs will be considered to have prevailed when they have vindicated important rights or when they ***1419** succeed on any significant issue that achieves some of the benefit the parties sought in bringing suit. *Maher v. Gagne,* 448 U.S. 122, 129, 100 S.Ct. 2570, 2574, 65 L.Ed.2d 653 (1980); *Hensley,* 461 U.S. at 433, 103 S.Ct. at 1939 (citing *Nadeau v. Helgemoe,* 581 F.2d 275, 278-79 (1st Cir.1978)).

If the court determines that plaintiffs have prevailed, it must calculate a reasonable attorneys' fee. The first step in this process is to arrive at a preliminary estimate of the value of the lawyer's services by multiplying the number of hours reasonably expended by a reasonable hourly rate. *Hensley,* 461 U.S. at 433, 103 S.Ct. at 1939. To assist the court in arriving at this "lodestar" figure, the Ninth Circuit has adopted a twelve-factor formula which must be applied in each case.[FN3] *Kerr v. Screen Extras Guild,* 526 F.2d 67, 70 (9th Cir.1975), *cert. denied,* 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976). Supporting documentation with respect to the hours claimed and the rate requested must be provided to the court by plaintiffs. The documentation must be "sufficiently detailed that a neutral judge could make a fair evaluation of the time expended, the nature and need for the service, and the reasonable fees to be allowed." *Jordan v. Multnomah County,* 815 F.2d 1258, 1263 (9th Cir.1987) (quoting *Hensley,* 461 U.S. at 441, 103 S.Ct. at 1943 (Burger, C.J., concurring)).

There is a strong presumption that the resulting lodestar figure constitutes the reasonable fee, although it may be enhanced in rare cases. *Jordan,* 815 F.2d at 1262.

> FN3. The twelve factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment; (5) the customary fee in the community for similar work; (6) the fixed or contingent nature of the fee; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the cost; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Kerr v. Screen Extras Guild,* 526 F.2d 67, 70 (9th Cir.1975), *cert. denied,* 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976).

> The district court need not consider all factors, but may focus its attention on those which are relevant. *Moore v. Jas. H. Matthews & Co.,* 682 F.2d 830, 838 (9th Cir.1982). Typically, the first factor is considered in determining the reasonable hours expended while other relevant factors come into play in determining of reasonable hourly rate. *Id.* at 840-41.

DISCUSSION

Both the City and the Union concede that plaintiff-intervenors are prevailing parties. The current dispute is whether the attorneys' fees requested are reasonable. The issues of both the hours expended and the rates requested have been thoroughly briefed and subjected to extensive discovery.[FN4] The court will take each in turn.

> FN4. In fact, the volume of paper generated-several hundred pages of briefs, depositions, declarations and exhibits stands in striking contrast to Justice Powell's admonition that civil rights attorneys' fees requests "should not result in a second major litigation." *Hensley,* 461 U.S. at 437, 103 S.Ct. at 1941.

I. *Hours Reasonably Expended*

[2] In arriving at a figure for hours reasonably expended in litigation, the court employs the first of the twelve *Kerr* factors-the time and labor required. The fee applicants must prove by a preponderance of the evidence that the hours expended on the litigation were reasonable. They must submit detailed time records. *Chalmers v. City of Los Angeles,* 796 F.2d 1205, 1210 (9th Cir.1986), *reh'g denied, opinion amended,* 808 F.2d 1373 (9th Cir.1987). The court may reduce the allowable hours on the grounds of inadequate documentation, overstaffing, duplicative hours, or excessive or otherwise unnecessary hours. *Id.* The City and, to a lesser extent, the Union challenge the reported hours on all of these bases.

A. Inadequate Documentation

[3] The City argues that plaintiff-intervenors' hours must be reduced due to overly vague descriptions of counsels' activities.[FN5] According to the City, time sheets only describing "co-counsel meeting," "client meeting" or "legal research" are ***1420** too general to aid the court in determining whether the hours chronicled were reasonably expended. The City compares these inadequacies to those found in *Daly v. Hill,* 790 F.2d 1071, 1079-80 (4th Cir.1986) (deducting virtually all hours described only as "conference with client"); *Grogg v. General Motors Corp.,* 612 F.Supp. 1375, 1382 (S.D.N.Y.1985) (50% reduction in total hours where records too vague to determine whether hours were reasonably expended);

and *Kraszewski v. State Farm Insurance,* 36 F.E.P.Cas. 1371, 1378, 1984 WL 1027 (N.D.Cal.1984) (deducting hours described only as "conference with [name]").

> FN5. Initially the City also objected to fees claimed for illegible hours. Those objections have been resolved after further discussions with the plaintiff-intervenors.

In response, the plaintiff-intervenors argue that the court may properly refer to the relevant context of the litigation history and to summaries prepared from plaintiff's notes and files to resolve any vague time records. This court agrees.

"Basing the attorneys' fee award in part on reconstructed records developed by reference to litigation files and other records" is an established practice in this circuit. *Bonnette v. California Health and Welfare Agency,* 704 F.2d 1465, 1473 (9th Cir.1983), *aff'g* 525 F.Supp. 128 (N.D.Cal.1981). *Accord, Beta Sys., Inc. v. United States,* 866 F.2d 1404, 1406 (Fed.Cir.1989) (documentation held sufficiently detailed where supplemented by "typical billing records, showing time and charges, a description of the work done, and by whom"); *Berberena v. Coler,* 753 F.2d 629, 634 (7th Cir.1985) (otherwise vague entries on time sheets deemed permissible when viewed in the context of sufficiently detailed surrounding documentation); *City of Detroit v. Grinnell Corp.,* 560 F.2d 1093, 1103 (2d Cir.1977) (allowing reconstruction of undocumented time records by reference to pleading files, time records of other attorneys and other contemporaneous documents).

In response to court instructions, the City submitted a detailed summary of challenged records. Plaintiff-intervenors have submitted extensive reconstructed time records covering each of the challenged time entries. The reconstructed records were based upon (1) agendas and summaries of meetings; (2) notes and time records of co-counsel; and (3) the temporal and factual context of the challenged events.

The court has examined these records and determines that no reduction is necessary, particularly in light of plaintiff-intervenors' 5% reduction for billing judgment. The challenged hours were reasonably spent.

B. Overstaffing

[4] The City and the Union both assert that the plaintiff-intervenors' litigation team of seven attorneys constitutes gross overstaffing. The City argues that there were no real conflicts among the five subclasses of litigants, that no conflicting legal positions were ever asserted in briefs, that much of the Consent Decree does not differentiate between groups, that to the extent that the Consent Decree encompasses distinct goals for subclasses, those goals were reached either without dispute or based upon the City's initiative. According to the City, although the potential for conflict existed, it never appeared.

Plaintiff-intervenors counter that, in fact, conflicts among subclasses did exist, but that through coordination and meetings, which apparently were rancorous at times, Paterson Reply Decl. para. 10, various counsel were able to present a united front in the litigation. They argue that the fact that no conflicts surfaced in briefs or before the court is testament to their cooperative skills, skills for which they should not be penalized.

In fact, this court has already visited this issue in its Supplemental Fee Order of August 31, 1988. At that time, in response to the City's charge that too many attorneys were being used, the court stated:

> As often happens in complex litigation of this kind, the interests of all the subclasses

are not precisely aligned on all issues. This requires that on every motion before the court, all counsel prepare and confer. The City should always be aware that when its actions spawn litigation it will be responsible for all reasonable attorneys' fees for all parties adversely affected by its actions.

***1421** Supplemental Order Awarding Attorneys' Fees at 9. Accordingly, no reduction in hours should be levied for time related to multiple class representation.

The City also argues that, even if one concedes the need to represent each subclass, only five attorneys were necessary. The City contends that Ms. Paterson and Mr. McNeill had needlessly overlapping responsibilities during the litigation, and that Mr. Galloway spent over 390 hours on general litigation activity when his supposed role was that of a testing expert. Additionally, the City and Local 798 argue that counsel for both subclasses of women, and counsel for Asians and for Hispanics went beyond representing the interests of their subclasses when they took part in general work including discovery, settlement activities and briefing. The City views all of these activities as indicative of unnecessary overstaffing in light of the expertise and experience of counsel.

The need for multiple counsel in complex class action litigation is well recognized. The Eleventh Circuit noted that "[t]he retaining of multiple attorneys in a significant, lengthy employment discrimination case ... [is] not a ground for reducing the hours claimed.... *[A] reduction is warranted only if the attorneys are unreasonably doing the same work.* " *Johnson v. University College of Univ. of Ala.,* 706 F.2d 1205, 1208 (11th Cir.) (emphasis added), *cert. denied,* 464 U.S. 994, 104 S.Ct. 489, 78 L.Ed.2d 684 (1983). *Accord, Probe v. State Teachers' Retirement Sys.,* 780 F.2d 776, 785 (9th Cir.), *cert. denied,* 476 U.S. 1170, 106 S.Ct. 2891, 90 L.Ed.2d 978 (1986).

In reviewing the time records, the court is awarding fees for most of the claimed hours, since they "reflect [ ] the distinct contribution of each lawyer to the case." *Johnson,* 706 F.2d at 1208. However, the lodestar amount is reduced as follows due to certain multiple appearances by counsel and law students at depositions and hearings: Attorney Blanco-14 hours; Attorney Galloway-5.2 hours; Attorney McNeill-11 hours from his time with the firm of Pearl, McNeill & Gillespie; law student Edwards-6 hours.

C. Duplicative Work

The City and the Union also maintain that much of the work billed in this case was duplicative. The City cites the following examples of duplication: (1) approximately 3500 hours spent either in co-counsel or client conferences; (2) 608 hours spent on file review; (3) excessive time spent drafting and researching. The City seeks a 50% reduction in the first two instances and "a substantial reduction" in the third.

If any of the enumerated charges are duplications they must be deducted. *Clark v. Marsh,* 609 F.Supp. 1028, 1034-35 (D.D.C.1985) (50% of client conference time deducted); *Jennings v. Lenox Hill Hosp.,* 42 F.E.P.Cas. 555, 558, 1986 WL 1177 (S.D.N.Y.1986) (reduction where use of multiple attorneys resulted in unnecessary time spent familiarizing each with case); *Farris v. Cox,* 508 F.Supp. 222, 226 (N.D.Cal.1981) (reduction of time where multiple attorneys attended depositions and hearings).

[5] The plaintiff-intervenors lodge several replies. First, they point out that the presence of several attorneys at strategy sessions for complex civil rights class action cases may be crucial to the case. *Berberena,* 753 F.2d at 633; *McKenzie v. Kennickell,* 645 F.Supp. 437,

450 (D.D.C.1986) (awarding attorneys' fees for co-counsel conferences); *Williamsburg Fair Hous. Comm. v. Ross-Rodney Hous. Corp.,* 599 F.Supp. 509, 518 (S.D.N.Y.1984) ("Multiple attorneys may be essential for planning strategy, eliciting testimony or evaluating facts or law."). Plaintiff-intervenors present evidence, in the form of agendas, meeting summaries and deposition testimony, of the efficient and essential nature of their co-counsel meetings. *See, e.g.,* Paterson Reply Decl. para. 11. Their evidence is comprehensive and persuasive. Plaintiff-intervenor counsel have met their burden of proving that attendance at co-counsel meetings was not duplicative.

Second, as to excessive file review, the plaintiff-intervenors assert that the defendants have mischaracterized documented work by labeling any work with the word ***1422** "review" in it as file review. The court's comparison of the attorney time records and the City's summaries supports that contention. In generating computer summaries, perhaps to facilitate data entry, the City forced attorney activities into narrow, at times unsuitable categories. Therefore, the conclusions which the City reached based on the faulty data are themselves faulty (once again illustrating the computer adage: garbage in, garbage out). No hours will be deducted for excessive file review.

Third, plaintiff-intervenors assert that the time spent drafting (and presumably researching) the pleadings in this case was reasonable. They insist that the 2,700 hours that the City alleges they spent on briefing seven motions, three state appellate briefs, and two trial briefs compares favorably to other cases where fees were awarded. *See, e.g., Thompson v. Barrett,* 599 F.Supp. 806, 811 (D.D.C.1984) (1,600 hours spent on one appeal). The court agrees. Moreover, a certain amount of drafting time is included in the 5% reduction for billing judgment.

D. Non-Legal Work

The City and the Union contend that the plaintiff-intervenors seek compensation for activities that are not billable legal work. The challenged hours include time spent on travel, clerical matters, press conferences, Title VII presentations to organizations and incorporation of the Black Firefighters Association.

1. *Travel Time.*

The City argues that much of the travel time in this case was spent by attorneys McNeill and Galloway essentially commuting to the office of co-counsel and is thus either compensable at a reduced rate, assuming work was done in transit, or not compensable at all.

Plaintiff-intervenors counter that the City has improperly characterized as "commuting" travel by the two attorneys from their respective offices to the office of co-counsel. Plaintiff-intervenors describe Mr. Galloway's residence as both his home and his office. Furthermore, according to plaintiff-intervenors, both men generally worked on the case while traveling to co-counsel meetings via public transit. Moreover, plaintiff-intervenors' counsel have submitted evidence establishing that local attorneys customarily bill their clients for travel time to co-counsel meetings. Schulz Depo. at 41:3-42:8; Barg Depo. at 16-23-18:11.

[6] Reasonable attorneys' fees include reasonable travel time compensated at the full hourly rate. *Rose Confections, Inc. v. Ambrosia Chocolate Co.,* 816 F.2d 381, 396 (8th Cir.1987) (travel to and from depositions compensable) (citing *Craik v. Minnesota State Univ. Bd.,* 738 F.2d 348, 350 (8th Cir.1984) (travel to oral argument)); *Henry v. Webermeier,* 738 F.2d 188, 194 (7th Cir.1984) (traveling time in statutory fee cases compensable just as for fee-paying clients) [FN6]; *Danny Kresky Enter. v. Magid,* 716 F.2d 215, 217-18 (3rd Cir.1983). The court finds that the travel time

claimed herein is reasonable.

> FN6. *Webermeier* is controlling authority in the Seventh Circuit; thus the city's citation to *Communications Workers v. Illinois Bell Tele. Co.,* 553 F.Supp. 144, 148 (N.D.Ill.1982) (deduction of transportation expenses from fee awards deemed proper) is of no moment.

2. *Clerical Matters.*

The City contends that the plaintiff-intervenors' counsel spent some 83 hours on clerical chores such as xeroxing or serving and filing papers. Plaintiff-intervenors counter that the City's figure for total clerical hours is suspect, citing certain incorrect consolidations of clerical and non-clerical chores.

Courts have deducted time spent by attorneys in xeroxing, *Rajender v. Univ. of Minn.,* 546 F.Supp. 158, 165-166 (D.Minn.1982), and time spent filing court papers, *Cook v. Block,* 609 F.Supp. 1036, 1042 (D.D.C.1985). But here, counsel spent less time involved in these or other clerical matters than the City contends. Once again, the City's computer summaries are in error. The court's comparison of those summaries versus the actual time records of the attorneys revealed inaccurate portrayals by the City in addition to those errors ***1423** alleged by plaintiff-intervenors' counsel. For example, the City's summary lists 3.3 hours spent by Mr. McNeill on August 19, 1986 as "clerical." However, Mr. McNeill's time records for that day show that the hours the city must be referring to were spent finalizing an amicus brief (the only other hours billed that day being 1.65 in various phone conferences and .75 on a letter to the Special Master).

Moreover, the plaintiff-intervenors' counsel already deducted 5% of their hours in the exercise of billing judgment. That deduction will take care of any hours spent by attorneys xeroxing or filing papers with the court. In light of the deduction, and keeping in mind the suspect characterization of "clerical" hours by the City, no additional reduction is warranted.

3. *Press Conferences.*

[7] The City and Local 798 also urge deletion of the time spent by counsel in press conferences and at a demonstration staged to foster political support among the City Board of Supervisors. Plaintiff-intervenors contend that such time is compensable because it furthered their goals of engendering necessary political support among the City's Board of Supervisors and of keeping class members apprised of the case.

Whether viewed as an effort to lobby the Board of Supervisors on behalf of their clients, or as a method of keeping class members apprised of events, press conference time may be compensable. Attorney work in the political arena, where narrowly focused on fostering the litigation goals of their clients, is compensable. *Jenkins v. Missouri,* 862 F.2d 677, 678 (8th Cir.1988) (time spent campaigning for passage of tax levy funding court-ordered desegregation plan held compensable), *aff'd,* 491 U.S. 274, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989). Moreover, this court has previously found compensable the use of the media to publicize an action to class members. *Pollar v. Judson Steel Corp.,* 49 F.E.P.Cas. 224, 225, 1985 WL 312 (N.D.Cal.1985).

In this case, obtaining the support of the Board of Supervisors, whose members are elected by the citizens of the City and County of San Francisco, was as vital to the consent decree as were the negotiations with the City's administrative officials. Therefore, the time is compensable.

4. *Presentations to Organizations.*

The City maintains that Mr. McNeill has billed for some 20 hours spent giving talks to

various community organizations. First, the court notes that Mr. McNeill's time records indicate that he did not bill for nine of the contested hours. McNeill Decl., Ex. A(1) at 58. Moreover, closer review of these hours, as well as similar hours by Ms. Marshall, shows that both attorneys spent the time conferring with their clients and with attorneys and firefighters involved in similar litigation. McNeill Reply Decl. para. 12; Marshall Depo. at 15:24-16:13. The contested activities were compensable legal work; the hours, save the nine deducted ones, will be included in the lodestar figure.

5. *Incorporation of the Black Firefighters Association.*

The City and the Union challenge the plaintiff-intervenor counsels' billing for 8.5 hours spent incorporating this organization. Plaintiff-intervenors concede that this time is not compensable and assert that it has already been deducted from their total hours. After a review of plaintiff-intervenor counsels' submissions, the court finds that in deed the disputed hours were deducted. McNeill Decl. para. 11(a).

E. Unsuccessful Claims

The City and the Union urge the deduction of hours spent on the unsuccessful challenges to the Fire Department's drug testing program and to the dismissal of two female applicants from the Fire College. They also seek deduction of the hours spent on the allegedly unrelated work instituting state court writ proceedings to overturn Civil Service Commission decisions and representing individual Black firefighters at disciplinary proceedings.

The Supreme Court has held that no fee should be awarded in attorneys' fee cases for unsuccessful claims which are based on different facts and different legal theories than the successful claims. ***1424***Texas State Teachers Ass'n v. Garland Indep. School Dist.,* 489 U.S. 782, ----, 109 S.Ct. 1486, 1492, 103 L.Ed.2d 866 (1989). However, plaintiff-intervenors' counsel argue that since they have achieved excellent results, they deserve a fully compensatory fee even though they did not prevail on every issue. *Hensley,* 461 U.S. at 435, 103 S.Ct. at 1940. Furthermore, they maintain that their fee should include most of the contested hours because the claims are closely related to those on which plaintiff-intervenors prevailed. Keeping these legal principles and the arguments of counsel in mind, the court addresses each claim in turn.

1. *Challenge to Drug Testing Program.*

[8] The City argues that plaintiff-intervenors' challenge to the Fire Department's substance abuse screening program was unrelated to the race and sex discrimination claims which were central to this case. The fee applicants counter that they challenged the drug testing program because they believed it would be used pretextually to discriminate against women and minority job applicants. However, a review of this court's August 27, 1987 order denying plaintiff-intervenors' motion for a preliminary injunction demonstrates that they objected to the proposed testing solely on fourth amendment and analogous state law grounds. Consequently, the fee applicants cannot receive compensation for time spent presenting those constitutional objections.

Nevertheless, some of the time spent litigating the substance abuse screening program is compensable. Prior to the issuance of a temporary restraining order on July 24, 1987, the City intended to move forward with its drug screening program despite this court's February 1986 order placing any such program under the supervision of the court and the monitor. *United States v. City and County of San Francisco,* 656 F.Supp. 276, 292-93 (N.D.Cal.1987) (" *Davis I* ") (monitor to supervise interim hiring; City to submit proposal re-

garding conduct of medical investigations), *aff'd as modified,* 890 F.2d 1438 (9th Cir.1989), *petition for cert. filed* (August 7, 1990) (No. 90-248). Consequently, plaintiff-intervenors were forced to expend resources in order to seek a stay and in order to litigate the threshold issue of this court's jurisdiction over the dispute. Since they prevailed in both instances, the fee applicants are entitled to a compensatory award. One third of the total hours spent on challenging the substance abuse screening program are thus compensable. Accordingly, two-thirds of the hours challenged by the City shall be deducted as follows: Ms. Hulett-13.5 hours; Mr. Lee-1 hour; Ms. Paterson-5 hours; Mr. McNeill-24 hours from his time with the Culver Law Firm; Ms. Marshall-11 hours.[FN7]

FN7. In response to the Union's contention that only one attorney should be compensated for attendance at the hearing on the matter, counsel for plaintiff-intervenors have already partially reduced their fee request and the deductions set forth herein have taken this into account.

2. *Challenged Dismissal of Female Trainees.*

[9] The City also argues that the unsuccessful attempt to reverse the dismissal of two women from the Fire College was unrelated to the prevailing claims. The court disagrees. Counsels' work to reverse those dismissals was part of the larger goal of increasing the hiring and retention rates for all female applicants, on which they prevailed. Furthermore, no one has contested plaintiff-intervenors' counsel's assertion that the City has since adopted the very standards (regarding the length and focus of training for female applicants) which were sought for the two dismissed women. Marshall Reply Decl. para. 15. Compensation is merited for the contested hours.

3. *State Writ Proceedings and Disciplinary Proceedings.*

[10] According to the City and the Union, Mr. McNeill's representation of individual black firefighters in state court writ proceedings and in disciplinary hearings is unrelated to the prevailing claim in this case.

The writ proceedings were brought to block publication of promotion lists which were compiled based on allegedly invalid tests. However, the theories pursued in the writ proceedings were not based on race discrimination; instead counsel argued ***1425** that a lack of notice of grading procedures was a denial of due process and that grading distinctions made between those who answered one or two questions and those who answered none violated equal protection guarantees. McNeill Depo. at 116:12-20. Those arguments would apply to test-takers regardless of race or gender and victory would have done nothing to advance the interests of the plaintiff class. The claims at issue (Mr. Braden's and Mr. Demmons') are unrelated to the core facts of this case.

With regard to the disciplinary hearings, plaintiff-intervenors contend that the representation was related to the racial harassment charges in the primary litigation.[FN8] However, neither Mr. McNeill's deposition testimony nor his time sheets establish any link to work on racial harassment claims. McNeill Depo. at 126-29. Attorney McNeill's testimony tends to indicate that the representation before the Fire Commission was related to disciplinary action due to a firefighter's drug usage. No evidence is before the court on the relationship between disciplining a drug abuser and racial harassment. Counsel has not argued, for example, that similarly situated white firefighters went undisciplined. Time spent on the disciplinary matter shall be deducted.

FN8. Actually, although both sides speak of representation of "firefighters," the record only estab-

lishes representation of one firefighter in a disciplinary hearing, Robert McGriff. McNeill Depo. at 126:11-128:5.

The cases cited by counsel for plaintiff-intervenors to support a contrary result are distinguishable. In each case, the contested hours were spent representing the interests of the entire class in matters closely related to the core issues in the primary litigation. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986) ("Delaware Valley I") (appearances before state and federal agencies and state court on behalf of all class members were compensable as post-judgment monitoring of consent decree); *Chrapliwy v. Uniroyal, Inc.,* 670 F.2d 760, 766 (7th Cir.1982) (time spent on debarment proceedings which involved issues identical to, and which led to settlement of, the Title VII proceedings held compensable), *cert. denied,* 461 U.S. 956, 103 S.Ct. 2428, 77 L.Ed.2d 1315 (1983); *Lampher v. Zagel,* 755 F.2d 99, 103-04 (7th Cir.1985) (hours compensable where spent representing identical parties in state court proceeding with identical issues).

The hours spent on the state court writ proceedings and the disciplinary hearings are properly deductible. Plaintiff-intervenors did not contest the City's assertion that over 100 hours were spent on these issues. Accordingly, 120 hours are deducted from Attorney McNeill's compensable hours as follows: one hundred hours are deducted from his billings with the law firm of Pearl, McNeill & Gillespie for the state writ proceeding; 10 hours are deducted from his billings as a sole practitioner; and 10 hours are deducted from his billings with the Culver Law Firm.

F. Law Student Hours

[11] The City and the Union argue that much of the law student time in this case is not compensable. The City argues that the law students engaged in unrelated work on the drug testing issue and on jury selection, conducted possibly redundant research, spent excessive time drafting interrogatories, and spent time engaged in clerical chores.[FN9]

FN9. The City also argued that the law students provided overly vague documentation and attended meetings or proceedings that were already overattended. The court resolved both of these contentions, allowing the challenged hours for attorneys as well as for law students. *See* the discussion above in Sections B and C.

First, with respect to work on drug testing, two-thirds of the challenged hours are not compensable, as discussed in subsection E, above. Therefore, 36.7 hours shall be deducted from the lodestar amount for law student Michael Adams.

Second, with respect to work related to jury selection, all challenged hours are allowable. The work was especially relevant to this case given the fact that the City did not concede the key issues until the very ***1426** eve of trial after substantial preparation for trial had commenced.

Third, with respect to redundant research, the City contends that no showing has been made that 9.5 hours spent in research by Em Herzstein, a law clerk for Ms. Dunlap, were not reasonably expended. A review of Ms. Herzstein's time records reveals that the contested hours were spent not merely on research, but also on writing and discussing two memoranda on distinct issues in the litigation. The hours were reasonably spent.

Fourth, with respect to the drafting of interrogatories, the court finds the hours were reasonably expended. While an attorney may well have been able to accomplish the task more ex-

peditiously, it is not beyond reason to assign the task to a law clerk who will bill at a lower rate for the time spent.

Finally, with respect to the clerical work assertedly performed by Ms. Edwards, a law clerk for Ms. Paterson, the court has examined closely her time records. Thirteen hours spent xeroxing are hereby deducted as not properly compensable paralegal time.

II. *Reasonable Hourly Rate*

The reasonable hourly rate is determined by reference to the prevailing rate in the community for similar work by attorneys of like skill, reputation and experience. *Jordan,* 815 F.2d at 1262-63. The prevailing party must present evidence on the issue beyond affidavits of counsel. *Id.* at 1263. The court has taken into account rate evidence provided by plaintiff-intervenors, the City and the Union. That evidence will be assessed below in light of the *Kerr* factors. While the factors "[are] not intended to be exhaustive or exclusive," *Chalmers,* 796 F.2d at 1215 n. 5, the court finds most of them relevant in this case.

A. The Relevant Kerr Factors

1. *Novelty and Difficulty of Questions.*

Federal courts have recognized that Title VII cases are becoming increasingly difficult to litigate. Judge Orrick of this district observed that private sector Title VII cases are much more difficult now than in the early days when blanket exclusions of women, regardless of ability, and obviously racially-biased tests were more commonplace. *Boyd v. Bechtel Corp.,* 485 F.Supp. 610, 612 (N.D.Cal.1979); *accord, Fadhl v. City and County of San Francisco,* 38 Empl.Prac.Dec. (CCH) ¶ 35,677 at 40,029, 1985 WL 349 (N.D.Cal. July 10, 1985) (noting general difficulties involved in litigating a Title VII case). Furthermore, the Fifth Circuit has noted, "If there ever was a time of facile Title VII litigation, it surely ended with the demise of intentional violations of equal employment opportunity. Today's parade of Title VII cases present more and more subtle manifestations of discrimination." *Swint v. Pullman-Standard,* 539 F.2d 77, 99 (5th Cir.1976).

In this case plaintiff-intervenors faced the particular difficulty of proving, among other things, the adverse impact of facially objective entrance and promotional examinations. To make their case, plaintiff-intervenors had to marshall considerable testing expertise. Moreover, the city compounded the difficulties in the case through two years of "tenacious and uncompromising pretrial litigation in defense of the challenged examinations[.]" *Davis I,* 656 F.Supp. at 281.

2. *The Skill Requisite to Perform the Legal Services Properly.*

To properly litigate a class action suit, counsel must be able to defeat potential challenges to their competency as adequate class counsel. Counsel must display expertise in either class litigation in general or in the subject matter of the dispute since those factors can be determinative in adequacy disputes. *Grasty v. Amalgamated Clothing & Textile Workers Union,* 828 F.2d 123, 129 (3rd Cir.1987) (adequacy of counsel likely met if experienced co-counsel were acquired), *cert. denied,* 484 U.S. 1042, 108 S.Ct. 773, 98 L.Ed.2d 860 (1988); *Simon v. Westinghouse Elec. Corp.,* 73 F.R.D. 480, 485-86 (E.D.Pa.1977) (familiarity with subject matter of suit overcame lack of experience and met adequacy requirement).

Representing the interests of class members during the remedial phase of this litigation ***1427** also requires skilled counsel. Counsel must be alert throughout the period of the decree to the possibility of actions detrimental to their clients' interests. For example, it was through the efforts of counsel for plaintiff-intervenors that this court was alerted to the

City's planned budget cuts which would have adversely affected the decree. As at other junctures in the litigation, counsel for plaintiff-intervenors exhibited critical legal and political skill in opposing the budget cuts.

Class counsel have submitted affidavits amply demonstrating their experience and proficiency with employment discrimination class actions in the private and public sectors. Marshall Decl. at 2:23-3:16 (expertise in cases involving employment discrimination against women); McNeill Decl. at 2:9-3:3 (general employment discrimination expertise); Paterson Decl. at 2:2-4:1 (civil rights class action expertise).

3. *The Preclusion of Other Work.*

Counsel for plaintiff-intervenors all practice law in firms with ongoing practices. Most of them depend on public funding and thus have budgets which significantly limit the number of cases they can take. To the extent that they were involved in this case, and their affidavits indicate the massive level of commitment, they have been unable to carry other cases. In fact, Mr. McNeill's involvement so limited his ability to do other work that it apparently contributed to the demise of a partnership in which he was a member. McNeill Decl. at 4:21-5:6.

Moreover, the remedial phase of this suit will continue to require a significant resource commitment. Resolution of the racial harassment claims has proven to be a lengthy process. Counsel must also allot time for monitoring the progress of goals set out by the decree.

In sum, the massive pre-trial discovery and negotiations and the extensive commitment required during the remedial phase support the finding that these attorneys were precluded from most other work during litigation of this case.

4. *The Fixed or Contingent Nature of the Fee.*

The focus of analysis under this factor is whether or not other compensation, in addition to a potential fee award, is available to fee applicants. Aside from Mr. McNeill, the applicants have no fee arrangements with their clients. Most of the applicants are salaried public interest attorneys who do not charge their clients. Their salaries depend upon their organizations' abilities to obtain funding sources, including court ordered fee awards. Mr. McNeill's fee arrangement yielded only a small amount of compensation. Before joining the public interest group in which he now practices, Mr. McNeill had a loosely defined fee agreement with the Black Firefighters Association whereby they were to pay him whatever they could. McNeill Depo. at 34:25-35:19. As a result he received $20,365.56 in fees through his various law firms.

Ms. Dunlap and Mr. Galloway are the only attorneys for plaintiff-intervenors (except for the fees counsel) who are not employed by public interest firms. They will receive no compensation for time spent on this case other than from the fee award.

5. *Time Limitations Imposed by the Client or the Circumstances.*

The applicants were subjected to the normal time limitations of a case which is expected to go to trial. They had to prepare their work product within the confines of the pretrial schedule. Perhaps the most dramatic time limitation occurred in October 1986. Settlement negotiations between the City and the plaintiff-intervenors broke down. The City indicated its tentative approval of a consent decree proposed by the Department of Justice and moved to have it adopted by the Board of Supervisors. Since they believed that the Department of Justice's consent decree would severely restrict the remedies available to their clients, counsel for the plaintiff-intervenors

had to quickly assess the situation and mount a political campaign to stop the proposed decree. Their ability to respond creatively under time pressure is a positive factor in their fee award.

***1428** 6. *The Amount Involved and the Results Obtained.*

The applicants have obtained excellent results as demonstrated by the entry of four separate orders enjoining actions by the City and approving the consent decree. As this court noted in its order approving the consent decree:

> "The plan is comprehensive in that it creates a whole system that deals with issues including test development, recruitment, the timing of the administration of tests and the duration of promotional lists, grievance procedures for complaints regarding both testing procedures and racial harassment, human relations training, issuance of appropriate equipment to all firefighters and provision for a court-appointed monitor who will supervise the implementation of the decree."
>
> *Davis III,* 696 F.Supp. at 1307.

Although earlier consent decrees between the San Francisco Fire Department and minorities existed, this is the first time that the City has truly moved forward. Until recent changes in the attitude of City officials occurred, the Department was recalcitrant in its resistance to change. The few minorities in the Department were confronted with racial hostility on a day-to-day basis. While the change in political administrations motivated the City's ultimate cooperation, the months of prior litigation could not have come to a successful conclusion without the tenacity of plaintiff-intervenors' counsel. Besides, even given the City's comparative cooperation late in the process, applicants still had to contend with the vigorous opposition of the Union. The applicants obtained excellent results.

Broad systemic relief such as that obtained here is not easily measured in terms of "the amount involved," which suggests a monetary figure. Nevertheless this court can quantify certain extraordinary results. In 1985, minorities comprised only 14.6% of the city's firefighting force. As of August 8, 1990 minority composition stood at 24%. In a department which hired no women before 1985 there are now 36, comprising 2.6% of the force. One of the women is a lieutenant. Minority men have registered even broader gains in the officer ranks. In a fire department that had no minority members in the ranks of lieutenant or above in 1985, there are presently 54 lieutenants, eight captains, five battalion chiefs, one assistant chief and one assistant deputy chief II. [FN10] Yet the greatest value, in terms of increased respect for local government and heightened pride in the affected communities, is immeasurable.

> FN10. Statistics in the text were submitted to the court by the Consent Decree Monitor in a document labeled "San Francisco Fire Department Uniformed Force-Rank by Race and Sex." The figures indicate that, as of August 5, 1990, the race and gender composition of the fire department was as follows: 1,041 White males (75.7%), 20 White females (1.5%), 103 Black males (7.5%), 10 Black females (.7%), 117 Hispanic males (8.5%), 4 Hispanic females (.3%), 55 Asian males (4%), 2 Asian females (.1%), 21 Filipino males (1.5%), 3 American Indians/Other males (.2%).

7. *The Experience, Reputation and Ability of the Attorneys.*

Each of the attorneys for plaintiff-intervenors submitted resumes detailing their ability to competently handle this case. Those submissions demonstrate the high level of experi-

ence, ability and reputation enjoyed by the fee applicants.

a. Mary Dunlap

Ms. Dunlap, co-counsel representing one of the subclasses of women, received her J.D. from the University of California, Berkeley, Boalt Hall in 1971, and has been a member of the California Bar since 1972. She is a co-founder of Equal Rights Advocates ("ERA"), a public interest law firm dedicated to ending discrimination against women. Over the course of her career she has litigated forty-three individual and 10 class action employment discrimination cases. Ms. Dunlap has written and lectured widely on sex-based discrimination, and lectures frequently at area law schools.

b. Russell Galloway

Mr. Galloway, co-counsel specializing in test validity issues, graduated magna cum laude from Columbia University School of Law in 1965 and was admitted to the California Bar in 1969. He spent seven years as a staff attorney for the Legal Aid Society*1429 of Alameda County, working primarily in employment discrimination and affirmative action litigation. A partial list of his litigation experience covers 19 federal cases including trial and appellate work, primarily regarding employment discrimination against classes and individuals. Mr. Galloway is now a tenured professor of law at the University of Santa Clara. He continues to work on Title VII cases and has published dozens of articles on employment discrimination and other legal areas in law reviews and other periodicals. He was recruited as part of the litigation team because of his extensive Title VII experience and his particular expertise in testing issues.

c. Denise Hulett

Ms. Hulett, a staff attorney at the Mexican American Legal Defense and Education Fund ("MALDEF"), is counsel for the Hispanic class members. She graduated from King Hall School of Law, University of California, Davis in 1985 and was admitted that year to the California Bar. She began her practice with the firm of Rosen & Phillips, where she participated in a successful prisoner constitutional rights class action case. As a MALDEF attorney, Ms. Hulett is currently litigating four employment discrimination class action suits in addition to the instant case.

d. Edwin Lee

Mr. Lee, co-counsel representing Asians in the case, received his law degree from Boalt Hall School of Law, University of California, Berkeley in 1978 and was admitted to the bar in 1979. During work on this litigation, he was managing attorney of the San Francisco office of the Asian Law Caucus, a public interest law firm engaged in protecting the legal rights of Asians. Mr. Lee's work for the Caucus focused primarily on cases of discrimination in housing and employment. Notable cases and issues in which Mr. Lee has been active include work on the San Francisco Minority and Business Enterprise Ordinance and the Chinatown Residential Hotel Demolition Moratorium.

e. William McNeill

Mr. McNeill served as lead counsel for the plaintiff-intervenors' team for half of the substantive litigation period. He also represented the Black Firefighters Association throughout the proceedings. Mr. McNeill graduated from the University of Michigan in 1971. He is a member of the Bars of Massachusetts, Georgia and California. He has specialized in employment discrimination since 1973 when he became a staff attorney at the Equal Employment Opportunity Commission Regional Litigation Center in Atlanta, Georgia. He was Director of the Title VII Project in San Francisco for the Lawyers' Committee for Civil Rights Under the Law from 1974 to 1976. In 1976 Mr. McNeill became a Regional Counsel for California Rural Legal Assistance, a position in

which he remained until going into private practice in 1982. In private practice he continued to litigate employment discrimination cases. Presently, he is a staff attorney for the Employment Law Center, a public interest law firm in San Francisco.

f. Shauna Marshall

Shauna Marshall, a staff attorney at Equal Rights Advocates, represented the interests of a subclass of women in this litigation. She graduated from the University of California, Davis in 1979 and was admitted to the California Bar that same year. Until 1984 she was a trial attorney in the United States Justice Department Honors Program, working in the San Francisco Field Office of the Anti-trust Division. Since 1984 she has been a staff attorney at ERA, working primarily on women's employment rights. Her successful cases have included remedying wage and hour violations in the garment industry and obtaining a large settlement in a police department sexual harassment case. She is currently on the Child Care Law Center's Board of Directors and was formerly on the board of Berkeley Neighborhood Legal Services.

g. Eva Jefferson Paterson

Ms. Paterson served as lead counsel for plaintiff-intervenors' litigation team for half of this case's history. She also represented the Black Firefighters Association on behalf of the San Francisco Lawyers' Committee for Urban Affairs ("Lawyers' ***1430** Committee"), of which she is now Executive Director. Ms. Paterson received her law degree from Boalt Hall School of Law, University of California, Berkeley in 1975 and was admitted to the Bars of California and the Federal Court for the Northern District of California in that year. She is also admitted to practice before the Ninth Circuit Court of Appeals and the United States Supreme Court.

Ms. Paterson's legal career has focused exclusively on civil rights law. She practiced as a staff attorney with the Legal Aid Society of Alameda County from 1975 to 1977. From 1977 until her recent selection as Executive Director, she was the Assistant Director at the Lawyers' Committee. She has also lectured on civil rights and litigation strategy as an adjunct professor of law at Hastings College of the Law, University of California, from 1980-1983. Her litigation experience includes numerous successful Title VII suits. The community and professional awards received by Ms. Paterson include the Black Leadership Forum's 1988 Woman of the Year Award, the National ACLU Certificate of Appreciation, and the NAACP Legal Defense and Education Fund 1988 Legal Award.

8. *The Nature and Length of the Relationship.*

This factor was explained in *Johnson v. Georgia Highway Express,* 488 F.2d 714, 719 (5th Cir.1974), abrogated by *Blanchard v. Bergeron,* 489 U.S. 87, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989), as follows: "A lawyer in private practice may vary his fee for similar work in the light of the professional relationship of the client with his office." In this action the factor is inapplicable. The very nature of this type of case tends to indicate that an ongoing professional relationship is unlikely. Most counsel are employed by public interest firms. The few who are in private practice, or were at the time of performing work on this case, do not have a professional relationship with any of the plaintiffs or class members apart from this case. Therefore, this factor is not included in calculating the lodestar.

9. *The Customary Fee in the Community for Similar Work and Awards in Similar Cases.*

To aid the court in ascertaining the customary fee and awards in similar cases, counsel for both the City and plaintiff-intervenors have submitted declarations, deposition testimony and case law. Plaintiff-intervenors particularly

refer the court to its Supplemental Fee Order of August 31, 1988 and the declarations filed in conjunction with it. In the Supplemental Order this court found that counsels' requested rates were "well within the rates prevailing in the Bay Area for attorneys of like skill, experience and reputation working on litigation of similar subject and complexity." Supp. Order Awarding Attorneys' Fees at 10. That finding was based primarily on declarations by Guy Saperstein, Jack Londen and James Hunt. The applicants have now re-submitted those declarations, by reference, and supplemented them with declarations from similar cases.

The combined weight of their evidence establishes that the applicants' rates are, as in their earlier application, well within the range of rates charged in the San Francisco Bay area for similar work. The 1988 billing rates they seek are from $110 per hour for 1985 graduates to $235 per hour for 1969 graduates. For paralegals they seek $70 per hour. By comparison, Mr. Saperstein, a prominent Title VII class action attorney, declared that attorneys at his firm with experience comparable to applicants would bill at 1988 hourly rates ranging from $110 for 1986 law school graduates to $250 for 1969 graduates. Paralegals at his firm would bill at $50 to $85 per hour. Saperstein Decl. at 4:18-5:2. Mr. Hunt asserts that attorneys at his firm with experience comparable to that of applicants would bill at 1988 hourly rates ranging from $150 for 1985 graduates to $230 for 1971 graduates. Hunt Decl. at 2:17-21. Mr. Steven Mayer, in a declaration filed in a sex discrimination case in this district, stated that attorneys at his firm with experience comparable to applicants would bill at 1988 hourly rates ranging from $155 for 1984 graduates to $195-$205 for 1980 graduates. Law clerks' 1988 ***1431** hourly rates were $75. Mayer Decl. at 2:17-19.

The case law provides further support for the conclusion that the applicants' requested rates are within community norms. Aside from this court's Supplemental Fee Order, other cases include: *San Francisco Police Officers' Association v. City and County of San Francisco,* No. 85-2180 (9th Cir. Sept. 6, 1989) (attorneys' fees ranging from $140 to $190 per hour); *Herrington v. County of Sonoma,* 883 F.2d 739, 746 (9th Cir.1989) ($200 per hour for senior partner; $150 per hour for senior associate; $80 per hour for junior associate, and $45-$50 per hour for paralegals); *Cabrales v. County of Los Angeles,* 875 F.2d 740 (9th Cir.1989) (rates of $175-$225 per hour). *But see Bernardi v. Yeutter,* C 73-1110 SC (N.D.Cal. Jan. 5, 1990) (rates of $105-$145 per hour; $50 per hour for law clerks).

B. The City's Contentions Regarding a Reduced Rate

The City advances several arguments against an award of fees at the requested rates. First, it argues that the rates are premium rates, rather than prevailing rates. Second, it argues that the rates are excessive because four attorneys seek rates normally charged only by lead counsel. Third, it argues that the rates are beyond those normally charged for many of the tasks in the litigation. Fourth, it argues that the rates are in excess of the fee applicants' own normal hourly rates. Fifth, it argues that the fee applicants have not established any right to compensation for law student time. The court will address each of these issues in turn.

1. *Whether Premium Rates are Being Charged.*

The City first argues that the rates sought by the applicants here are premium rates, charged only by a handful of firms in the area. It contends that the average 1988 rates for attorneys with experience similar to that of Dunlap, Galloway, McNeill and Paterson are from $130 to $134 per hour, with only ten percent billing above $175 per hour. The average rates for attorneys with experience similar to Mar-

shall, Lee and Hulett are assertedly even lower. However, the support for the City's argument is deficient. The apparent centerpiece of their attack, a survey by the legal consulting firm of Altman & Weil, is not representative of rates charged for complex litigation in the San Francisco area. Data was gathered nationwide and covered a broad number of practice areas, including insurance defense, which Mr. Weil admits has significantly lower billing rates than other areas. Weil Depo. at 10-12. In fact, Mr. Weil admits that the rates for complex federal litigation would be as much as $50 per hour higher than the survey's reported averages. Weil Depo. at 12.

The City further argues that the rate of Mr. Baller, a federal employment discrimination litigator and one of the applicants' declarants, should be virtually conclusive on the question of an hourly rate due to his eminent credentials and experience. However, Mr. Baller's rate is simply some evidence of the range of rates in the area.

The City also mistakenly contends that public interest attorneys are not entitled to value their rates at the same level as corporate attorneys of equal caliber. *EEOC v. Sage Realty Corp.,* 521 F.Supp. 263, 270 (S.D.N.Y.1981). However, *Sage Realty* is flatly contrary to Supreme Court precedent. The Court's has made it clear that "the calculation of fee awards [may not] vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization." *Blum v. Stenson,* 465 U.S. 886, 894, 104 S.Ct. 1541, 1546, 79 L.Ed.2d 891 (1984). Moreover, this court recognizes that fees for public interest legal work are set entirely by courts; no client is ever charged. For the court to be the instrument of bias against such laudable endeavors would be unconscionable. The court accords equal value to complex litigation of all types.

2. *Whether Four Attorneys Seek Lead Counsel Rates.*

The City asserts that attorneys Dunlap, Galloway, McNeill and Paterson are all billing at rates which are normally only charged for time spent overseeing or leading a litigation team. Since only Galloway ***1432** and Paterson acted as lead counsel, and each of them only half of the time, the City posits that the four counsels' rates should be reduced accordingly. The court does not share the City's view. Whether counsel is serving as lead counsel or not, a uniform rate is awardable. The City cites no case law to the contrary, and its vague reference to supporting declarations is offset by the deposition testimony of its own declarants. Barg Depo. at 15:15-16:15; Schulz Depo. at 38:4-39:5.

3. *Whether Rates are Excessive for Certain Tasks.*

The City further maintains that, even if the applicants deserve their requested hourly rates in some instances, they should not be compensated at those rates for certain tasks that required less expertise. Instead, the City argues that court-awarded compensation should promote the use of the commercial law firm-type pyramidal staffing pattern, whereby most work is performed by junior attorneys or senior associates. *See, e.g.,* Schulz Decl. at 3, 6.

While the City's argument and the case law cited from other circuits have some force, [FN11] in this circuit there is ample authority for awarding a single fee for all work done. *See, e.g., Suzuki v. Yuen,* 678 F.2d 761, 764 (9th Cir.1982) (one rate for research, discussion, drafting, proofreading and court appearances by counsel); *Handgards, Inc. v. Ethicon, Inc.,* 552 F.Supp. 820, 823 (N.D.Cal.1982) (applying one rate to all tasks without delineating types of tasks performed), *aff'd,* 743 F.2d 1282 (9th Cir.1984), *cert. denied,* 469 U.S. 1190, 105 S.Ct. 963, 83 L.Ed.2d 968 (1985);

Powell v. United States Dept. of Justice, 569 F.Supp. 1192, 1203 (N.D.Cal.1983) (flat rate for all tasks including review and organization of documents).

> FN11. *See, e.g., Cohen v. West Haven Bd. of Police Comm'rs,* 638 F.2d 496, 505 (2d Cir.1980) ("a different rate of compensation may well be set for different types of litigation tasks").

In any event, as the fee applicants' declarations and citations demonstrate, the efficacy of the pyramidal staffing pattern is a matter of some debate. Beasley Decl. paras. 6-8; Moore Decl. para. 4; *Muehler v. Land O'Lakes, Inc.,* 617 F.Supp. 1370, 1379 (D.Minn.1985) (questioning wisdom of judicial involvement in staffing issues and noting efficiency of senior partners engaging in research); *Laffey v. Northwest Airlines,* 572 F.Supp. 354, 366 (D.D.C.1983) (noting efficiency of senior attorneys engaging in research, drafting, etc.), *rev'd on other grounds,* 746 F.2d 4 (D.C.Cir.1984), *cert. denied,* 472 U.S. 1021, 105 S.Ct. 3488, 87 L.Ed.2d 622 (1985). The court declines to award fees by task type and instead will grant a uniform rate for each attorney.

4. *Whether Rates are Beyond Counsels' Normal Fees.*

The City urges that this court limit awardable fees to the rates which the fee applicants normally bill for their work. The City claims that the pertinent rule in this circuit is substantially similar to that espoused in *Laffey v. Northwest Airlines,* 746 F.2d 4, 24-25 (D.C.Cir.1984), *cert. denied,* 472 U.S. 1021, 105 S.Ct. 3488, 87 L.Ed.2d 622 (1985). The *Laffey* court ruled that the historical rate of fee applicants is the proper figure for an award, so long as it is within the range of rates within the relevant legal community. However, the rule in this circuit is markedly different:

> This Circuit does not follow the legal standard set forth in *Laffey.* "While evidence of counsel's customary hourly rate may be considered by the District Court, it is not a [sic] abuse of discretion in this type of case to use the reasonable community standard that was employed here."

Maldonado v. Lehman, 811 F.2d 1341, 1342 (9th Cir.) (quoting *White v. City of Richmond,* 713 F.2d 458 (9th Cir.1983)), *cert. denied,* 484 U.S. 990, 108 S.Ct. 480, 98 L.Ed.2d 509 (1987). Furthermore, the D.C.Circuit has expressly overruled *Laffey,* holding that the prevailing market rates must be used to determine fees under the fee-shifting statutes. *Save Our Cumberland Mountains, Inc. v. Hodel,* 857 F.2d 1516, 1524 (D.C.Cir.1988).

5. *Whether Law Student Time is Compensable.*

Finally, the City asserts that the applicants have not established the right to compensation ***1433** for law student time. That contention ignores the court's Supplemental Fee Order which included an award for such time and wherein this court encouraged use of law students to reduce more costly attorney hours. Supplemental Order Awarding Attorneys' Fees at 9. The City's position also is at odds with recent Supreme Court precedent. *Missouri v. Jenkins,* 491 U.S. 274, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989) (recognizing right to compensation for law student time). Furthermore, the declarations provided by counsel establish that the $70 hourly rate sought is within the community standard. See Saperstein, Hunt and Mayer Decls., *supra* p. 34.

Having considered all relevant *Kerr* factors and the arguments of counsel, the court finds that the rates requested by applicants are reasonable. The lodestar amount for all attorneys and paralegals is set forth in the accompanying Appendix.

III. *Enhancement of the Lodestar*

[12] A strong presumption exists that the lodestar figure is the reasonable fee and it is only in rare cases that figure will be adjusted. *Jordan v. Multnomah County,* 815 F.2d 1258, 1262 (9th Cir.1987); *Clark v. City of Los Angeles,* 803 F.2d 987, 991 (9th Cir.1986). Where an upward adjustment is made, it must be "supported by specific evidence on the record and detailed findings by the district court." *Jordan,* 815 F.2d at 1262. For fee enhancement to occur, two prerequisites must be met: FN12

> FN12. Plaintiffs present two additional bases for fee enhancement. First, they contend that the exceptional nature of the success achieved is a proper basis for enhancement. *See White v. City of Richmond,* 713 F.2d 458, 462 (9th Cir.1983). That contention is discussed in the text below. Plaintiffs also argue that the lodestar should be enhanced because of the preclusion of other employment. They provide evidence of the inability of counsel to pursue other work. *See, e.g.,* McNeill Decl., para. 10. However, this court believes that the preclusion of other employment was accounted for in the earlier determination of the number of hours reasonably expended. Although neither the Supreme Court nor the Ninth Circuit have rejected consideration of that factor in a fee enhancement, in the present case it is properly subsumed within the lodestar figure.

First, the fee applicant must establish that "without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.' " Second, any enhancement for contingency must reflect "the difference in market treatment of contingent fee cases *as a class,* rather than ... the 'riskiness' of any particular case."
Fadhl v. City and County of San Francisco, 859 F.2d 649, 650 (9th Cir.1988) (" *Fadhl II* ") (quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 483 U.S. 711, 733, 731, 107 S.Ct. 3078, 3090, 3089, 97 L.Ed.2d 585 (1987) (" *Delaware Valley II* ") (O'Connor, J., concurring) (emphasis in original)).

A. Difficulty in Finding Counsel

Robert Demmons, one of the individual plaintiffs-in-intervention and president of the San Francisco Black Firefighters Association, itself an organizational plaintiff-in-intervention, submitted a declaration attesting that he had contacted at least twenty-five attorneys prior to obtaining counsel. Demmons Decl. para. 3. According to Demmons, the attorneys who declined to take the case did so primarily out of an unwillingness to take on the City of San Francisco and an unwillingness to risk the time and money involved. *Id.*

Defendants contest the degree of difficulty that plaintiffs experienced in retaining counsel. They maintain that Mr. Demmons and Ms. Paterson are unable to provide any specific evidence of the names of attorneys whom they attempted to recruit or the reasons the attorneys refused. In reply, Mr. Demmons lists the names of eight attorneys or legal organizations whom he solicited. He reiterates that the attorneys objected to the "tremendous risk and time commitment involved." Demmons Reply Decl. para. 2. Two of the attorneys contacted furnished affidavits confirming plaintiffs' representations. Beasley Decl. para. 3; Moore Decl. para. 5.

Nevertheless, the City argues that once counsel for the Black Firefighters Association was acquired, plaintiffs retained the ***1434** balance of class counsel relatively easily. Local 798 adds that since the Department of Justice

was planning to file suit on plaintiffs' behalf, they already had counsel before retaining present counsel.[FN13] Consequently, the City and the Union argue that the plaintiffs cannot meet Justice O'Connor's requirement of a showing that without an enhancement they would have experienced substantial difficulty in obtaining counsel.

> FN13. In fact, the presence of the United States may have cut both ways. The position of the Justice Department was likely to be at odds with plaintiff-intervenors in significant respects. Thus, a knowledgeable Title VII lawyer would likely be faced with a two-edged, if not three-edged, sword.

However, plaintiffs need not establish the actual difficulty in finding counsel for their particular case, although on this record they have done so. It is sufficient to establish that such a difficulty would exist for Title VII cases in the San Francisco area as a class, absent an enhancement. This standard has been accepted in this circuit as well as in the D.C. Circuit. *Fadhl II,* 859 F.2d at 650-51; *Bucci v. Chromalloy Am. Corp.,* 53 Empl.Prac.Dec. (CCH) ¶ 39,882 at 62,300, 1989 WL 222441 (N.D.Cal. Sept. 15, 1989); *McKenzie v. Kennickell,* 875 F.2d 330, 337 (D.C.Cir.), *reh'g denied,* 884 F.2d 1405 (D.C.Cir.1989). In elucidating the rationale for a standard not tied to a specific case, the D.C. Circuit explained:

> A standard of actual difficulty ... would have perverse effects in practice. It would penalize plaintiffs who were lucky enough to stumble across on their first try the one-in-a-hundred lawyer who was willing to take their case. It would also discourage referral services such as the Lawyers' Committee that make it easier for litigants to find legal representation. [citations omitted]. Finally, it would lead to a charade in which clients seeking representation under fee-shifting statutes would be steered to several attorneys whose pre-arranged role it would be to "refuse" the case, knowing that such refusals were necessary to permit the eventual award of fees. For these reasons, we conclude that applicants need not show that plaintiffs actually experienced difficulty in obtaining representation. They must only establish, according to the test formulated by Justice O'Connor, that plaintiffs *would have* faced "substantial difficulties" in the absence of a contingency enhancement.

McKenzie, 875 F.2d at 337 (emphasis in original). This court agrees with the reasoning of the D.C. Circuit.

Plaintiffs' counsel, who collectively constitute a large segment of the local public interest bar, submitted declarations regarding the difficulty of referring Title VII cases to private attorneys. *See, e.g.,* Paterson Decl. para. 5 (Lawyers' Committee for Urban Affairs); Hulett Decl. para. 22 (MALDEF); Lee Decl. para. 10 (Asian Law Caucus); Marshall Decl. para. 12 (Equal Rights Advocates); Supp. Dunlap Decl. II paras. 2-4 (relating conversation with former coordinator of this district's Title VII-related Civil Legal Assistance Panel, attesting that project terminated due to lack of attorneys).

Moreover, plaintiffs have augmented their case with declarations from area Title VII and public interest attorneys. Supp. Saperstein Decl. paras. 6-7 (noting exodus of experienced plaintiff's attorneys from employment discrimination litigation); Sheehan Decl. para. 4 (17-year public interest attorney attesting that none of fourteen Northern California legal services firms would take Title VII class action cases). Plaintiffs have amply demonstrated the "general dearth of counsel willing to accept [Title VII] suits...." *McKenzie v. Kennickell,* 684 F.Supp. 1097, 1103 (D.D.C.1988), *aff'd,* 875 F.2d 330 (D.C.Cir.), *reh'g denied,* 884

F.2d 1405 (D.C.Cir.1989).

Defendants also argue that there is no evidence that any class counsel were themselves motivated by the prospect of a fee enhancement. This argument is troubling. On this theory, the self-aggrandizing attorney would be rewarded; the altruistic would be penalized. Again, defendants seek an overly particularized standard. Plaintiffs are not required to establish the precise motivation of the counsel whom they ultimately retain. As the D.C. Circuit noted in *McKenzie,* 875 F.2d at 338, such a ***1435** requirement would lead to differential treatment of public interest firms in fee petitions, a result condemned by the Supreme Court in *Blum,* 465 U.S. at 894, 104 S.Ct. at 1546 (1984) [FN14]. Plaintiffs will meet the requirements of *Delaware Valley II* if they can satisfy the general standard set forth above.

> FN14. The fee applicants also cite *Blanchard v. Bergeron,* 489 U.S. 87, 93, 109 S.Ct. 939, 944, 103 L.Ed.2d 67 (1989) as support for the argument that whether or not counsel accepted the case in anticipation of a fee enhancement is irrelevant. Although the proposition is correct, the case cited is inapposite. In *Blanchard,* the Court ruled that "[t]he attorney's fee provided for in a contingent fee agreement is not a ceiling upon the fees recoverable under § 1988." *Id.* 109 S.Ct. at 946.

Plaintiffs' counsel, as well as numerous declarants including two of the unsuccessfully solicited attorneys, attested to the fact that the potential for a fee multiplier would improve the ability to attract counsel to civil rights cases. Hulett Decl. para. 22; Lee Decl. para. 10; Beasley Decl. para. 4; Moore Decl. para. 5; Baller Decl. para. 15.

Furthermore, there is sufficient authority on the difficulty in finding counsel for Title VII cases in the San Francisco area without an enhancement. In *Fadhl II,* the Ninth Circuit recognized "the extraordinary difficulty [plaintiff] encountered in retaining counsel, and the manifest need in San Francisco for fee enhancement in civil rights cases." *Fadhl II,* 859 F.2d at 651; *accord, Clark v. City of Los Angeles,* 803 F.2d at 991 (upward adjustment justified where at least 10 attorneys had previously turned down case); *Bradshaw v. United States Dist. Court,* 742 F.2d 515, 516 (9th Cir.1984) (20 attorneys reject case, court refers to district court's finding that chief reason was lack of compensation for time-consuming, complex litigation); *Bucci v. Chromalloy,* 53 Empl.Prac.Dec. (CCH) ¶ 39,882 at 62,300 (N.D.Cal. Sept. 15, 1989). The foregoing authority, declarations and affidavits abundantly demonstrate the difficulty in obtaining counsel. The existence of an enhancement may motivate more attorneys to accept Title VII cases.

B. Market Treatment of Contingent Fee Cases

The second prong of the inquiry into the availability of a multiplier focuses on how the relevant market compensates for the risk of loss incurred by plaintiffs' counsel [FN15]. *Delaware Valley II,* 483 U.S. at 733, 107 S.Ct. at 3090 (O'Connor, J., concurring). Once such a determination has been made for the relevant market, it must control future cases. *Id.* Consequently, this court need not engage in any pioneering analysis on market compensation, for it has already been aided by other courts in this district.

> FN15. The City engages in additional argument over the riskiness of this particular case. But the award of a contingency-based multiplier does not depend upon the riskiness of a particular case before the court. "[C]ompensation for contingency must be based on the difference in market treatment of contingent fee cases *as a class,* rather than on

> an assessment of the 'riskiness' of any particular case." *Delaware Valley II,* 483 U.S. at 731, 107 S.Ct. at 3089 (O'Connor, J., concurring) (emphasis in original).

In *Fadhl II,* the Ninth Circuit upheld the district court's determination that the San Francisco market compensates for risk in Title VII cases through a 100% enhancement on fees. Although the City argues that *Fadhl II* is too fact specific to be dispositive on the multiplier issue, the court in *Fadhl II* expressly recognized that the multiplier conformed with precedent: "The 2.0 multiplier is consistent with the unrebutted testimony as to compensation required in the San Francisco market and is generally 'in line' with allowances in fee cases in this circuit." *Fadhl II,* 859 F.2d at 651 (citing *Clark,* 803 F.2d 987 (9th Cir.1986) (1.5 multiplier applied)). Other courts in this district have also allowed a multiplier of 2.0. *See, e.g., Bucci v. Chromalloy,* 53 Empl.Prac.Dec. (CCH) ¶ 39,882 at 62,300 (N.D.Cal. Sept. 15, 1989).[FN16]

> FN16. The plaintiffs also cite *Gomez v. City of Watsonville,* No. C-85-20319 WAI (N.D.Cal. April 11, 1990) for evidence of the 2.0 multiplier used in the San Francisco area. In *Gomez,* the district court enhanced the lodestar to reflect "the novelty of the issues in this action, the contingent nature of the representation by plaintiffs' counsel, the demonstrated lack of any other competent counsel available in the area, and the resounding success of plaintiffs' counsel's conducting of the case...." *Id. Gomez* taken alone is insufficient to establish the standard for the local multiplier. The court utilized a factor, "the novelty of the issues," which the Ninth Circuit has held cannot be the basis for awarding a multiplier. Furthermore, the court provided an extremely skimpy two-page analysis to support its fee award. Nevertheless, since *Gomez* also based the fee award on permissible grounds, it demonstrates the consistency of a 2.0 multiplier in this market.

***1436** Moreover, even absent existing precedent, there is ample evidence that a multiplier of 2.0 for contingency is typical in the San Francisco area. Cooper Decl. para. 8 (2.0 to 3.5 multiplier); Scarpulla Decl. para. 5 (2.0 to 4.0 multiplier); Supp. Saperstein Decl. para. 10 (2.0 multiplier); Mayer Decl. para. 8 (same); Baller Reply Decl. para. 4 (same). The City submitted opposing declarations of two attorneys whose firms' practices are limited almost exclusively to contingency fee cases. The attorneys each averred that their firms make no calculation based on a multiple of regular fees in deciding what cases to take. Cartwright Decl. at 3; Cox Decl. at 2. Those declarations taken alone are not decisive, given the prior case law and submissions of the fee applicants.

The City also contends that, notwithstanding the suitability of a 2.0 multiplier in other cases, Supreme Court and Ninth Circuit precedent preclude the application of a multiplier in this case.[FN17] However, none of the cases cited preclude the application of a multiplier; they simply establish that an enhancement is warranted in few instances and that several of the *Kerr* factors cannot serve as independent bases for such enhancement. *See, e.g., Jordan,* 815 F.2d at 1262 & n. 6. The court deems the present case to be one of the unusual instances where a multiplier is justified, and has computed the multiplier without relying on impermissible *Kerr* factors. Instead, it is based on the market treatment of contingent fee cases in this area.

> FN17. The City also argues that *Wood v. Sunn,* 865 F.2d 982, 991 (9th Cir.1988) establishes a cap of 33% for

> any multiplier awarded. However, *Wood* is no longer good law. It has been vacated. *Wood v. Sunn,* 880 F.2d 1011 (9th Cir.1989).

C. Additional Enhancement for Exceptional Success

Although the Supreme Court allows an additional enhancement to the lodestar due to exceptional success, it is only in rare cases. *Delaware Valley I,* 478 U.S. at 565-66, 106 S.Ct. at 3098-99; *Blum,* 465 U.S. at 897, 104 S.Ct. at 1548.

Ordinarily, consideration of the results obtained by a prevailing party is incorporated within the lodestar determination and cannot be used twice. *Delaware Valley I,* 478 U.S. at 565, 106 S.Ct. at 3098; *Jordan,* 815 F.2d at 1262 n. 6.

Plaintiffs argue that they have achieved "what no one else has been able to do for many years: obtain an order mandating the racial and sexual integration of the San Francisco Fire Department from top to bottom." Pl. MPA in Support of Motion for an Award of Reasonable Att. Fees (filed 12/2/89) at 22. They assert that this accomplishment, in light of the long and arduous resistance of the City and Local 798 as well as the inconsistent position of the United States Department of Justice in the latter stages of litigation, is truly exceptional. Moreover, they maintain that the consent decree is so extraordinary in scope that it is almost peerless. In support of this contention, they submit the declaration of Barry Goldstein, associate counsel for the NAACP Legal Defense and Educational Fund.

The City and Local 798 seek to minimize the contributions of plaintiffs' counsel to the results obtained. The City argues that the relief achieved was to be expected given the experience of plaintiffs' counsel. The City also maintains that the credit due to fee applicants for the results achieved is undercut by the fact that the consent decree reflects the joint efforts of plaintiffs' counsel, the City, the Justice Department (through its earlier partial summary judgment motion) and this court. However, the City's efforts came only after months of opposition and the Justice Department did not participate in the settlement negotiations. The City further contends that the decree does not represent original work of plaintiffs' counsel but instead follows from the decree in ***1437** *Officers for Justice v. Civil Service Comm'n of the City and County of San Francisco,* 473 F.Supp. 801 (N.D.Cal.1979), *aff'd,* 688 F.2d 615 (9th Cir.1982), *cert. denied,* 459 U.S. 1217, 103 S.Ct. 1219, 75 L.Ed.2d 456 (1983). For its part, Local 798 asserts that the fee applicants deserve less credit for the results achieved since the Union, rather than plaintiffs' counsel, was responsible for the inclusion of Hispanics and Asians in the promotional relief granted under the decree.

A detailed response to the arguments of counsel is unnecessary because the court declines to augment the fee award for exceptional success. That is not to say that the court does not consider the results achieved to be outstanding, despite the attempts of the City and Union to denigrate the work of plaintiffs' counsel. However the fee applicants' success was well accounted for in calculating their reasonable hourly rate. Moreover, the 2.0 multiplier awarded in recognition of the market treatment of contingency cases also serves to adequately compensate the fee applicants for their success herein.[FN18]

> FN18. The City also contends that any multiplier that is awarded should be reduced because of the asserted lack of difficulty in finding counsel for most of the clients and because the risk of not prevailing in this case diminished over time. However, as discussed earlier, a

> court must analyze both of these factors with respect to a class of cases, rather than with respect to the particular case before it.

IV. *Request for Attorney's Fees Against Local 798*

[13] Plaintiff-intervenors seek an award of fees against Local 798, a defendant-intervenor in this action. The Supreme Court held recently that district courts should "award Title VII attorney's fees against losing intervenors only where the intervenors' action was frivolous, unreasonable, or without foundation." *Independent Fed'n of Flight Attendants v. Zipes,* 491 U.S. 754, ----, 109 S.Ct. 2732, 2736, 105 L.Ed.2d 639 (1989). The rationale for this holding was that those who have not been found to have violated any person's civil rights should not be presumptively liable for fees. *Id.* 109 S.Ct. at 2737. Such liability would promote neither the general policy of making a wrongdoer compensate for injuries nor the Title VII goal of deterring discriminatory behavior.

Intervenors may still be subject to fee awards in certain circumstances, for example where they intervene in order to avoid liability for violation of the law and thus are functionally defendants.[FN19] However, no fee award is permissible against defendant-intervenors in the case at bar. While the attorneys' fee motion was under consideration, the Ninth Circuit affirmed this court's approval of the consent decree. In its affirmance, the circuit court rejected a request for attorney's fees on appeal sought by the plaintiff-intervenors against Local 798. The court stated:

> FN19. The flight attendants union in *Zipes* intervened to protect the seniority rights of its membership. The Court's ruling in *Zipes* shields from fee liability only those intervenors "who enter lawsuits to defend their own constitutional or statutory rights." 109 S.Ct. at 2738, n. 4. Consequently, intervenors remain liable for any actions taken which place them in a role as functional defendants.

> Here, as in *Zipes,* the Union intervened to protect the interests of incumbent employees, an act that was neither frivolous, unreasonable or without foundation. [citation omitted]. Following the reasoning in *Zipes,* we decline to award attorney fees as costs to Davis for this appeal.
> *Davis v. City and County of San Francisco,* 890 F.2d 1438, 1452 (9th Cir.1989), *petition for cert. filed* (Aug. 7, 1990) (No. 90-248).

The fee applicants argue that, even if the Union is not liable, the City should be required to pay the costs of the Local's intervention. However, *Zipes* precludes such a result. The *Zipes* majority noted that the losing defendant in a Title VII suit will be liable "for all of the fees expended by the plaintiff in litigating the claim against *him.* " *Zipes,* 109 S.Ct at 2736 (emphasis added). Both the concurring and dissenting opinions in *Zipes* agreed that, in using "him," the majority intended to disallow the levying of intervenor-related costs against the losing defendant. *Id.* at 2739, 2743-44 (concurring and dissenting opinions).

***1438** The fee applicants have submitted declarations allocating hours attributable solely to Union litigation activities. Pearl Decl. Re: Allocation of Hours to Local 798. In light of the clear unavailability of compensation from the Union, rather than being used to augment the overall fee award, the hours accounted for in those declarations must serve to reduce the award.[FN20] The deductions shall be allocated among the attorneys in accordance with their submissions as follows: Ms. Paterson-14.7 hours; Mr. McNeill-5.8 hours from Pearl, McNeill & Gillespie, 19.6 hours from the Culver Law Firm and 1.8 hours from his time as a sole practitioner; Ms. Marshall-22.1

hours; Ms. Hulett-27.7 hours; Mr. Lee-19.8 hours; Ms. Dunlap-4.7 hours; Mr. Galloway-8.1 hours; Mr. Pearl-24.5 hours.

> FN20. Plaintiff-intervenors bear some responsibility for the denial of their fee request from Local 798. Given the Union's early and contentious intervention, it is surprising that the plaintiff-intervenors never named it as a defendant, an act which ultimately would have resulted in fee liability.

Notwithstanding the general unavailability of fees from the defendant-intervenor in this action, a small subset of its litigation activity is subject to a fee award. Where an intervenor's action is frivolous, unreasonable or without foundation, an award is permissible. *Zipes,* 109 S.Ct. at 2736. In October 1986, on the eve of trial, the City abandoned the defense of the challenged H2, H4 and H20 examinations. Despite this, the Union stubbornly persisted in asserting the tests' validity. This court noted, in its Memorandum and Order of February 26, 1987, that the Union's position was "fundamentally misplaced and wholly without authority." *Davis I,* 656 F.Supp. at 282 n. 5. Accordingly, plaintiff-intervenors, as prevailing parties on the issue of the invalidity of the challenged examinations, are owed attorneys' fees from Local 798 to the extend that fees are attributable to the additional effort of Local 798. Plaintiff-intervenors are directed to submit a declaration detailing solely those hours spent responding to the Union's defense of the tests; fees will be awarded accordingly.

V. *Fee Award for Fee Counsel*

Time spent establishing the right to compensation for attorneys' fees is itself compensable. *In re Nucorp Energy, Inc.,* 764 F.2d 655, 661 (9th Cir.1985); *Manhart v. City of Los Angeles, Dept. of Water and Power,* 652 F.2d 904, 909 (9th Cir.1981), *vacated on other grounds,* 461 U.S. 951, 103 S.Ct. 2420, 77 L.Ed.2d 1310 (1983). The City accepts the right in general, but questions the need for separate fee counsel in this case, arguing that needless time was expended in orienting new counsel. The City further contends that fee counsel's requested hourly rate is excessive and unsupported.

The argument regarding time spent in orientation of new counsel is unpersuasive. Since it is permissible for separate counsel to litigate the fee award, it follows naturally that such counsel must familiarize themselves with the case in order to render competent service. The requested hours are well-documented and in fact the City lodges no complaint regarding any specific hours. Furthermore the total number of hours expended, just under 600, is quite reasonable given the vigor with which the City challenged the fee petition. The defendant's broad-based attack on the appropriateness of the hours spent is unavailing. Mr. Pearl's requested hours, save the 24.5 allocable solely to Local 798, are compensable.

The City's challenge of fee counsel's requested hourly rate likewise must fail. As in the case of the rate for plaintiffs' counsel, fee counsel's rate is determined by reference to the prevailing rate in the community for attorneys of like skill, reputation and experience. Attorney Pearl has adequately documented his two decades of experience as a public interest attorney and, most recently as an expert on court-awarded attorneys' fees. The prevailing rate for comparable attorneys is supported by declarations of Guy Saperstein (same years of experience as Pearl, $275 per hour) and Steve Mayer (attorneys with comparable experience at declarant's firm bill at $250 to $265 per hour). Those declarations, coupled with earlier declarations submitted in support of the rates of plaintiffs'***1439** counsel, sufficiently establish the reasonableness of the fee counsel's rates.

VI. *Compensable Costs*

The plaintiff-intervenors have included a request for costs in their fee application. The City opposes the award of any costs, arguing that plaintiff-intervenors could be awarded no more than $30 a day for expert witness fees and that they have not adequately documented any costs. As discussed below, the court finds these arguments to be unavailing.

A. Expert Witness Fees

The City maintains that this court must observe a cap of $30 per day on expert witness fees pursuant to *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 445, 107 S.Ct. 2494, 2499, 96 L.Ed.2d 385 (1987). The *Crawford* Court addressed the issue of the district courts' discretion to levy costs under Federal Rule of Civil Procedure 54(b) and held that: "absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920." *Id.* Section 1920(3) sets out witness fees as taxable costs and section 1821(b) limits witness fees to a $30 per day. Both the concurring and dissenting opinions in *Crawford* highlighted the fact that the Court did not have before it the issue of whether a court may award expert witness fees separately, under 42 U.S.C. § 1988. Nevertheless, a number of courts have extended the case to bar excess awards in civil rights and Title VII cases.[FN21] The City invites this court to follow them, citing *Pacific West Cable Co. v. City of Sacramento,* 693 F.Supp. 865, 876 (E.D.Cal.1988) for its argument that Ninth Circuit authority for expert witness fee awards is founded on Rule 54(b) and is thus discredited by *Crawford.*

> FN21. *Denny v. Westfield State College,* 880 F.2d 1465 (1st Cir.1989) (Title VII expert witness fee cap of $30 per day); *Gilbert v. City of Little Rock,* 867 F.2d 1062 (8th Cir.1989) (en banc decision affirming, by equally divided vote, lower court decision capping witness fees under § 1988 at $30 per day), *cert. denied,* 493 U.S. 812, 110 S.Ct. 57, 107 L.Ed.2d 25 (1989); *West Virginia Univ. Hosps. v. Casey,* 885 F.2d 11, 34 (3d Cir.1989) (section 1988 witness fee cap $30 per day), *cert. denied,* 496 U.S. 936, 110 S.Ct. 3213, 110 L.Ed.2d 661 (1990); *Sevigny v. Dicksey,* 846 F.2d 953, 959 (4th Cir.1988) (" § 1988 does not provide statutory authority for the awarding of compensation for non-legal experts"); *Noble v. Herrington,* 732 F.Supp. 114, 119 (D.D.C.1989) (Title VII cap of $30 per day).

In dicta, the *Pacific West* court considered and rejected the propriety of an award of witness fees in excess of the statutory limit after *Crawford.* The court noted that the Ninth Circuit approach on fees and costs in Title VII cases is to evaluate attorneys' fees and certain costs under 42 U.S.C. § 2000e-5(k), but to evaluate witness fees separately under Rule 54(b) and related statutes. *Pacific West Cable,* 693 F.Supp. at 876 (citing *Thornberry v. Delta Air Lines,* 676 F.2d 1240, 1245 (9th Cir.1982), *vacated on other grounds,* 461 U.S. 952, 103 S.Ct. 2421, 77 L.Ed.2d 1311 (1983)). Since *Crawford* curtailed the award of excess witness fees under Rule 54(b), the court reasoned: "unless the Ninth Circuit, when squarely presented with the issue, finds the authority for recovery of these costs within section 1988, it appears that those excess costs are not now recoverable." *Pacific West Cable,* 693 F.Supp. at 876. The court agrees that, if excess witness fees are unavailable under section 1988, they are arguably also unavailable under section 2000e-5(k), since the two fee-shifting statutes "are to be interpreted alike." *Zipes,* 109 S.Ct. at 2735 n. 2. However, this court rejects the

City's argument that such fees are noncompensable in this case, instead finding common cause with those courts ruling to the contrary.

Since *Crawford,* the Ninth Circuit has ruled that out-of-pocket litigation expenses are still reimbursable as part of a civil rights attorney's fee, although the court has not specifically held that witness fees are included. *United Steelworkers v. Phelps Dodge Corp.,* 896 F.2d 403, 407 (9th Cir.1990). The award of expert witness fees for civil rights attorneys is consistent with the recognition in this circuit that, in order to fully effectuate the congressional purposes behind Title VII, courts must have "the option to allow plaintiffs to recover***1440** the full costs of litigation." *Thornberry,* 676 F.2d at 1245.

In *Friedrich v. City of Chicago,* 888 F.2d 511 (7th Cir.1989), *petition for cert. filed* (Jan. 29, 1990) (No. 89-1230), the court ruled that *Crawford's* limit on witness fees only applied to time spent by a witness in court. The court noted that non-testimonial time spent by experts, in particular time spent educating counsel, was analogous to paralegal time which was found to be compensable in *Missouri v. Jenkins,* 491 U.S. 274, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989). The court reasoned that "[t]o forbid the shifting of the expert's fee would encourage underspecialization and inefficient trial preparation, just as to forbid shifting the cost of paralegals would encourage lawyers to do paralegals' work." *Friedrich,* 888 F.2d at 514. Accordingly, the court held that, regardless of the compensability of time spent on the stand by an expert, time spent in educating an attorney was essentially part of the attorney's work product and was thus compensable as part of reasonable fees. *Id.; accord, Denny v. Westfield State College,* 880 F.2d 1465, 1474 (1st Cir.1989) (Breyer, J., concurring) (expert's fee in Title VII case may involve far more than simply appearing in court and could be work that falls within the scope of a reasonable attorneys' fee). Moreover, the court noted that time spent preparing to testify may also serve to educate counsel and thus may be compensable on that basis.

[14] In the present case, the expert witness fees for which compensation is sought are perhaps better denominated consulting fees. Both of the relevant experts used by the fee applicants submitted affidavits; neither testified in court, though the City did depose Mr. Baller. Since no fees are sought for actual in-court attendance, the limit of section 1821 of "$30 per day for each day's attendance" is inapplicable and reasonable fees are awardable.

Moreover, although this court need not reach the issue of the effect of *Crawford* on fee awards for in-court expert witnesses in Title VII cases, several courts have rejected its extension. *Friedrich,* 888 F.2d at 518 (Congress intended that section 1821 cap does not apply to section 1988-based fees); [FN22] *Williams v. City of New York,* 728 F.Supp. 1067, 1071-72 (S.D.N.Y.1990) ($30 per day limit inapplicable to section 1988 cases); *Maturo v. National Graphics, Inc.,* 722 F.Supp. 916, 932-33 (D.Conn.1989) (*Crawford* 's limit on witness fees not applicable where fees awarded under fee-shifting statute); *Black Grievance Comm. v. Philadelphia Elec. Co.,* 690 F.Supp. 1393, 1403 (E.D.Pa.1988) (interpreting *Crawford* to mean that, as to section 1988, the $30 per day limitation is repealed); *cf. Mennor v. Fort Hood Nat'l Bank,* 829 F.2d 553, 557 (5th Cir.1987) (42 U.S.C. § 2000e-5(k) does not overrule limit on statutory costs but includes reasonable out-of-pocket expenses normally charged to fee-paying clients). [FN23]

> FN22. The *Friedrich* court ruled that, in enacting section 1988, Congress intended to restore courts' equitable power to shift litigation expenses in the

aftermath of a contrary ruling in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). The *Friedrich* court reasoned further that, given the long-held understanding that fee-shifting pursuant to equitable powers does not come within the ambit of statutory caps, Congress' enactment of section 1988 placed civil rights fees outside the reach of those limits as well. *Friedrich,* 888 F.2d at 518. This holding is limited to section 1988, however its extension to Title VII is plausible, given the identical language and similar legislative purpose of section 2000e-5(k).

FN23. *SapaNajin v. Gunter,* 857 F.2d 463, 465 (8th Cir.1988) provides further support for the general proposition that witness fees in civil rights cases are beyond the reach of section 1821. In *SapaNajin,* the plaintiff prevailed on a First Amendment claim and sought expert witness fees as an expense under section 1988. In answer to the defendant's contention that *Crawford* capped such fees, the court explained that, since the fees were not awarded as a taxation of costs under 28 U.S.C. § 1821, but rather as an expense under section 1988, the $30 per day limit was inapplicable. *But see Gilbert v. City of Little Rock,* 867 F.2d 1062 (8th Cir.1989) (en banc decision affirming, by equally divided vote, lower court decision capping witness fees under § 1988 at $30 per day), *cert. denied,* 493 U.S. 812, 110 S.Ct. 57, 107 L.Ed.2d 25 (1989).

The City's contrary authority, *Seven Gables Corp. v. Sterling Recreation Org.,* 686 F.Supp. 1418, 1421 (W.D.Wash.1988), is unpersuasive,***1441** as it involved interpretation of the Clayton Act, 15 U.S.C. § 15(a) and thus did not take into account the legislative purposes of Title VII and section 1988.

[15] In light of the foregoing authorities and the policy of encouraging litigation of Title VII suits through adequate compensation, the court finds that reasonable witness fees, at least for activities other than court attendance, if not more, are available as a component of attorneys' fees under Title VII and section 1988. Nevertheless, there is some limit on those fees. Under Ninth Circuit precedent, where witness fees are taxed under Rule 54(b), they are available only upon a finding that the expert testimony was crucial or indispensable in establishing the prevailing party's case. *United States v. City of Twin Falls,* 806 F.2d 862, 878 (9th Cir.1986), *cert. denied,* 482 U.S. 914, 107 S.Ct. 3185, 96 L.Ed.2d 674 (1987). Although the witness fees in the case at bar are sought as a part of reasonable attorneys' fees under Title VII, not under Rule 54(b), the court adheres to the "indispensability" standard and limits the award to solely Mr. Baller's fees.

Mr. Baller's testimony provided critical support for the plaintiffs' position on the need for a multiplier to attract competent counsel. The court accorded Mr. Baller's testimony considerable weight, given that the bulk of the remaining relevant testimony was less objective, coming from plaintiffs' counsel. Mr. Goldstein's testimony, on the other hand, was directed at the exceptional nature of the success obtained. Given that the court found that a risk-based multiplier was sufficient, without a supplemental enhancement for exceptional success, Mr. Goldstein's affidavit was not crucial. The amount of his fee, $6,820, will not be awarded to plaintiffs' counsel.

B. Documentation of Costs

The City contends that the costs requested by the fee applicants are inadequately docu-

mented. It asserts that Mr. McNeill's submissions include unexplained travel costs, that the Lawyers' Committee for Urban Affairs has provided minimal documentation and that Equal Rights Advocates has not established that its claimed expenses are compensable.

However, the City's position is untenable. The plaintiff-intervenors provided approximately one hundred pages of receipts in support of their cost figures in response to the City's discovery request. Pl. Reply MPA at 34. *See* Response to Request for Production of Documents, Ex. 30. Moreover, the magnitude of costs requested given the scope and duration of the litigation, is reasonable.[FN24]

FN24. The City also argued that plaintiff-intervenors failed to segregate allowable costs from disallowed ones. However, given that both expert witness costs and other costs have been allowed, no segregation was needed and this argument fails.

CONCLUSION

For the foregoing reasons, the court GRANTS in part and DENIES in part plaintiff-intervenors' motion for an award of reasonable attorneys' fees. The fee applicants are awarded fees and costs as set forth in detail in the accompanying appendix. The lodestar amount of attorneys' fees is $1,746,681.63. Application of the 2.0 multiplier yields a total fee award of $3,493,363.26. Costs are awarded in the amount of $74,916.64.

IT IS SO ORDERED.

***1442** APPENDIX LODESTAR CHART
(Through September 18, 1989)

ATTORNEYS	YEAR ADMITTED	HOURLY RATE	HOURS	UNADJUSTED LODESTAR FEE	5% BILLING ADJUSTMENT	LODESTAR FEE AWARDED	ENHANCED FEE AWARDED
Asian Law Caucus							
E. Lee	1979	$170	598.55	$101,753.50	[$5,087.68]	$96,665.83	$193,331.66
ATTORNEYS	**YEAR ADMITTED**	**HOURLY RATE**	**HOURS**	**UNADJUSTED LODESTAR FEE**	**5% BILLING ADJUSTMENT**	**LODESTAR FEE AWARDED**	**ENHANCED FEE AWARDED**
Culver Law Firm							
W. McNeill	1971	$230	357.95	$ 82,328.50	[$4,116.43]	$ 78,212.08	$ 156,424.16
Mary C. Dunlap	1972	230	364.00	83,720.00	[4,186.00]	79,534.00	159,068.00
Employment Law Center							

W. McNeill	1971	230	176.90	40,687.00	[2,034.35]	38,652.65	77,305.30
Equal Rights Advocates							
S. Marshall	1979	170	1053.85	179,154.50	[8,957.73]	170,196.78	340,393.56
T. Chaw	1980	160	109.90	17,584.00	[879.20]	16,704.80	33,409.60
D. Hitchens	1977	190	62.50	11,875.00	[593.75]	11,281.25	22,562.50
Russell Galloway	1969	235	617.90	145,206.50	[7,260.33]	137,946.18	275,892.36
MALDEF							
T. Bustillos	1980	160	67.50	10,800.00	[540.00]	10,260.00	20,520.00
F. Garcia-Rodriguez	1980	160	85.30	13,648.00	[682.40]	12,965.60	25,931.20
D. Hulett	1985	110	880.80	96,888.00	[4,844.40]	92,043.60	184,087.20
William C. McNeill	1971	230	190.65	43,849.50	[2,192.48]	41,657.03	83,314.06
Pearl, McNeill & Gillespie							
W. McNeill	1971	230	1813.85	417,185.50	[20,859.28]	396,326.23	792,652.46
S.F. Lawyers' Committee for Urban Affairs							
E. Jefferson Paterson	1975	220	1523.70	335,214.00	[16,760.70]	318,453.30	636,906.60
M. Blanco	1984	120	486.55	58,386.00	[2,919.30]	55,466.70	110,933.40
Law Offices of Richard M. Pearl							
R. Pearl	1969	235	374.85	88,089.75	[4,404.88]	83,685.26	167,370.52
L. Hess	1986	100	60.20	6,020.00	[301.00]	5,719.00	11,438.00
E. O'Donnell		90	44.45	4,000.05	[200.00]	3,800.05	7,600.10
		70	76.60	5,362.00	[268.10]	5,093.90	10,187.80

Post December 2, 1988 Work on Fee Issue							
E. Jefferson Paterson	1975	220	49.07	10,795.40	[539.77]	10,255.63	20,511.26
W. McNeill	1971	230	39.70	9,131.00	[456.55]	8,674.45	17,348.90
S. Marshall	1979	170	25.30	4,301.00	[215.05]	4,085.95	8,171.90
M. Dunlap	1972	230	23.90	5,497.00	[274.85]	5,222.15	10,444.30
R. Galloway	1969	235	46.59	10,948.65	[547.43]	10,401.22	20,802.44
D. Hulett	1985	110	7.40	814.00	[40.70]	773.30	1,546.60
ATTORNEY'S FEES SUBTOTAL:						$1,694,076.802	$3,388,153.60
PARALEGALS/ LAW STUDENTS							
Equal Rights Advocates							
(Several)		70	383.15	26,820.50	[134.13]	25,479.48	50,958.96
MALDEF							
M. Adams		70	74.30	5,201.00	[260.05]	4,940.95	9,881.90
Law Offices of Mary C. Dunlap							
E. Herzstein		70	23.50	1,645.00	[82.25]	1,562.75	3,125.50
S.F. Lawyers' Committee for Urban Affairs							
V. Edwards		$70	180.00	$12,600.00	[$ 630.00]	$11,970.00	$23,940.00
M. Adams		70	105.00	7,350.00	[367.50]	6,982.50	13,965.00
Pearl, McNeill & Gillespie							
L. Hess		70	8.10	567.00	[28.35]	538.65	1,077.30
Law Offices of Richard Pearl							

D. Collins	70	10.00	700.00	[35.00]	665.00	1,330.00
G. Gough	70	7.00	490.00	[24.50]	465.50	931.00
PARALEGALS/LAW STUDENTS SUBTOTAL:					$52,604.83	$105,209.66
FEES TOTAL:					$1,746,681.63	$3,493,363.26

COSTS

(through May 1988, plus fee-related costs)

FIRM	TOTAL
Culver Law Firm	661.08
Mary C. Dunlap	396.65
Employment Law Center	263.91
Equal Rights Advocates	14,758.74
Russell Galloway	264.38
Richard M. Pearl	1,242.26
Pearl, McNeill & Gillespie	12,203.54
SF Lawyers' Committee for Urban Affairs	39,726.08
Services of Morris J. Baller	5,400.00
COSTS TOTAL:	$74,916.64

N.D.Cal.,1990.
U.S. v. City and County of San Francisco
748 F.Supp. 1416, 55 Empl. Prac. Dec. P 40,343

END OF DOCUMENT

512 F.3d 555, 183 L.R.R.M. (BNA) 2413, 155 Lab.Cas. P 10,960, 42 Employee Benefits Cas. 2057, 08 Cal. Daily Op. Serv. 159, 2008 Daily Journal D.A.R. 180, Pens. Plan Guide (CCH) P 24001Z
(Cite as: 512 F.3d 555)

H

United States Court of Appeals,
Ninth Circuit.

UNITED STEELWORKERS OF AMERICA; Alberto Aguilar, Jr.; Angel L. Arellano; Jesus M. Canaba; Francisco Carreon; Franklin Davila; Jaime O. Frausto; Armando B. Hidalgo; Santiago Martinez; Hector Ochoa; Ismael Ortega; Mauricio Ortega; Lorenzo Ramirez; Sergio Ramirez; Ernesto Robles; Carlos Rodriguez; Roberto Romo; Ramon Sanchez; Arturo R. Saucedo; United Steelworkers of America, AFL-CIO, CLC; Jesus M. Uranga; Ruben R. Villarreal, Plaintiffs-Appellees,
v.
RETIREMENT INCOME PLAN FOR HOURLY-RATED EMPLOYEES OF ASARCO, INC.; ASARCO, Inc., Defendants-Appellants.
Alberto Aguilar, Jr.; Angel L. Arellano; Jesus M. Canaba; Francisco Carreon; Franklin Davila; Jaime O. Frausto; Armando B. Hidalgo; Santiago Martinez; Hector Ochoa; Ismael Ortega; Mauricio Ortega; Lorenzo Ramirez; Sergio Ramirez; Ernesto Robles; Carlos Rodriguez; Roberto Romo; Ramon Sanchez; Arturo R. Saucedo; United Steelworkers of America, AFL-CIO, CLC; Jesus M. Uranga; Ruben R. Villarreal, Plaintiffs-Appellees,
v.
Retirement Income Plan for Hourly-Rated Employees of ASARCO, Inc., Defendant-Appellant,
and
ASARCO, Inc., Defendant.

Nos. 05-16833, 06-15862.
Argued and Submitted Oct. 15, 2007.
Filed Jan. 7, 2008.

Background: Union and individual retirees sued employer and employer-administered retirement plan, seeking to compel arbitration of retirees' entitlement to additional benefits, and asserting claims under Labor Management Relations Act (LMRA) and Employee Retirement Income Security Act (ERISA). The United States District Court for the District of Arizona, David C. Bury, J., granted summary judgment for union and retirees. Following employer's filing bankruptcy petition, the District Court awarded attorney fees to union, and denied retirement plan's motion for stay. Plan appealed.

Holdings: The Court of Appeals, Wallace, Senior Circuit Judge, held that:
(1) presumption of arbitrability applied;
(2) LMRA claim was timely;
(3) retirees could take advantage of retirement plan's arbitration procedure; and
(4) union was not estopped from opposing motion for stay.

Affirmed in part and remanded in part.

West Headnotes

[1] Labor and Employment 231H 1549(2)

231H Labor and Employment
231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)3 Arbitration Agreements
231Hk1543 Construction and Operation
231Hk1549 Matters Subject to Arbitration Under Agreement
231Hk1549(2) k. Arbitration Favored; Presumption of Arbitrability. Most Cited Cases

There is presumption in favor of arbitrability in disputes arising from collective bargaining agreements.

[2] Labor and Employment 231H ⚿ 1549(12)

231H Labor and Employment
231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)3 Arbitration Agreements
231Hk1543 Construction and Operation
231Hk1549 Matters Subject to Arbitration Under Agreement
231Hk1549(12) k. Pensions and Other Benefits. Most Cited Cases

Presumption of arbitrability applied in union's LMRA and ERISA action against employer and employer-administered retirement plan, seeking to compel arbitration of retirees' entitlement to additional benefits; threat of economic disruption was present to substantial degree, since union was party seeking arbitration, had filed complaint, and was actively pursuing litigation. Labor Management Relations Act, 1947, § 1 et seq., 29 U.S.C.A. § 141 et seq. ; Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[3] Labor and Employment 231H ⚿ 1549(12)

231H Labor and Employment
231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)3 Arbitration Agreements
231Hk1543 Construction and Operation
231Hk1549 Matters Subject to Arbitration Under Agreement
231Hk1549(12) k. Pensions and Other Benefits. Most Cited Cases

In LMRA and ERISA dispute between union and employer concerning retirement benefits, which was presumed arbitrable and which union sought to compel arbitration of, union's interpretation of retirement plan documents as requiring arbitration was reasonable, and thus arbitration was appropriate; union's interpretation did not have to be shown to be correct, or more persuasive than plan's contrary contention that dispute was required to be settled via internal grievance procedure only. Labor Management Relations Act, 1947, § 1 et seq., 29 U.S.C.A. § 141 et seq.; Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[4] Limitation of Actions 241 ⚿ 58(1)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(A) Accrual of Right of Action or Defense
241k58 Liabilities Created by Statute
241k58(1) k. In General. Most Cited Cases

Six-month limitations period for union's LMRA action against employer and employer-administered retirement plan, seeking to compel arbitration of retirees' entitlement to additional benefits, commenced when employer refused to arbitrate upon union's request, not earlier when employer by letter rejected grievance filed under collective bargaining agreement (CBA); letter was not clear refusal to arbitrate, especially since it directed union to "separate claims procedure" for retirement plan. Labor Management Relations Act, 1947, § 1 et seq., 29 U.S.C.A. § 141 et seq.

[5] Labor and Employment 231H ⚿ 483(2)

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(C) Fiduciaries and Trustees
231Hk479 Notice and Disclosure Requirements
231Hk483 Summary Plan Description
231Hk483(2) k. Inconsistency with Plan Document. Most Cited

In union's LMRA and ERISA action against employer and employer-administered retirement plan, seeking to compel arbitration of retirees' entitlement to additional benefits, court would defer to language of employer-administered retirement plan where it conflicted with summary plan description (SPD), on question of whether retirees qualified as "employees" able to take advantage of plan's arbitration procedure; plan agreement was more favorable to retirees, and interpreting SPD as foreclosing retirees' post-retirement arbitration of retirement benefits disputes resulted in absurdity. Labor Management Relations Act, 29 U.S.C.A. § 141 et seq.; Employee Retirement Income Security Act, 29 U.S.C.A. § 1001 et seq.

[6] Federal Courts 170B ⚿813

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk813 k. Allowance of Remedy and Matters of Procedure in General. Most Cited Cases

Court of Appeals reviewed for abuse of discretion district court's denial of motion for stay.

[7] Estoppel 156 ⚿68(2)

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k68 Claim or Position in Judicial Proceedings
156k68(2) k. Claim Inconsistent with Previous Claim or Position in General. Most Cited Cases

Union that brought LMRA and ERISA action against employer and employer-administered retirement plan seeking to compel arbitration of retirees' entitlement to additional benefits was not estopped from opposing plan's motion for stay, which followed employer's filing bankruptcy petition, based on union's earlier position that employer was proper defendant; union's arguing that employer was proper defendant was not equivalent to arguing that employer was necessary party to litigation, and court never had held that employer was necessary party. Labor Management Relations Act, 1947, § 1 et seq., 29 U.S.C.A. § 141 et seq.; Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[8] Estoppel 156 ⚿68(2)

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k68 Claim or Position in Judicial Proceedings
156k68(2) k. Claim Inconsistent with Previous Claim or Position in General. Most Cited Cases

Factors generally considered in determining whether to apply doctrine of judicial estoppel are whether: (1) party's later position is clearly inconsistent with its earlier position; (2) party achieved success in prior proceeding; and (3) party asserting inconsistent position would achieve unfair

advantage if not estopped.

[9] Courts 106 ⚿99(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k99 Previous Decisions in Same Case as Law of the Case
106k99(1) k. In General. Most Cited Cases
Law of the case acts as bar only when issue in question was actually considered and decided by first court.

[10] 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 reviewed for abuse of discretion district court's decision to award attorney fees in ERISA action. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[11] Labor and Employment 231H ⚿720

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(K) Actions
231HVII(K)7 Costs and Attorney Fees
231Hk719 Amount
231Hk720 k. In General. Most Cited Cases
District court, in calculating attorney fee award to prevailing union in its ERISA action against employer and employer-administered retirement plan, was not required to use as reasonable hourly rate the rate that counsel actually had charged union; correct starting point was prevailing market rate. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[12] 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 fees bears burden of documenting appropriate hours expended in litigation, and must submit evidence in support of those hours worked; however, attorneys are not required to record in great detail how each minute of their time was expended.

***558** John Alan Doran and Leigh Anne Ciccarelli, Greenberg Traurig, LLP, Phoenix, AZ, for the appellants.

Robert J. Stock, Joshua F. Young and Jay Smith, Gilbert & Sackman, Los Angeles, CA, for the appellees.

Appeal from the United States District Court for the District of Arizona; David C. Bury, District Judge, Presiding. D.C. Nos. CV-04-00010-DCB/JJM, CV-04-00010-DCB.

Before: J. CLIFFORD WALLACE and JOHNNIE B. RAWLINSON, Circuit Judges, and JANE A. RESTANI,[FN*] Judge.

FN* The Honorable Jane A. Restani

, Chief Judge, United States Court of International Trade, sitting by designation.

WALLACE, Senior Circuit Judge:

The Retirement Income Plan for Hourly-Rated Employees of ASARCO, Inc. (the Plan) appeals from the district court's summary judgment in favor of United Steelworkers of America, AFL-CIO (the Union), and twenty individually named retirees (the named appellees). The Plan also appeals from the district court's order granting attorney's fees and denying its motion to stay. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm the district court's summary judgment and its denial of the Plan's motion to stay. Although we agree with the district court's award of attorney's fees, we remand to determine what effect, if any, the automatic stay in place for ASARCO, Inc. (ASARCO) should have on payment of the award.

I.

ASARCO owns and operates a copper smelter plant in El Paso, Texas. Beginning in early 1999, the company substantially reduced operations at the plant, and began laying off employees. Among those laid off were the twenty named appellees. Under the relevant pension plan documents, these employees were entitled to collect immediate, unreduced retirement benefits if they qualified for "70/80" benefits. These benefits accrued to any claimant who could demonstrate that (1) he was laid off due to a permanent shutdown, (2) he was younger than 55 years, and (3) his age plus years of "Continuous Service" equaled at least 80. All of the named appellees were under the age of 55 at the time they applied for benefits. Applicants over the age of 55 were only required to demonstrate an age plus years of Continuous Service equal to 70, hence the term "70/80 benefits."

In 2001, after intense negotiations, the Union and ASARCO agreed that the staff reductions at ASARCO's El Paso plant would be treated as a "permanent shutdown" for purposes of calculating pension benefits. When the named appellees subsequently applied for 70/80 benefits, however, ASARCO denied their claims on the ground that their combined age and years of Continuous Service totaled less than 80.

The plan documents provide that employees may continue to accrue years of Continuous Service for up to two years after they are laid off. This concept is known as "creep," as it allows otherwise ineligible employees to "creep" into pension benefits. Although the combined age and years of Continuous Service of the named appellees did not total more than 80 at the commencement of layoff, at least some of the individuals would be entitled to 70/80 benefits if an additional two years of "creep" were added to the calculation.

On August 21, 2002, the Union filed a grievance on behalf of the named appellees,***559** arguing that ASARCO had violated the collective bargaining agreement by failing to pay 70/80 benefits to the named appellees. ASARCO denied the grievance on September 26, 2002. A year later, the Union submitted a request for a panel of arbitrators to the Federal Mediation and Conciliation Service. When ASARCO refused to arbitrate, the Union filed a complaint in the district court to compel arbitration of the benefits claims under section 301(a) of the Labor Management Relations Act (LMRA) and section 502 of the Employee Retirement Income Security Act (ERISA). The complaint named both AS-

ARCO and the Plan as defendants.

The district court entered summary judgment in favor of the Union. With respect to the Union's ERISA claims, however, the court held that the Union was not a proper party, and gave the Union ten days to substitute the named appellees in an amended complaint. The court made its summary judgment expressly contingent on this substitution.

The Union then filed an amended complaint adding the named appellees. Four days later, ASARCO filed for bankruptcy, resulting in an automatic stay of proceedings with respect to ASARCO pursuant to 11 U.S.C. § 362(a). The Plan then filed a motion in the district court to stay all proceedings. Meanwhile, the Union filed a motion for attorney's fees and costs, seeking $143,156.25. In an order dated March 13, 2006, the district court awarded $140,556.25 in attorney's fees and denied the Plan's motion to stay.

The Plan has timely appealed from the district court's summary judgment and from the order denying its motion to stay and awarding attorney's fees. Both appeals were consolidated.

II.

We review the district court's summary judgment *de novo*. *See Buono v. Norton*, 371 F.3d 543, 545 (9th Cir.2004). Our review in this case is limited. We are not required to determine whether the named appellees were *entitled* to 70/80 benefits, only whether they had the right to arbitrate their claims. *See AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649-50, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). Both parties have presented a plausible interpretation of the relevant plan documents, and the outcome of this case ultimately turns on whether we apply a presumption of arbitrability.

A.

[1] In 1960, the Supreme Court decided a series of cases known as the Steelworkers Trilogy: *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). The Court held that national labor policy favored arbitration, and courts should therefore apply a presumption in favor of arbitration to disputes arising from collective bargaining agreements. The Court instructed:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

Warrior & Gulf Navigation Co., 363 U.S. at 582-83, 80 S.Ct. 1347 (footnote omitted). The Court reaffirmed this principle more recently in *AT & T Technologies*, 475 U.S. at 650, 106 S.Ct. 1415. The Court held ***560** that the presumption of arbitrability "recognizes the greater institutional competence of arbitrators in interpreting collective bargaining agreements, furthers the national labor policy of peaceful resolution of labor disputes and thus best accords with the parties' presumed objectives in pursuing collective bargaining." *Id.* at 650, 106 S.Ct. 1415 (internal citation and quotations omitted).

[2] The Plan argues that the presumption of arbitrability is inapplicable here because the named appellees are retired. As such, they "pose no risk of labor disruption," and their claims "do not implicate federal labor policy." To support this argument, the Plan relies on the Eighth Circuit case of *Anderson v. Alpha Portland Industries, Inc.*, 752 F.2d 1293 (8th Cir.1985).

In *Anderson,* a group of union employees worked under a collective bargaining agreement with a cement company, which provided for health insurance benefits upon retirement. After the employees retired, however, the plant closed, the local union dissolved, and the company terminated insurance benefits for retirees. *Id.* at 1294. When the retirees sought redress in federal court, the district court dismissed their case on the grounds that they had not exhausted the administrative remedies in their contract, which called for mandatory arbitration. *Id.* at 1295. The Eighth Circuit, *en banc,* reversed and held that the presumption of arbitrability did not apply to the retirees. One of the reasons the court gave for disregarding the presumption was that "[r]etirees have no recourse to economic weapons other than a hope that active employees will strike on their behalf." *Id.* at 1298.

In *Anderson,* the retirees posed little threat of economic disruption, because their union had dissolved and their plant had closed. The union was not a party in the proceedings, and the district court was effectively forcing the retirees into arbitration against their will. In contrast, other circuits have explicitly *applied* the presumption of arbitrability in cases where a union is actively seeking arbitration on behalf of its retirees. In *Cleveland Electric Illuminating Co. v. Utility Workers, Local 270,* 440 F.3d 809, 814 (6th Cir.2006), a union filed a grievance on behalf of a group of retirees. The union argued that the presumption of arbitrability should apply, "because it was the Union not the retirees who filed the grievance and the dispute is actually between the Union and Cleveland Electric." *Id.* The court agreed, and held that "the presumption of arbitrability applies to disputes over retirees' benefits if the parties have contracted for such benefits in their collective bargaining agreement ..." *Id.* at 816.

Likewise, in the recent case of *United Steelworkers of America v. Cooper Tire & Rubber Co.,* 474 F.3d 271 (6th Cir.2007), the Sixth Circuit specifically rejected the argument that retirees pose no threat of economic disruption. The court held:

> Because it is the Union, not a third party beneficiary, that brought the grievance ... there is recourse to economic weapons such as striking. Moreover, even though the class consists of all non-Union member Retirees and Survivors, the Union still has an interest in resorting to economic weapons in order to maintain the integrity of the bargaining process.

Id. at 281. Finally, in *United Steelworkers of America v. Canron, Inc.,* 580 F.2d 77 (3d Cir.1978), a case cited in *Anderson,* the Third Circuit explicitly applied the presumption of arbitrability when a union filed a grievance on behalf of a group of retirees. *Id.* at 82.

In the present case, it was the Union that sought arbitration, the Union that ***561** filed a complaint to compel arbitration, and the Union that actively pursued the litigation that followed. As a result, the threat of economic disruption is present to a much greater degree than it was in *Anderson,* and

this case is more analogous to *Cleveland Electric, Cooper Tire*, and *Canron*. Therefore, we will not depart from the rule established by the Supreme Court in the Steelworkers Trilogy, and we will apply the presumption of arbitrability in this case.

B.

[3] The Union and the Plan present competing interpretations of the relevant plan documents. The Plan characterizes the dispute over 70/80 benefits as a broad question of contract interpretation, one that is only properly resolved through the internal grievance procedure. The Union characterizes the dispute much more narrowly. It argues that the dispute is more akin to a ministerial disagreement over "age" and years of "Continuous Service."

To support its position, the Plan points to language in the first paragraph of the Summary Plan Description, which provides that all questions related to (1) "the interpretation of the Plan," (2) "eligibility of employees," and (3) "the amount of benefits payable in each individual case" are to be resolved through the internal grievance procedure. The Plan argues that the question of whether the named appellees can "creep" into coverage is ultimately a question of contract *interpretation,* one that will require an examination of the bargaining process that led to the plan documents.

In response, the Union cites language in the Pension and Disability Benefits Agreement which provides *arbitration* for disputes as to either "(a) the number of years of Continuous Service of an Employee" or "(b) the age of such Employee." The Union also points to language in the Summary Plan Description that describes arbitration as the "exclusive remedy" for disputes as to these two issues. Under the Union's interpretation, every employee is automatically entitled to two additional years of Continuous Service when he is laid-off. Therefore, when the retirees dispute the denial of their benefits, it is analytically no different than if ASARCO made a mistake as to an employee's numerical age or start-date of employment.

We need not decide which side presents the better argument. Once we apply the presumption of arbitrability, the question becomes much easier. We can only deny arbitration if it can be said "with positive assurance" that the dispute is "not susceptible of an interpretation" that would cause it to fall within the arbitration clause. *Warrior & Gulf Navigation Co.,* 363 U.S. at 582-83, 80 S.Ct. 1347. Whether the Union's interpretation is the more persuasive of the two, it is at the very least a reasonable interpretation of the relevant language. Therefore, we hold that the district court did not err when it entered summary judgment in favor of the Union.

C.

[4] The Plan offers two remaining arguments as to why arbitration is inappropriate. First, the company asserts that the Union's request for arbitration was untimely. We have imposed a six-month statute of limitations for claims under section 301 of the LMRA. *See Local Joint Exec. Bd. of Las Vegas, Bartenders Union Local 165 v. Exber, Inc.,* 994 F.2d 674, 675 (9th Cir.1993). This six-month period "begins to run from the time one party makes it clear that it will not submit the matter to arbitration." *Id.* (citation omitted).

***562** In August 2002, the Union filed a grievance under the collective bargaining agreement. On September 26, 2002, ASARCO sent a letter to the Union rejecting its grievance and stating "[t]hese issues are not an appropriate subject for the grievance

and arbitration process." The Plan argues that this letter constituted a clear refusal to arbitrate, and the statute of limitations for filing a claim under the LMRA expired long before the Union filed its claim. However, the September 26, 2002 letter, by its terms, only constituted a denial of the Union's request to arbitrate its collective bargaining agreement grievance. In fact, the letter specifically directs the Union to the "separate claims procedure" for the benefits plan. Thus, the district court did not err when it determined the Union's LMRA claim to be timely. Nor did the district court violate Rule 56 when it decided the question on summary judgment. The district court was only required to draw "all justifiable inferences" in favor of ASARCO, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), and the language in ASARCO's letter is quite clear.

[5] The Plan also argues that the retirees may not take advantage of the arbitration provision because they stopped being "employees" when they retired. Before we undertake a textual analysis of the relevant plan documents, it is important to recognize the practical ramifications of the Plan's argument. If the Plan is correct, then an employee who wants to challenge his pension can only do so *before* leaving the company, and *before* receiving a pension. If a recent retiree opened his first pension check and was surprised to find less than he had anticipated, he would be locked out of the very mechanism set up to resolve the dispute. With that in mind, we turn to the conflicting textual interpretations.

The Plan argues that retirees who wish to challenge their benefit calculations may only do so through the internal grievance procedure outlined in the Summary Plan Description. Under the terms of that document, the internal grievance procedure is available for "any application for a claim or benefits" by "the claimant." The Summary Plan Description then defines "claimant" to include "a surviving spouse, a retired employee or a terminated employee." In contrast, the Plan argues, the clear terms of the arbitration procedure provide that it "applies only to bargaining unit employees" and makes no mention of "claimants" or "retirees."

In response, the Union points to the Pension and Disability Benefits Agreement. Under the terms of that document, arbitration is available for any dispute that may "arise between any Employee (as defined in the Plans) and the Company." Although the definition of "Employee" does not specifically include retirees, the Union points to two other definitions to support its argument. First, the Summary Plan Description defines "Pensioner" as "an Employee who retires under the Plan and is entitled to Retirement Income Benefits pursuant to the Plan." In addition, it defines "Terminated Employee" as "an Employee who is terminated for any reason ..." The Union essentially argues that although "Employee" is not defined to include retirees, the functional equivalent of retirees (Pensioners and Terminated Employees) are defined in such a way that they necessarily qualify as "Employees." Furthermore, the Union points out that to the extent this interpretation conflicts with the text of the Summary Plan Description, it is entitled to rely on the more favorable language from the Pension and Disability Benefits Agreement. *See* ***563***Bergt v. Ret. Plan for Pilots Employed by MarkAir, Inc.*, 293 F.3d 1139, 1145 (9th Cir.2002).

It is a close question as to which side

presents the better textual interpretation of the plan documents. However, given the inherent absurdity of creating a pension dispute mechanism and then denying access to pensioners, and given our duty, under *Bergt,* to defer to the Pension and Disability Benefits Agreement when it conflicts with the Summary Plan Description, we hold that retirees are not excluded from the arbitration procedure.

III.

[6] The Plan also appeals from the District Court's March 13, 2006 Order denying its Motion to Stay. We review the district court's decision for abuse of discretion. *Sheet Metal Workers Int'l Ass'n v. Jason Mfg., Inc.,* 900 F.2d 1392, 1400-01 (9th Cir.1990).

[7] The crux of the Plan's argument is that because ASARCO is subject to an automatic stay in bankruptcy court, and because ASARCO is a necessary party to this litigation, the entire proceeding should be stayed. However, the Plan never directly argues that ASARCO *is* a necessary party to this litigation. Instead, the Plan rests its entire argument on the allegedly contradictory positions taken by the Union at various stages of the litigation.

In 2004, the Plan and ASARCO filed a motion to dismiss, arguing that ASARCO was not a proper defendant in an ERISA action. In response, the Union argued that ASARCO was a proper party, because in addition to being an employer, ASARCO acted as a plan administrator. The Union's memorandum in opposition to motion to dismiss included the following:

> ASARCO is the Plan Administrator, and, therefore, its inclusion as a defendant in this action is wholly appropriate. An order compelling arbitration must necessarily include ASARCO, as it is party to the relevant collective bargaining agreements setting forth the obligation to arbitrate, it is the party that would appear before any arbitrator, and it is the party that would implement any orders of the arbitrator in the present dispute.

The Plan argues that the Union is barred, by the doctrine of judicial estoppel, from opposing the motion to stay, since the Union argued in 2004 that ASARCO was a necessary party to the litigation.

[8] We generally consider three factors when determining whether to apply the doctrine of judicial estoppel. First, we determine whether "a party's later position [is] 'clearly inconsistent' with its earlier position." *New Hampshire v. Maine,* 532 U.S. 742, 750, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (citations omitted). Second, we inquire whether the party achieved success in the prior proceeding, since "judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled.' " *Id.* (citation omitted). Finally, we consider whether the party asserting an inconsistent position would achieve an unfair advantage if not estopped. *Id.* at 751, 121 S.Ct. 1808.

The Plan has not demonstrated these factors in the present case. First, it is not clear that the Union's 2004 position in its opposition to ASARCO's motion to dismiss was necessarily inconsistent with its later position in opposition to stay. There is a crucial distinction between arguing that a party is *proper* and should not be dismissed, and arguing that a party is *necessary* and the litigation cannot proceed without it. More importantly, the district court never *held* that ASARCO was a necessary party to the litigation. Instead, the

district court held only that ASARCO "acted*564 as plan administrator" and was therefore "a proper party to this action." Because the Plan has failed to demonstrate the first two elements of our judicial estoppel analysis, we hold that the doctrine does not apply, and do not need to reach the third element of unfair advantage.

[9] We also reject the Plan's argument that the doctrine of "law of the case" applies. The "law of the case acts as a bar only when the issue in question was actually considered and decided by the first court." *United States v. Cote,* 51 F.3d 178, 181 (9th Cir.1995). Because the district court never *held* that ASARCO was a necessary party to the litigation, the doctrine does not apply.

IV.

[10] Finally, the Plan appeals from the district court's award of attorney's fees. We review the district court's decision for abuse of discretion. *Thomas v. City of Tacoma,* 410 F.3d 644, 647 (9th Cir.2005).

The Plan concedes that, as a general rule, the prevailing party on an ERISA claim is entitled to attorney's fees, "unless special circumstances would render such an award unjust." *Hensley v. Eckerhart,* 461 U.S. 424, 429, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (quotations and citation omitted). The Plan rests its entire argument, therefore, on the distinction between the Union and the individual named appellees. The Plan argues that it was the Union that filed the lawsuit and the Union that incurred the attorney's fees, but it was the *named appellees* that prevailed, since the district court conditioned its summary judgment on their substitution for the Union. This argument elevates form over substance. The Union brought this litigation on behalf of its retirees, and it prevailed. The fact that the district court only "conditionally granted" the Union's motion for summary judgment is of no real consequence.

The Plan also argues that the district court erred when it failed to address specifically each of the factors from *Hummell v. S.E. Rykoff & Co.,* 634 F.2d 446, 452-53 (9th Cir.1980). As an initial matter, the district court was not required to engage in a discussion of the *Hummell* factors, because the Union prevailed on its motion for summary judgment. *See Nelson v. EG & G Energy Measurements Group, Inc.,* 37 F.3d 1384, 1392 (9th Cir.1994). Furthermore, the district court did, in fact, address the *Hummell* factors in a lengthy footnote.

[11] The Plan next argues that the district court abused its discretion when it calculated the Union's legal fees at an average of $300 per hour, because counsel maintained a discounted fee arrangement with the Union and only charged $100 to $110 per hour. But "[w]e have repeatedly held that the determination of a reasonable hourly rate is not made by reference to the rates actually charged the prevailing party." *Welch v. Metro. Life Ins. Co.,* 480 F.3d 942, 946 (9th Cir.2007) (citation and quotations omitted). Instead, as the district court correctly held, the starting point for calculating attorney's fees is "the prevailing market rate[ ] in the relevant community." *Bell v. Clackamas County,* 341 F.3d 858, 860 (9th Cir.2003).

To calculate the prevailing market rate for ERISA-related legal work, the district court relied on *Morgan v. Wal-Mart Associates' Health and Welfare Plan,* 214 F.Supp.2d 1047 (D.Ariz.2002). In *Morgan,* the court found that in 2002, "the customary fee charged by ERISA plaintiff's attorneys in Arizona is $275 per hour." *Id.* at

1054. The district court took that number and adjusted it upwards slightly to account for inflation.

***565** The district court also relied on a declaration from the Union's counsel, which established that the firm typically charged a blended rate of $300 per hour for ERISA-related work. The district court could properly rely on this declaration. *See United Steelworkers of Am. v. Phelps Dodge Corp.,* 896 F.2d 403, 407 (9th Cir.1990) ("Affidavits of the plaintiffs' attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate"). The Plan has offered no evidence to support a lower market rate for ERISA-related work. Accordingly, we hold that the district court did not abuse its discretion when it set $300 per hour as a reasonable hourly rate.

[12] The Plan also argues that the district court abused its discretion in awarding attorney's fees, asserting that almost every entry on the Union's time sheet was improper, either because it was insufficiently detailed or because it improperly aggregated more than one task in a single description. As the party seeking attorney's fees, the Union bore "the burden of documenting the appropriate hours expended in the litigation," and was required to "submit evidence in support of those hours worked." *Gates v. Deukmejian,* 987 F.2d 1392, 1397 (9th Cir.1992) (citation omitted). However, attorneys are "not required to record in great detail how each minute of [their] time was expended." *Hensley,* 461 U.S. at 437 n. 12, 103 S.Ct. 1933. They need only "keep records in sufficient detail that a neutral judge can make a fair evaluation of the time expended, the nature and need for the service, and the reasonable fees to be allowed." *Id.* at 441, 103 S.Ct. 1933 (Burger, C.J., concurring). We have reviewed the relevant time records, and hold that they are sufficiently detailed for the district court to have made a determination of reasonableness.

Finally, the Plan argues that the district court abused its discretion when it awarded legal fees against both ASARCO and the Plan, because ASARCO is subject to an automatic stay in bankruptcy. The Union contends that ASARCO is not precluded from contributing its share of the fees, because under 11 U.S.C. § 1113 and § 1114, actions seeking to enforce a collective bargaining agreement are not subject to automatic stay. This issue has not been fully briefed before the district court, and we are not in a position to decide the question now. Therefore, we remand to the district court to decide the issue or refer the matter to the bankruptcy court to determine what effect, if any, the automatic stay should have on the district court's award of attorney's fees.

AFFIRMED in part and REMANDED in part.

C.A.9 (Ariz.),2008.
United Steelworkers of America v. Retirement Income Plan For Hourly-Rated Employees of ASARCO, Inc.
512 F.3d 555, 183 L.R.R.M. (BNA) 2413, 155 Lab.Cas. P 10,960, 42 Employee Benefits Cas. 2057, 08 Cal. Daily Op. Serv. 159, 2008 Daily Journal D.A.R. 180, Pens. Plan Guide (CCH) P 24001Z

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