U.S. Court of Appeals No. 11-56594

(U.S.D.C. No. CV07-3469 ODW (SHx) [consolidated with CV08-3099, CV08-3105, CV08-3106, CV08-3107, CV08-3109, CV08-3110])

IN THE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTIN GONZALEZ, Sr., et al.,

Plaintiffs-Appellants,

vs.

CITY OF MAYWOOD, et al.,

Defendants-Appellees

On Appeal from the District Court
For the Central District of California,
Honorable Otis D. Wright II, presiding

APPELLANTS' OPENING BRIEF

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INTRODUCTION

Plaintiffs appeal from the district court's decision to reduce their fee award arising from the settlement of eight consolidated civil rights actions by more than 75% of the requested lodestar. The district court's fee decision is arbitrary and contrary to established law. The limit on Plaintiffs' fees was based on the district court's determination not to award fees that exceeded what Plaintiffs received in the settlement of these cases.

The underlying cases challenged a pattern and practice of unconstitutional police conduct by the now dismantled Maywood Police Department ("MPD"). Appellant's Excerpts of Record ("ER") at 1198–1233. The lawsuits, and the Attorney General's investigation and report inspired by the litigation,[1] contributed to the decision to transfer policing in Maywood to the Los Angeles County Sheriff's Department on July 1, 2010.

On the eve of trial of the first case, the parties reached a settlement. Defendants agreed to pay $500,000 in compensation to the seventeen plaintiffs. The agreement also provided that Plaintiffs could seek a statutory award of attorneys' fees. In the settlement agreement, Plaintiffs agreed to limit their fee request to $1,025,000, ER 277, 910, even though their lodestar ($2,059,451.50) greatly exceeded this amount, ER 262. Evidence in support included, *inter alia*,

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[1] "In the Matter of the Investigation of the City of Maywood Police Department," (March 2009), *available at* http://ag.ca.gov/cms_attachments/press/pdfs/n1722_maywoodreport.pdf. *See* ER 130:11-16 (staying all cases until report released).

defense counsel's billings. Plaintiffs sought fees in an amount approximately 35% of what Defendants' counsel were paid ($2,956,654.00) to defend these cases. ER 3, 172.

At the January 24, 2011 hearing on Plaintiffs' motion, District Judge Otis Wright expressed outrage at the fact that Plaintiffs' counsel in these civil rights actions were asking for more in attorneys' fees than their clients received in the settlement. ER 31–32. This visceral reaction, utterly in conflict with established law, determined the district court's analysis of Plaintiffs' request from that point on.

At the hearing, the district court refused to rule, indicating it was inclined to deny the motion. ER 48. The court demanded that the parties rewrite the settlement agreement so that the numbers were "flipped," *i.e.,* $1,000,000 in damages and $500,000 in fees. ER 31, 48. Only after Plaintiffs sought mandamus relief in this Court did the district court issue its fee ruling. ER 2.

Based upon the evidence Plaintiffs' counsel presented to the district court, Plaintiffs were plainly entitled to the full $1,025,000 they sought in fees. This request represented a reduction of approximately 50% of the lodestar. Yet in its August 22, 2011 Order, the district court reduced Plaintiffs' fees by 75%, and awarded Plaintiffs' counsel $473,138.24. Instead of evaluating Plaintiffs' request under methods approved by this Court, the district court used unconventional and arbitrary reasoning to justify its preordained result of awarding fees that amounted to less than the settlement.

The district court disregarded the evidence of rates paid to attorneys of comparable skill and experience in the Central District of California. Instead, the Court averaged the rates Defendants and Plaintiffs had suggested for one of the higher-paid counsel, found that it resulted in a 25% reduction in his rates, and then imposed an across-the-board 25% reduction in rates for all counsel. Then, using overlapping across-the-board percentage cuts for "improper entries," "impossible entries," "clerical entries," "travel entries," "unrelated entries," and "improper format," the district court imposed further across-the-board reductions in hours totaling roughly 66%.

Plaintiffs' counsel won a substantial victory for their clients after extremely hard-fought litigation. The district court arbitrarily deprived Plaintiffs and their counsel of the benefits promised under 42 U.S.C. §1988 and undermined the Congressionally mandated incentive for lawyers to represent victims of civil rights violations who cannot afford counsel. This Court will rarely be confronted with a record that so clearly demonstrates that a district judge abused his discretion to arrive at a preordained fee amount.

The district court's order should be reversed and the Plaintiffs' request for a $1,025,000 fee award should be granted. At a minimum, this case should be remanded to a different, unbiased judge for a consideration of Plaintiffs' fee motion.

ISSUES ON APPEAL

1. Whether the district court erred by imposing a cap on Plaintiffs'

statutory fees based on the amounts Plaintiffs received in the settlement of the underlying cases.

2. Whether the district court erred by reaching the final "reasonable rate" by averaging Plaintiffs' and Defendants' suggested rates for one of Plaintiffs' counsel and then applying the same percentage reduction to each attorney.

3. Whether the district court erred in reducing Plaintiffs' proposed rates based on alleged "overbilling" and supposedly minimal "results obtained."

4. Whether the district court erred by engaging in double counting and imposing a series of overlapping, across-the-board reductions unsupported by the record.

5. Whether the district court erred by refusing to award any fees for the time spent preparing and litigating the fees motion.

6. Whether the district court erred by failing to look at whether Plaintiffs' claimed fees and hours were reasonable as a whole, in light of Defendants' counsel's fees and hours, instead concluding that that evidence was irrelevant.

7. Whether the district court erred by failing to address Plaintiffs' request for a multiplier under state law.

JURISDICTION

Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction on a post-judgment

award of attorneys' fees. *Webb v. Ada County*, 285 F.3d 829, 834 (9th Cir. 2002). The notice of appeal was timely filed. ER 2 (August 22, 2011 Order); ER 133A–D, Dkt. #318 (Case No. 08-cv-03103) (Notice of Appeal, September 13, 2011).

STANDARD OF REVIEW

While an award of fees is reviewed for an abuse of discretion, *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), review of the legal principles underlying the fee award is *de novo*. *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111-12 (9th Cir. 2008). In particular, the district court's cap of fees at Plaintiffs' settlement amount and its methodological errors were errors of law subject to *de novo* review. *Id.* The use of across-the-board percentage reductions "in cases involving large fee requests [is] subject to heightened scrutiny." *Gates v. Deukmejian*, 987 F.2d 1392, 1400 (9th Cir. 1992).

STATEMENT OF THE CASE

A. The Filing and Prosecution of Plaintiffs' Claims.

On May 29, 2007, Plaintiffs filed a single complaint on behalf of twenty-two Maywood residents involved in nine separate incidents wherein Plaintiffs' civil rights were violated by Maywood police officers, pursuant to policies and practices of the Maywood Police Department ("MPD"). ER 1198-1232. The complaint alleged that all of the constitutional violations in these separate incidents stemmed from similar policies and/or customs of the Maywood Police Department. ER 1201-13.

For example, the Pablo Camarillo incident involved the unjustified beating of Mr. Camarillo by Defendant Cunningham in his home. Mr. Camarillo's nose was broken by a police officer while he was seated in the patrol car after being detained. ER 123, 1207–08. He was subjected to racial slurs and his family was terrorized. *Id*. False police reports were filed, and the MPD conducted no serious investigation into Mr. Camarillo's complaints of police misconduct. ER 1207–08, 1218–19. The complaint alleged that a policy or practice existed of acquiescing in and covering up such abuses, including by engaging in the malicious prosecution of victims. ER 1207.

The other eight incidents involved similar claims of abuse, false reports and systematic failures of MPD discipline and training, all of which generated an atmosphere of impunity throughout the department. ER 1201–14. The complaint alleged a pattern and practice of malicious prosecution of victims and cover-ups of abuses. ER 1208–12.

On defendants' motions to sever into separate complaints, which Plaintiffs opposed, the district court directed that Plaintiffs re-file the separate incidents into separate complaints. ER 122-31 (order severing cases); ER 132-33 (Order deeming all cases related to the lead case of CV07-3469). The district court also indicated that notwithstanding the filing of separate complaints for the separate incidents, the court would "try the related Maywood cases jointly." ER 118-21 (August 17, 2009 Orders in CV07-3469 [*Camarillo*], CV08-3103 [*Hernandez*], CV08-3107 [*Gonzalez*], CV08-3109 [*Garcia*]).

Thereafter, in scheduling pretrial dates for discovery, expert disclosures and law and motion cut-offs, the district court set the same dates for all eight related cases. ER 110-17; ER 83-94 (February 26, 2010 orders in CV08-3099; CV08-3103; CV08-3105; CV08-3106; CV08-3107; CV08-3110); ER 81-82 (CV08-3109).

The severance ruling caused a substantial amount of additional work because the same issues frequently had to be re-litigated in the different cases. ER 514–15 (Koerner Declaration ¶6-7); *see also* Dockets Listing Motions to Dismiss, ER 1234–1410, at Dkt. #55 (CV07-3469); Dkt.#5 (CV08-3099); Dkt.#29 (CV08-3110); Dkt. #17 (CV08-310); Dkt. #19 (CV08-3109); Dkt. #29 (CV08-3107); Dkt.#24 (CV08-3103); Dkt. #24 (CV08-3106); Dkt. #24 (CV08-3105).

Discovery was extensive. Defendants served at least 1,879 interrogatories, 964 requests for admissions, 1,243 requests for production, and 173 deposition notices. ER 523 (Anderson-Barker Declaration ¶15). Defendants ultimately deposed 53 witnesses. *Id*. Meanwhile, Plaintiffs were forced to file eight separate motions and ex parte applications to compel discovery. ER 514–15 (Koerner Declaration ¶¶ 5, 9). All the motions were granted, and sanctions were imposed against defense counsel. ER 80A; 178–79.

B. Mediation and Settlement.

Early in the litigation, in October 2007, Plaintiffs sought a negotiated resolution of these cases through mediation. ER 522, 420. Defendants rejected

the offer. ER 522.

After nearly three years and nearly $3,000,000 in defense billings, on August 19, 2010, the parties held a settlement conference before a private mediator to resolve all cases shortly before commencement of trial in the Pablo Camarillo incident (CV07-3469). The parties agreed that Defendants would pay $500,000 in damages for all seventeen remaining Plaintiffs. The individual plaintiffs would receive payment without deduction for attorneys fees. Plaintiffs' counsel would receive statutory fees based upon a motion. Defendants' exposure on fees, however, was limited to a maximum of $1,000,000, plus $25,000 for work performed on the fees motion even if Plaintiffs' fees actually incurred exceed that amount. ER 277.

C. The Fee Motion.

In November 2010, Plaintiffs filed their motion seeking fees under 42 U.S.C. § 1988, and Cal. Civil Code §52.1(h). The motion asked that $1,025,000 be awarded. ER 910. The motion attached declarations from each of Plaintiffs' lawyers and the expert declaration of Barrett S. Litt. ER 472. The motion asked for the settlement agreement maximum of $1,025,000, given that Plaintiffs' lodestar was $2,059,451.50. ER 262.[2] Defendants, in response, attacked almost

[2]The fee motion as originally filed contained two mathematical errors and thus understated the lodestar by about $500,000. One error was the use of a "period" instead of a "comma" in a spreadsheet formula, causing an understatement of attorney Anderson-Barker's time by about $480,000, reducing her fees to about $480.00. The other error was incorrectly totaling attorney Ellison's time at 411.54 hours, whereas the correct total was 636.7 hours. ER 261, ¶2(a)-(b). Well before the hearing on the

every aspect of Plaintiffs' fee request, contending that all fees had been waived per the settlement agreement; that Plaintiffs were not the prevailing party; that Plaintiffs' counsel overbilled; that fees should not be awarded for any pre-discovery work; and finally, if fees were to be awarded, fees should be greatly reduced. ER 396–415. Plaintiffs were forced to respond to these arguments, and spent much more than $25,000 in litigating the fee motion.

D. The January 24, 2011 Hearing.

The district court held a hearing on the motion on January 24, 2011. At the hearing, the district judge castigated Plaintiffs' counsel for asking for more in fees than the Plaintiffs themselves had obtained in their damages settlement, saying:

> This is offensive on its face. I have got a summary here of the various, we will call it indignities suffered by each of the plaintiffs and what their settlements have been, and then I look at the attorney's fees request and it literally shocks the conscience.
>
> Let me cut to the chase. If it were flipped, if what is being divided up among the plaintiffs is what the attorneys are asking for in compensation [$1,025,000], fine. I would approve that. And then the attorneys get what you have given to your clients [$500,000], that would get approved.
>
> Now, I understand that you have already convinced each of these plaintiffs to go along with whatever, and that is fine. They are free to contract as they wish. They are free to resolve and compromise their claims on any terms they want, but to the extent that you come in here seeking approval of these attorney's fees, that is not going to happen. All right.
>
> * * * *
>
> I have said what I have got to say on this issue. And I felt this all along, if the numbers were flipped, if the injured plaintiffs had received the lion's share of this money, fine, I would have no problem

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fee motion, the two errors were noted by both Plaintiffs and defendants, and corrected. ER 261, 326 ¶¶2-3; ER 336.

whatsoever. But I will not approve this. We are done.

ER 31, 48. The district court stated that its tentative decision was to deny the motion "as currently presented," and ordered the parties "to keep the Court apprised of any changes with respect to the settlement amount and/or attorneys' fees." ER 27. Presumably, this order was designed to induce Plaintiffs' counsel to reduce their fee request.

E. The Acquisition and Submission of Defense Attorneys' Billing and Time Records.

While Plaintiffs' motion for fees was under submission, Plaintiffs' counsel obtained, on April 16, 2011, records from the City of Maywood showing the attorneys' fees paid to defense counsel. Those records showed that the defense attorneys had billed 16,988.1 hours, for which they were paid $2,956,654. ER 192–93; ER 172). In other words, defense counsel billed nearly four times the hours defending the same lawsuits that Plaintiffs' counsel incurred in prosecuting the cases (16,988.1 hrs. vs. 4,330.85 hrs.), and were paid at least $2,956,654 in fees whereas Plaintiffs limited their maximum recoverable fees to $1,025,000.

F. Plaintiff's Petition for Mandamus Relief

On July 13, 2011, Plaintiffs petitioned this Court for mandamus relief to compel the district court to rule on Plaintiffs' fees motion. *See Camarillo v. United States District Court*, No. 11-71952. In the petition, Plaintiffs contended, inter alia, that the district court's demand that the Plaintiffs' attorney fees and damages settlement amount be "flipped" was contrary to precedent, and that the

court's obligation was to rule on the motion in accordance with the applicable standards. About six weeks after filing the petition and before this Court ruled on the petition, the district court issued its August 22, 2010 fee order, thereby mooting the petition.

G. The District Court's August 22, 2011 Fee Order.

The district court initially cut all of Plaintiffs' attorneys' rates by 25% across the board, and cut all paralegal rates to $125.00 an hour. ER 17–18. This reduced Plaintiffs' lodestar to $1,400,248.13. ER 18. This represented a $659,203.37 (approximately 32%) cut from Plaintiffs' lodestar of $2,059,451.50. The district court reduced the hourly rates claimed by Plaintiffs' experienced and skilled attorneys by taking an average rather than determining the appropriate local rate for lawyers of comparable skill, reputation, and experience.

The district court then imposed substantial and overlapping layers of across-the-board percentage-based reductions to the hours. The district court imposed a 35% ($490,086.85) across-the-board cut for "irregular billing format"(by which the court meant the grouping of hours by attorney rather than by plaintiff, ER 19-20), a 20% ($182,032.26) cut for "unrelated entries," a 20 % ($145,625.80) cut for "impossible and ridiculous entries", a 5% ($29,125.16) cut for "improper entries", a 10% ($55,337.81) cut for clerical tasks, and then a 5% ($24,902.01) cut for "travel entries." ER 18–24. All of these across-the-board cuts resulted in a fee award of $473,138.24, a total cut of approximately 66% of the hours for improper entries and format. ER 26.

In addition, the district court did not discriminate among attorneys (based on billing practices or tasks undertaken) or strike particular time entries in imposing these cuts. For example, the district court only found allegedly "impossible" entries in paralegal time for two of the paralegals, ER 21-22, and yet it imposed a reduction for "impossible" entries across all attorneys and paralegals, ER 22. Similarly, only three of the attorneys spent time at the legal clinic investigating Maywood police department abuses, ER 20, and yet the court, finding that the clinic was not directly related to the litigation, reduced all attorney and paralegal time by 20% for "unrelated" entries. ER 21-22.

Although the district court's fee order took into account the parties' correction of Anderson-Barker's time, the fee order used the incorrect total for Ellison's time, despite the earlier corrections by both sides. ER 18.

Though the district court granted Plaintiffs leave to submit the defense billing and time records, the court deemed the time spent and fees paid to defense counsel "irrelevant to its decision." ER 11-12 & n.6. The defense billing records showed that Defendants had incurred almost $3 million in fees. ER 192, 197–32.

The district court refused to award any fees for work on the fee motion at all, stating that the fee motion and records were not well presented and thus the district court would not compensate counsel for *any* of the hours they spent on it. ER 26. The district made no mention of the request for fees under state law (Cal. Civ. Code § 52.1(h)) or of Plaintiffs' entitlement to a multiplier under state law. ER 25–26.

Overall, the district court cut Plaintiffs' lodestar by more than 75 %. Although the court's August 22, 2011 Order did not explicitly contain the modification the court had previously demanded, the amount of fees awarded was just below the $500,000 the court had earlier said it would approve if Plaintiffs revised the settlement agreement according to its demands. Notably, even defense counsel did not ask for such a drastic across-the-board reduction. The declaration of their auditor, James Schratz, set forth a 68% reduction in fees. ER 365.

SUMMARY OF ARGUMENT

The district court abused its discretion by, in effect, limiting fees to an amount equal to what Plaintiffs received in the settlement. The district court's use of multiple, overlapping reductions in hours and across-the-board, not individualized, reductions in rates only serves to conceal the district court's true motivation: to reduce the lodestar below $500,000, a motivation expressed clearly at the January 2011 hearing. The district court's analysis in the August 21, 2011 Order is riddled with legal and factual errors.

The district court erred in setting rates without examining or taking into account evidence of *current* local rates for work of similar complexity. Instead, the district court took what it said was the highest rate cited by Defendants and the rate requested by Plaintiffs for Paul Hoffman's time, and averaged the two rates to get a 25% reduction in Hoffman's rates. The district court then applied an across-the-board reduction of 25% in rates to all attorneys. In so doing, the district court

dismissed the evidence presented by Plaintiffs about the reasonableness of their rates. The district court may not simply average the assertions of either side rather than determining the current market value for counsel's services. *United Steelworkers of Am. v. Phelps Dodge Corp*., 896 F.2d 403, 407 (9th Cir. 1990)(the court must rely on evidence, not assertions).

The court also erred in holding that small firms and solo practitioners deserve a lower rate than larger law firms: Rates are based on the complexity of the work and the skill and experience of counsel, not the number of lawyers they choose to associate themselves with. *Davis v. City of San Francisco*, 976 F.2d 1536, 1545–46 (9th Cir. 1992), vacated in (irrelevant) part on denial of reh'g, 984 F.2d 345 (9th Cir. 1993).

Second, the district court erred in reducing the hours claimed by Plaintiffs' counsel through a series of overlapping and arbitrary across-the-board cuts for a total reduction of more than 66% of Plaintiffs' counsel's time. The district court may not impose multiple cuts of more than 10% without more carefully parsing the time records and explaining why a particular percentage cut in hours is warranted, although the district court is free to reduce hours by a less than 10% across-the-board cut without a detailed analysis of its reasons. *See Moreno*, 534 F.3d at 1112. In addition, it was error for the district court to impose across-the-board cuts on all counsel when it admitted in its opinion that it only found errors in the billing of some of the attorneys and paralegals at issue. *See* ER 22–23. In a case such as this, where counsel practice at multiple firms each with their own

billing practices, the district court must more carefully justify across-the-board cuts under *Moreno,* taking into account the way litigation tasks were apportioned between counsel. It was legal error to turn a handful of billing errors into a wholesale cut of more than half of the hours.

The district court erred by not looking at the lodestar as a whole and realizing that the fees awarded were unrealistically low, particularly compared to Defendants' fees. There is simply no explanation for awarding Plaintiffs only 17% of the fees that defense counsel were paid to litigate the same issues in the same cases. The district court erred as a matter of law in concluding that the time billed and fees paid to defense counsel were irrelevant in assessing the reasonableness of time spent by Plaintiffs' counsel.

The district court also erred by not awarding fees for the fees litigation itself. Plaintiffs are entitled to compensation for time reasonably spent on this consolidated motion.

Finally, as multipliers are commonly applied to the lodestar under California law, particularly in contingency cases such as this one, the district court erred in failing to consider whether Plaintiffs were entitled to a positive multiplier as part of its analysis of the reasonable fee in this case.

The district court made errors of law and abused its discretion in making such draconian reductions in Plaintiffs' fee request. All of the arbitrary methodology used in this case was designed to ensure that Plaintiffs' attorneys received less than their clients, and was contrary to law. On remand, the case

should be assigned to a different judge.

ARGUMENT

I. THE DISTRICT COURT'S ARBITRARY REDUCTIONS OF PLAINTIFF'S LODESTAR WERE MADE TO IMPOSE A CAP ON FEES IN THE AMOUNT OF THE UNDERLYING SETTLEMENT IN VIOLATION OF ESTABLISHED LAW.

The district judge violated established law in arbitrarily reducing the lodestar to below the amount of the settlement because of his view that Plaintiffs should not receive more in fees than their clients received in settlement. At the hearing, the district judge made it clear he would not grant an award beyond the $500,000 Plaintiffs obtained. ER 31. In his August 22, 2011 Order, the district judge reduced Plaintiffs' fee to $473,138.24, just as he stated he would do at the January 24, 2011, hearing. The district judge did not have discretion to impose such a cap on fees.

Under 42 U.S.C. § 1988, the lodestar consisting of reasonable hours multiplied by reasonable hourly rates is presumptively a reasonable fee. *Perdue v. Kenny A.*, 130 S.Ct. 1662, 1669 (2010). Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, in order to ensure that the victims of civil rights violations such as Plaintiffs would be able to attract competent counsel to vindicate their rights in court. *Hensley*, 461 U.S. at 429; *City of Riverside v. Rivera*, 477 U.S. 561, 575-576 (1986). Even where Defendants argue that hours are excessive, "only in rare circumstances should a court adjust the lodestar figure, as this figure is the presumptively accurate measure of reasonable fees." *Ballen v. City of Redmond*, 466 F.3d 736, 746 (9th

Cir. 2006).

A proportionality limit to fee awards under §1988 has been unequivocally and repeatedly rejected by the Supreme Court, this Court, other federal circuits, and California courts. *Riverside*, 477 U.S. at 574, holds unequivocally that "[w]e reject the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers." As the Supreme Court emphasized, such a rule would be "totally inconsistent with Congress' purpose in enacting § 1988. Congress recognized that private-sector fee arrangements were inadequate to ensure sufficiently vigorous enforcement of civil rights." *Id.* at 578. The fact is that "Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief." *Id*. at 575.

This Court has also consistently rejected any proportionality limitation on §1988 fees. *Morales of City of San Jose*, 96 F. 3d 359, 364-65 n.11 (9th Cir. 1996); *Cunningham v. County of Los Angeles*, 879 F.2d 481, 489 (9th Cir. 1988); *Quesada v. Thomason*, 850 F.2d 537, 541 (9th Cir. 1988).[3]

The California Supreme Court has also rejected the rule of proportionality, stating that "[e]ven a small award of compensatory damages in a federal civil

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[3] Other circuits have similarly rejected a proportionality ceiling in § 1988 awards. *See e.g., United Automobile Workers Local 259 Social Security Dept. v. Metro Auto Center*, 501 F. 3d 283, 293 (3d. Cir. 2007); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F. 3d 311, n. 20 (4th Cir. 2006); *Simpson v. Merchants & Planters Bank*, 441 F. 3d 572, 581 (8th Cir. 2006); *Kassim v. City of Schenectady*, 415 F. 3d 246, 252 (2d. Cir. 2005); *Cobb v. Miller*, 818 F. 2d 1227, 1234 (5th Cir. 1987).

rights lawsuit can justify a substantial amount of fees." *County of Los Angeles v. Superior Court (Schoenert)*, 21 Cal.4th 292, 304 n.2 (1999) (citing *Riverside,* 477 U.S. at 574); *Ketchum v. Moses*, 24 Cal.4th 1122 (2001) (upholding fee enhancements based on the need to award attorneys a "premium" for undertaking the risk of contingent representation).[4] Under California law, the trial court abuses its discretion when it applies a negative multiplier to a lodestar in order to reduce the fees to the percentage of the plaintiff's recovery specified in the contingent fee agreement. *Graciano v. Robinson*, 144 Cal. App. 4th 140, 164 (2006).

The district court erred by placing a cap on Plaintiffs' fees based upon the amounts Plaintiffs received in the settlement. *See Moreno*, 534 F.3d at 1115 (even if the impermissible reason is only given at the hearing and not in the order, it still constitutes legal error if "nothing else supports" the reduction). The reductions in the lodestar by the district court do not comply with the established legal methodology for calculating the lodestar and were arbitrarily designed to get to the district court's preordained result. All of the other errors the district court committed flow from this fundamental legal error. *See* §§ II-IV*, infra.* The district court's fee judgment should be reversed for this reason alone.

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[4] *See also Harman v. City and County of San Francisco*, 158 Cal. App. 4th 407, 419 (2007) (court awarded over $1 million in fees where the damages were merely $30,300, on the theory that § 1988 does not mandate a percentage approach to attorneys' fees in relation to damages in civil rights cases); *Vo v. Las Virgenes Municipal Water District,* 79 Cal. App. 4th 440, 446 (2000) (fee award of $470,000 for $37,500 damages upheld); *Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128, 1137, 1169 (1990) (award of $921,565 upheld where damages were $50,000.).

II. THE DISTRICT COURT ERRED BY REDUCING PLAINTIFFS' COUNSEL'S HOURLY RATES BY 25% ACROSS THE BOARD.

The district court has the duty when deciding a fee petition to determine what the reasonable hourly rate is for the services provided by counsel. *Camacho v. Bridgeport Financial Inc.,* 523 F.3d 973, 978-79 (9th Cir. 2008). Hourly rates are established by "satisfactory evidence" that the rates are "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson*, 465 U.S. 886, 895 n. 11 (1984). In this case, the district court completely neglected that duty by disregarding all of Plaintiffs' evidence of rates at other firms and past fee awards, as well as the declaration of their fee expert, and simply averaging the rate from a 2005 case cited by Defendants ($400) for Mr. Hoffman and Plaintiffs' claimed rate for Mr. Hoffman ($750). ER 10-11, 17. The district court found that the average resulted in a 25% reduction for Mr. Hoffman and then applied that 25% reduction to all other attorneys and paralegals.

The district court also said that this reduction was based on counsel's poor performance, based on overbilling and the district court's dissatisfaction with the settlement amount. None of the evidence presented supported the court's conclusions, nor did the court's analysis provide a sufficient basis for reducing the hourly rates Plaintiffs had presented by the same categorical percentage.

This Court should remand this case for a determination of the market rate for lawyers of similar skill, experience, and reputation for these services, or in the alternative, award Plaintiffs the requested amount of fees.

A. The District Court Erred in Disregarding Plaintiffs' Evidence of Current Rates for Counsel Performing Similar Work in Los Angeles.

As this Court has recognized, "[a]ffidavits of the plaintiffs' attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases . . . are satisfactory evidence of the prevailing market rate." *United Steelworkers,* 896 F. 2d at 407; *see also Camacho,* 523 F.3d at 980; *Bouman v. Block*, 940 F. 2d 1211, 1235 (9th Cir. 1991), *cert. denied* 502 U.S. 1005 (1991) (declarations of the "prevailing market rate in the relevant community . . . [are] sufficient to establish the appropriate rate for lodestar purposes.").

Plaintiffs' counsel filed detailed declarations with exhibits showing their skill, experience, and education levels. ER 434–467, 497–532. Plaintiffs also filed a declaration with extensive supporting evidence by fee expert Barrett S. Litt attesting to the reasonableness of the requested rates in light of prevailing community rates. ER 472–92. Such evidence is precisely what courts look to for satisfactory evidence of community rates. *See, e.g., Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 455 (9th Cir. 2010) (affirming attorneys' fees based on declarations of attorneys and fee expert compiling the hourly rates charged by various area firms).

1. The District Court Erred by Simply Averaging Defendants' and Plaintiffs' Proposed Rates Rather than Finding the Current Market Rate.

The district court claimed that Defendants asserted that Mr. Hoffman's rate should be $400. ER 17. The district court then, instead of engaging in the

required analysis, averaged $400 and $750 (Plaintiffs' claimed hourly rate for Mr. Hoffman) to get what it found to be a 25% reduction in Mr. Hoffman's rates.[5] The district court then applied this reduction to all of Plaintiffs' requested rates. As a matter of law, the district court should use evidence of the current legal rate for legal work of similar complexity in the community to determine the market rate, not simply take an average of defendants' and plaintiffs' assertions. *United Steelworkers*, 896 F.2d at 407.

The district court erred by engaging in such an arbitrary process to begin with. Its use of a lower rate has no factual support in the form of any current rates for small firms or solo practitioners and was directly contrary to the evidence of rates charged by other firms before the Court. Defendants based their claim on a series of cases decided, with two exceptions, between fifteen and sixteen years ago. ER 12. Under established law, Plaintiffs' counsel are entitled to be paid at 2012 rates. *Missouri v. Jenkins,* 491 U.S. 274, 284 (1989); *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994)(historical rates "inadequately compensate the firm for the delay in receiving its fees."); *see also Graham v. DaimlerChrysler Corp.*, 34 Cal.4th 553 (2004) (same principle applies

[5] In fact, Defendants had asserted that Mr. Hoffman's rate should be $450, and the district court clearly erred in holding that the highest rate Defendants asserted was $400. *See* ER 356 (Schratz Decl.) Even more oddly, the court found the average of $400 and $750 to be $562, not $575. The actual average is a 23% reduction in Mr. Hoffman's rates, not a 25% reduction. Such a numerical "discrepancy alone is sufficient to require remand." *McGrath v. County of Nevada*, 67 F.3d 248, 254 (9th Cir. 1995).

under California law). It was error to take rates from cases decided over five years ago in the face of Plaintiffs' evidence that current rates were higher, particularly their more recent fee awards showing the market value of their services.

The $400 an hour rate apparently comes from *Dang v. Cross*, 422 F.3d 800, 813 (9th Cir. 2005), a fee award that was entered in 2003, approximately 8 years before the fee award in this case. The district court did not undertake any analysis of the skill, experience, or reputation of any of the lawyers involved in the cases Defendants cite. It is legal error for a court to assign the same rate to lawyers with different years of experience and reputation in the legal community. *United Steelworkers*, 896 F.2d at 407; *see also Sorenson v. Mink*, 329 F.3d 1140, 1145 (9th Cir. 2001). Simply averaging Defendants' and Plaintiffs' assertions for *one attorney* and then applying the results to all other attorneys is not within the court's discretion.

2. The District Court Improperly Disregarded Fee Awards Given to Plaintiffs' Counsel in Other Cases.

Indeed, the district court erred by failing to consider the skill, experience or reputation of any of Plaintiffs' counsel.[6] Plaintiffs' counsel presented the district court with such evidence but the court ignored it. This Court need only look at the declarations submitted by Plaintiffs' attorneys, several of whom have been

[6] Plaintiffs also object to the Court's consideration of rates requested by Samantha Koerner and Ellen Ellison in discovery sanctions motions. Plaintiffs' attorney's choice to use lower rates in matters which did not involve research or skill should not penalize them in later, more complex matters.

litigating police misconduct cases in Los Angeles for decades, to find that the district court abused its discretion in imposing a 25 % across-the-board cut in all of Plaintiffs' rates and a nearly 50 % cut in paralegal rates.

The declarations filed by Plaintiffs' counsel clearly support the requested hourly rates. Counsel explained that they had previously been awarded rates identical or similar to those requested. ER 434–36, 504–05, 512, 516–17, 519. Counsel further explained that the rates represented the market value of their services in the Los Angeles legal community. *Id*.

The district court rejected Plaintiffs' reliance on the hourly rates awarded in *Multi-Ethnic Workers Organization Network v. City of Los Angeles ("MIWON")*, No. 07-3072, 2009 WL 1065072 (C.D. Cal. Mar. 19, 2009) and *Jochimsen v. County of Los Angeles*, ER 14–15, 140–163, 483–484. There was no basis to exclude these cases. In both *MIWON* and *Jochimsen*, Mr. Hoffman was awarded fees at an hourly rate of $750.00 an hour. ER 154, 437. *MIWON* was a class settlement where class members received less on average than the Plaintiffs in these cases, even though the injuries were comparable. *MIWON*, No. 07-3072, 2009 WL 1065072 (C.D. Cal. Mar. 19, 2009).

In *Jochimsen,* the single Plaintiff received a jury award of $35,000 after a five day jury trial against a single sheriff's deputy for a beating in a detention cell. ER 152. The *Jochimsen* case was not as complex as these cases and the result obtained was very similar.

The district court's attempt to distinguish *Jochimsen* and *MIWON* is

factually inaccurate; it is clear that the district court was merely distinguishing these cases in order to achieve a preordained result. Its refusal to consider the hourly rates given in these cases was error. Mr. Hoffman received $750.00 an hour in *MIWON* and *Jochimsen*, yet the district court arbitrarily cut his rate to $562.00 in this case without examining his skill, experience or reputation in the community.

3. The District Court Erred by Refusing to Credit the Expert Declaration of Barrett S. Litt.

The district court's discussion of Mr. Litt's expert declaration demonstrates even more clearly the fact that the district court's intent was to arbitrarily cap Plaintiffs' attorneys' fees at the settlement amount. Mr. Litt's declaration plainly establishes that he qualifies as an expert. Mr. Litt included ample information about his background, his qualifications as a fee expert, and his sources for and evidence of community rates. ER 472–492. Courts have awarded fees based on Mr. Litt's expertise on multiple prior occasions. ER 473. Mr. Litt supports his opinions about the reasonableness of each of Plaintiffs' requested rates with a wide array of recent evidence (*e.g.* his contracts with law firms, his own familiarity with rates asserted and obtained in comparable cases, and past court filings.)

Expert testimony regarding billing rates in the relevant legal community meets the burden of proof to establish hourly rates. *Prison Legal News*, 608 F.3d at 455; *Fair Housing of Marin v. Combs*, 285 F.3d 899, 908 (9th Cir. 2002); *Mandel v. Lackner*, 92 Cal. App. 3d 747, 762 (1979). Rates awarded to attorneys

of comparable skill and experience in other cases in the same legal market also meet the burden. *United Steelworkers*, 896 F.2d at 407; *Davis*, 976 F.2d at 1547; *Margolin v. Regional Planning Comm'n*, 134 Cal. App. 3d 999, 1006 (1982).

The Court mischaracterized the Litt Declaration as merely listing firm rates. ER 16. A fair review of the Litt Declaration indicates that Mr. Litt analyzed the rates requested based not only on firm rates,[7] but based upon a wide range of sources. ER 16–17. The Declaration filed by Defendants, by James P. Schratz, did not list *any* firm rates or recently awarded rates, but simply relied upon his "background and experience with billing rates in Southern California." ER 356.

The district court further objects to Mr. Litt's citation to "large, nationally-recognized" firm rates. ER 16–17. Indeed, the district court dismissed the "overall credibility" of the Declaration because of the alleged "oversight" of including three firms from outside Los Angeles in the Declaration, even though the Litt Declaration specifically points this out in his declaration. ER 16, ER 477–78. This comment merely underscores the district court's bias and its erroneous analysis of the expert declaration.

It was perfectly appropriate for Mr. Litt to use large firm rates as part of his analysis. The Supreme Court has made it clear that "'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant

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[7]The district court's reliance on *Elser v. I.A.M. National Pension Fund*, 579 F.Supp. 1375, 1379 (C.D. Cal. 1984), was misplaced. In *Elser*, Plaintiffs' Counsels' sole evidence was a one paragraph survey of six firms in Los Angeles. In this case, both Mr. Litt and Plaintiffs' counsel made a far more substantial showing.

community, regardless of whether plaintiff is represented by private or, nonprofit counsel." *Blum*, 465 U.S. at 895; *see also Moreno*, 534 F.3d at 1114. Plaintiffs' counsel regularly litigate against such firms.

Mr. Litt cited to large firms to show that the rates they request are far in excess of the rates requested by Plaintiffs' attorneys. For example, Mr. Hoffman requests $750 despite his 34 years of experience and well-established skill and reputation. In contrast, attorneys at large firms who have 10 or even 15 years less experience bill far higher, in the $905–960 range. ER 477–78. In addition to citing large firms to show how much lower Plaintiffs' requested rates are, Mr. Litt also cites to various small civil rights firms and non-profit organizations, such as the Disability Rights Legal Center, Hadsell & Stormer and the Law Office of Carol Sobel.[8] ER 154, 482.

The district court mistakenly relies on *Common Cause v. Jones*, 235 F. Supp. 2d 1076, 1081-82 (C.D. Cal. 2002), to support the idea that the size of the firm determines the rates of the attorneys. *Common Cause* did not discuss the size of the firm or the type of practice usually undertaken by the attorneys. *Id.* *Common Cause* simply found that the "legal issues were complex, multivariate and often novel," which justified the retention of "the most competent and talented attorneys available." *Id*. The correct factors to be applied in these cases is the skill, reputation, and experience of the attorneys as applied to the work in the case,

[8] The district court asserted that the Declaration fails to list any solo practitioner rates. In fact, Carol Sobel is a solo civil rights practitioner. ER 154.

not the size of the firm. *See Lopez v. San Francisco Unified Sch. Dist*., 385 F. Supp. 2d 981, 991 (N.D. Cal. 2005) ("[T]he Ninth Circuit specifically rejected the approach taken by Schratz, requiring instead that the court consider the market rates for legal work of similar complexity.") (citing *Davis*, 976 F.2d at 1545). As in *Common Cause*, Plaintiffs' counsel dealt with difficult legal issues to achieve an important civil rights victory in obtaining damages for the Plaintiffs and catalyzing the transfer of the Maywood Police Department to the Los Angeles Sheriff's Department.

The district court's belief that small civil rights firms should be awarded lower rates than a large corporate law firm, *see* ER 17, is directly contrary to Congressional intent and established law. As the California Supreme Court put it in *Serrano IV*, if corporate firms could demand higher fees than public interest or civil rights lawyers, there would be less incentive to settle public interest or contingency cases, and "the fate of plaintiff's claim would rest in part on the identity of his counsel." *Serrano v. Unruh*, 32 Cal. 3d 621, 642 (1982)(*"Serrano IV"*); *see also Blum*, 465 U.S. at 895 (identity of counsel should not affect method of calculating fees); *Davis,* 976 F.2d at 1545–46.

4. The District Court Erred by Arbitrarily Reducing the Hourly Rates for All Paralegal Time From $235.00 to $125.00 an Hour.

Plaintiffs supported their request for paralegal rates with the Litt expert declaration, ER 484, and by declarations of counsel. *See*, *e.g.*, ER 506–09; 435–36. The Litt Declaration stated that the range for paralegal rates was $125.00

an hour to $235.00 an hour based on experience. ER 484. The district court, without any explanation or reasoning, arbitrarily used the $125.00 rate for *all* paralegals regardless of their level of experience or skills. ER 18. ("Additionally, the Court adopts the lower paralegal rates provided in the Litt Declaration.")

For example, the district court reduced the rate to $125 for a highly experienced paralegal, Patricia Orantes-Gallegos. Ms. Orantes-Gallegos has 25 years of experience. ER 506. Mr. Litt expressed an opinion based on his work with Mann and Cook paralegals that Ms. Orantes-Gallegos' requested rate of $235.00 an hour was reasonable. ER 484. There was no contrary evidence, and the court did not say anything about the experience and education of the paralegals, although it was presented to the court in the record. ER 17–18. Under *Moreno*, 534 F.3d at 1111, the district court cannot simply reduce all paralegal rates by $110 an hour without any explanation or factual basis.

B. The District Court Erroneously Reduced Plaintiffs' Attorneys' Rates for the Quality of Representation

The district court is required to give specific evidence if it reduces rates based on the quality of representation. *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1046 (9th Cir. 2000). Here, the district court first gave three examples of alleged overbilling as a reason to reduce rates. The court then reduced the award based on the "results obtained." Both of these across-the-board reductions were erroneous.

1. It was Legal Error for the District Court To Reduce the Rates For All Attorneys and Paralegals Working on the Case for Discrete Instances of Alleged Overbilling

The district court first focused on possible areas of overbilling, giving three examples of work that it considered unreasonably expended in this case (the number of amended complaints, the opposition to severing the cases, and the failure to confer before the motions in limine). It was legal error to impose an across-the-board rate reduction for overbilling. *Sorenson*, 239 F.3d at 1146–47(lowering the rate instead of the hours for overbilling "does not comport with our precedent"). Where the district court considers counsel to have been inefficient, the appropriate remedy is to reduce hours in a limited and specific way, rather than reducing the rate based on quality of representation. *Id*. Here, the district court found that the number of amended complaints and the filing of motions in limine without conferring with defendants required a reduction in the hourly rate. The appropriate response to what the district court saw as overbilling would be to reduce the hours spent on drafting the complaints and any ultimately useless motions.

Moreover, this was a complicated case, and there was good reason for the time expended on the complaint and the severance. First, in this complex case, it was crucial that Plaintiffs provide detailed and factual amendments to the pleadings, amendments that took some time to craft. The district court made no effort to determine whether any excess hours were spent, beyond noting the length of time from the filing of the first complaint to the operative complaint. Second,

as discussed above in the statement of the case, the cases were initially filed as one action before the court severed them. Severance created more work for Plaintiffs' counsel, as similar motions had to be filed in separate cases, and the attempt to keep the cases consolidated was intended to promote efficiency.[9] *See* Statement of the Case, *supra*.

The district court reasoned that the quality of representation was poor because Plaintiffs' motions in limine were stricken for failure to comply with the local rules, ER 13. The basis for striking the motions was only a failure to meet and confer with opposing counsel. *See* ER 104:10-17 (September 1, 2009 Scheduling and Case Management Order). The district court struck the motions "without prejudice." ER 70 (August 10, 2010 Order in CV07-3469). Furthermore, the court ruled that "[i]ssues raised in the motions in limine will be resolved . . . at time of trial." *Id*. The research on the motions included issues that would have been raised in trial and thus was useful in valuing the claims for settlement. Moreover, not all of the lawyers in this case worked on the motions in limine. The court could have simply reduced these hours, rather than reducing all lawyers' rates. It was inappropriate for the court to reduce rates across the board.

Finally, by reducing the rates of all lawyers and paralegals working on the case, the district court drew no distinction between lawyers responsible for these

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[9]Plaintiffs are unsure what the district court is referring to when the order states that Plaintiffs' counsel "reject[ed] initial attempts to reconsolidate" the cases. ER 13. Counsel supported the consolidation of the cases. After severance, the parties agreed that all dates should be consistent across cases when seeking continuances of the dates. ER 83-94.

alleged inadequacies and lawyers who were not involved in drafting the complaint or working on motions in limine. The court had a duty to "analyze the quality of the performance of the various lawyers individually because, just as the risk of the litigation may vary from counsel to counsel, so too may the quality of the work." *In re Equity Funding Corp. of Am. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977). It was improper for the district court to evaluate the skill and experience of counsel as a group instead of carefully setting rates for each counsel based on their own performance in the case. *Sorenson*, 239 F.3d at 1146–47 (each lawyer must be evaluated on their own merits).

2. It Was An Abuse of Discretion for the Court to Reduce Rates Based on the Results Obtained When Plaintiffs Received a Substantial Settlement

The Court found that the $500,000 settlement was "minimal." The Court claimed, without analysis of the evidence in the case or the summary judgment motions filed by Defendants, that the settlement was inadequate and that this somehow reflected poor lawyering. Reducing the hourly rates of all lawyers across the board because the district court *post hoc* concluded that the settlements should have been larger is a *non sequitur*.

Each Plaintiff agreed to the settlement amounts and each amount was net of attorneys' fees. The district court had no basis to determine that these settlements were too low or reflected poorly on Plaintiffs' counsel's performance. There is *no* evidence, and the district court cited none, that showed that the $500,000 damages recovery for the 17 Plaintiffs in the eight settling lawsuits, was "minimal." None

of the complaints alleged damages in any amount but rather, sought damages "according to proof." ER 1070, 1085, 1100, 1115, 1127, 1143, 1158, 1190. The district judge's view that the $500,000 damages recovery was "minimal" is thus unsupported by any evidence, thereby establishing an abuse of discretion in reducing the lodestar. *Cunningham*, 879 F.2d at 488 ("Adjustments to the lodestar based on 'results obtained' must be supported by evidence in the record demonstrating why such a deviation from the lodestar is appropriate.")

Defendants claimed that Plaintiffs were entitled to nothing and spent approximately $3 million in fees and costs defending that position. Plaintiffs faced years of additional litigation and delay in the absence of a settlement, and the settlement amounts represent significant payments for the injuries Plaintiffs suffered. The fact that juries may have awarded them more is not a reason to denigrate the settlement in this case or counsel's efforts in obtaining the settlement. There is absolutely no basis in the record of this case for the district court to conclude that the size of Plaintiffs' settlement awards was the result of inadequate lawyering by Plaintiffs' counsel, as opposed to recalcitrant Defendants who were unwilling to settle the case until they had expended millions in litigation fees.

Moreover, the courts have held that the outcome of a police misconduct case such as this one is not predictable or assured. Although the jury may have awarded Plaintiffs more, Plaintiffs also would have needed to "overcome the inherent sympathy in favor of law enforcement." *Agster v. Maricopa County*, 486

F. Supp. 2d 1005, 1015 (D. Ariz. 2007). Other factors besides the skill of the attorneys influence whether plaintiffs should settle the case for a certain amount. *See Gomez v. Gates*, 804 F. Supp. 69, 76 (C.D. Cal 1992) ("Simply billing more hours, no matter how they are spent, is not likely to have much effect on jurors' preconceptions about the relative credibility or entitlement to judgment of criminals and police officers.").

In addition, as the Court stated in *Riverside*, 477 U.S. at 574 "[u]nlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms . . . Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards." Therefore, "it is inappropriate for a district court to reduce a fee award below the lodestar simply because the damages obtained are small." *Quesada*, 850 F.2d at 541; *see also Cunningham*, 879 F.2d at 489. Damages act as a deterrent for future civil rights violations. The ultimate outcome of this case was the closing of the Maywood Police Department, and under California state law it is appopriate for the court to consider whether the lawsuit substantially benefitted the public by causing a change in policy.[10]

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[10]There is no doubt that Plaintiffs are the prevailing parties within the meaning of section 1988 given the $500,000.00 settlement to Plaintiffs. An enforceable settlement agreement clearly entitles a plaintiff to prevailing party status. *Skaff v. Meridien North America Beverly Hills, LLC* 506 F.3d 832, 844 n. 12 (9th Cir. 2007); *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 604 (2001).

Tipton-Whittingham v. City of Los Angeles, 34 Cal. 4th 604, 607 (2004).

The true basis for the rate reduction was revealed at the January 2011 hearing.[11] The district court apparently believed that this case was an easy one and that the jury would have awarded Plaintiffs substantially more damages than they received in the settlement. As mentioned above in Section I, at the hearing the district court said that it was inappropriate for Plaintiffs to get so little and that fees should be proportionate to the settlement. *See supra* Section I. Referring to civil rights cases, the judge stated that "a kid out of law school" could handle "these types of cases."[12] ER 32. Any fair review of the record in this case reveals the absurdity of this statement. The district court's decision to impose across-the-board cuts in hours, discussed below in Part III, itself reflects a determination that the case was a complex and voluminous one, not a simple one. *See Ferland v. Conrad Credit Corp*., 244 F.3d 1145, 1150 (9th Cir. 2001)("Where, however, the

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[11]Even where the court does not put the reasoning in its order, the reasons given at the hearing are relevant to understanding how the judge arrived at his decision. *Moreno*, 534 F.3d at 1115.

[12] Even if junior attorneys could have handled these cases, there is no principle of law allowing a court to assign junior attorney rates to senior attorneys. The Ninth Circuit has previously held that it can be cost-effective and efficient to have lead counsel perform tasks such as document review that are normally performed by junior attorneys, and it is "impermissible" legal error for the court to adjust billing to reflect the degree of difficulty of each task performed. *Moreno*, 534 F.3d at 1114-15. ("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.").

underlying case was not a complicated one, the district court that presided over the litigation should be able, after briefing by the parties, to look over the billing records for specific inefficiencies without expending a great deal of judicial time doing so."). Plaintiffs' counsel spent a great deal of time on this complex case and litigated it with skill and the benefit of experience. There was no justification for reducing their rates.

III. THE DISTRICT COURT ERRED BY IMPOSING OVERLAPPING CUTS TO PLAINTIFFS' HOURS THAT RESULTED IN A 66% ACROSS-THE-BOARD CUT AND BY REFUSING TO AWARD FEES FOR LITIGATING THE FEE MOTION.

Although a limited across-the-board percentage cut may sometimes be within the trial court's discretion, the court here abused its discretion and double-counted factors in setting a fee award when imposing overlapping cuts on hours. This Court set forth the proper methodology for district courts considering such cuts in *Moreno*, 534 F.3d at 1115-16. In *Moreno*, this Court indicated that a district court could impose a 10 % reduction in hours without a specific explanation, but anything beyond such a 10 % "haircut" must be accompanied by a more specific explanation. *Id.* at 1112.

Here, the district court cut hours by 66% without providing specific analysis of the relative percentage of inappropriate entries. It did so by imposing reductions of 35%, 20%, 20%, 5%, 10%, and 5%. These reductions were arbitrary and based on overlapping rationales that double-counted factors. In addition, the district court completely refused to award any hours related to preparation of the fee motion. In general, the district court ultimately failed to adhere to the

methodology prescribed in *Moreno*. In its hands, a "haircut" was transformed into a beheading.

A. The District Court Erred By Imposing a Total Across-the-Board Cut of 66% Without A Detailed Analysis of Plaintiffs' Time Records.

These cases were hotly contested over a period of years. Defendants' counsel were paid approximately $3 million to defend these cases. Not surprisingly, Plaintiffs' fee motion was voluminous. Each attorney submitted a declaration along with detailed time records. ER 493-905.

In *Moreno*, this Court indicated that a district court has the discretion to reduce hours by up to 10 % without giving a detailed explanation of its reasoning, stating:

> 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 over 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.

534 F.3d at 1112.

Here, the district court, after reducing the Plaintiffs' hourly rates by 25%, reduced Plaintiffs' hours by more than 66% without giving an adequate explanation for such draconian cuts. Plaintiffs do not contest a district court's

discretion to eliminate hours it finds to be excessive or unnecessary. Had the district court reduced Plaintiffs' hours by 10% across the board, as allowed under *Moreno*, there would be no appeal.

The district court's methodology, however was entirely contrary to the methodology insisted on by this Court to protect Plaintiffs from arbitrary reductions in fee awards. *Moreno*, 534 F.3d at 1112-1113. If the district court wishes to impose a cut of more than ten percent, it must give some explanation of why the percent that it is imposing is appropriate and appears accurate given the records. In particular, the court must set out the degree of "overbilling" and "explain the relationship between the number of hours improperly billed and the degree of the reduction." *Sorenson*, 239 F.3d at 1146.

1. The District Court Erred in Reducing Plaintiffs' Hours For "Irregular Billing Format."

The trial court imposed a sweeping 35% reduction simply because Plaintiffs' counsel separated the hours by attorney, with each attorney attesting to the accuracy of their hours and attaching their records with a detailed description of each task. This conventional and commonly accepted form of submitting hours was declared an "incomprehensible format" by the trial court. ER 20. The trial court claimed that Plaintiffs' counsel should have submitted their hours by each "'case' or 'client.'" Plaintiffs had no way of knowing that the court would have required that breakdown.[13] Although these were eight separate cases, they were

[13]Indeed, certain errors in billing, such as accidentally billing too many hours to one day, are only apparent when hours are listed by attorney or paralegal and *not*

litigated concurrently, and consolidated for purposes of the fee motion. ER 69. Many of the hours necessarily overlapped, such as work on the *Monell* claims and trial preparation, and thus the time spent in the different cases furthered all of the Plaintiffs' interests. Plaintiffs reasonably believed that indexing their time records by timekeeper rather than by case was appropriate.

The only support for the district court's 35% across-the-board reduction in Plaintiffs' hours was this Court's decision in *Welch v. Metro Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2009). In *Welch,* this Court agreed that a percentage reduction in time that was "block billed" was appropriate. *Id*. However, this Court also overturned a 20% reduction of all of the plaintiffs' time in that case because the district court had not applied the 20% reduction to block billed time. *Welch* rejects the methodology employed by the district court.

There is no support for the district court's conclusion that Plaintiffs' fee records were akin to block billing or were so incomprehensible that a 35% across-the-board reduction in *all* hours was justified. Indeed, the district court failed to cite any specific examples of inappropriate block-billing in Plaintiffs' records. *Moreno* requires a more detailed explanation if such a percentage reduction exceeds 10%.

The district court's assertion that it would take too many hours to analyze Plaintiffs' fee request cannot justify a 35% across-the-board reduction in hours for billing format. ER 20. Defendants made a specific analysis of Plaintiffs' billing

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by case.

records through the declaration of Mr. Schratz. Plaintiffs challenge the validity of his analysis and conclusion but the adversary submissions by the parties provided the information the district court could have used in making a fee award. The district court also had the option of requesting additional information from the parties in specific issues to facilitate its decision-making. What the district court is not permitted to do is reduce Plaintiffs' hours 35% across the board without adequate justification.

2. The District Court Erred in Reducing Plaintiffs' Hours 20% For "Entries Unrelated to the Case."

The district court identified certain isolated entries in Plaintiffs' time records which it concluded were not related to this case. Having found a handful of entries"vague," the court then reduced Plaintiffs' hours by another 20% across the board. Though Plaintiffs dispute that these hours were unrelated to these cases, Plaintiffs' hours should not have been reduced across the board based upon a finding that a handful of entries were "unrelated."

The entries were not so vague that they seemed unrelated to the case. For example, the district court noted that Plaintiffs' counsel billed for meeting with Singleton, who the record showed was a Maywood police officer. ER 22. The district court said that it would have to strike all hours for research involving Singleton because Plaintiffs' counsel had not explained how Singleton was involved in the particular matters at issue.

Where a *Monell* liability claim attempts to establish that there was a pattern and practice of violations, it would be folly to limit discovery to only the people

who witnessed or participated in the incident at issue. In discovery, lawyers investigate all leads "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1); *see also SNK Corp. of Am. v. Atlus Dream Entm't Co., Ltd.*, 188 F.R.D. 566, 572 (N.D. Cal. 1999). Talking to police officers such as Singleton and Densmore about their experiences in the Maywood Police Department, and talking to other victims of the Police Department's unlawful activity such as Trujillo and Salazar, is clearly related to the case. Plaintiffs need not record a detailed summary of each conversation to establish that their investigation of the facts was reasonable.

Similarly, it was reasonable for Plaintiffs to use a free legal clinic regarding police abuses to gather more information about patterns and practices of the Maywood Police Department. ER 520. The court referred to approximately 84 hours and around $27,322.50 in fees (using the Court's reduced rates) for clinic hours, and a total of approximately 69.5 hours and around $9,137.50 in fees for work on related towing cases. ER 21–22; *see also* ER 535–859 (time records). That is a total of $36,460 in fees for aspects of the case that the court found to be unrelated to the ultimate settlement. Yet the total reduction that the court imposed for "unrelated entries" was $187,032.26.

The additional 20% reduction for "unrelated" entries is arbitrary and unsupported by any reasonable analysis of Plaintiffs' billing records. Even if some of Plaintiffs' hours should have been reduced, there is no basis for an additional 20% across-the-board reduction to all of Plaintiffs' remaining hours.

3. The District Court Erred by Reducing Plaintiffs' Hours 20% For "Impossible and Ridiculous Billing Entries."

The district court identified a number of mistakes and inappropriate entries in Plaintiffs' billing records. Plaintiffs brought most of these errors to the district court's attention. ER 138–39, 172. The sum total of the entries the court identified was 108.05 hours or $13,875 in fees at the reduced hourly rates established by the Court.[14] The court reduced fees for "impossible and ridiculous entries" by $145,625.80.

The only truly impossible entries (i.e., billing entries for days that seem too long) occurred in paralegal time records. ER 23-24. Yet the district court imposed a reduction across all attorneys and paralegals, regardless of their firm's particular billing practices. Where "the improper billing practices were the responsibility of some, but not all, of the lawyers who represented Plaintiffs," it is inappropriate for a court to impose across-the-board percentage reductions on all lawyers. *Sorenson*, 239 F.3d at 1146.

The district court imposed yet another across-the-board 20% reduction to Plaintiffs' remaining time without actually identifying the improper entries which might plausibly warrant such a huge reduction. The district court was certainly within its discretion to strike inappropriate time entries, especially mistaken entries. However, there was no basis in Plaintiffs' time records for the district court's punitive additional 20% reduction based on a handful of such entries.

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[14] $13,268.75 of that total was for entries that were "long days," i.e., that the Court should have reduced but not eliminated totally.

4. The District Court Erred by Reducing Plaintiffs' Hours 5% for "Improper Billing Entries."

The district court identified entries for media work and for keeping time records as being improper. Rather than eliminating those entries the court reduced Plaintiffs' total amount of hours by an additional 5% whether a particular attorney had recorded such time or not. There was no basis for such an arbitrary reduction on top of all of the previous across-the-board reductions.

Billing for public relations work is not necessarily improper, particularly in a case litigated against a government defendant. Media and public relations work is appropriate and billable where the goal is to influence the defendant to settle the case, particularly where a defendant funded and controlled, albeit indirectly, by voters may be influenced by public opinion. *Gilbrook v. City of Westminster*, 177 F.3d 839, 877 (9th Cir. 1999)(where "[l]ocal politics had a potentially determinative influence on the outcome of settlement negotiations, . . . granting fees for media and public relations activities" was not an abuse of discretion). The court should have allowed entries for "the giving of press conferences and performance of other lobbying and public relations work" when it was "directly and intimately related to the successful representation of a client." *Davis*, 976 F.2d at 1545. While the court had the discretion to find that the media work was not sufficiently related to the case, the court erred in holding that it had no power to award fees for hours related to public relations work. The court compounded that error when it found that an appropriate sanction for even attempting to claim any hours related to public relations work was a 5% reduction in all hours.

5. The District Court Erred by Reducing Plaintiffs' Hours by 10% for "Clerical Tasks."

Next, the district court found that there were several entries for what the court considered to be "clerical tasks." ER 23. The court applied an additional 10% across-the-board reduction to Plaintiffs' time for this reason without any support for the conclusion that Plaintiffs had requested that much compensation for clerical tasks.

6. The District Court Erred by Reducing Plaintiffs' Hours by 5% for "Travel."

The district court made an additional across-the-board 5% reduction for "travel time" entries based on this Court's decision in *Davis*, 976 F.2d at 1543 (awarding attorneys' fees for travel time). The trial judge's objection to attorneys' travel time lacks merit. Travel time is traditionally compensated in this Circuit. *Nadarajah v. Holder*, 569 F.3d 906, 923-924 (9th Cir. 2009) (finding attorney travel time reasonably expended and including it in attorneys' fees).

7. These Reductions, Taken Together, Added Up to A Total Percentage Cut of 66%, Necessitating More Detailed and Thorough Explanation and Review of the Hours than Provided By the District Court

Under *Moreno* a district court may reduce hours by up to 10% across-the-board without much explanation. In this case, the district court reduced Plaintiffs' hours by 66.2%[15] with minimal or unsupported reasoning. The methodology of

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[15] *See* ER 25. This 66.2% reduction in hours was in addition to the reduction of rates, which had already reduced the plaintiffs' lodestar by 30.4%. The total reduction in the lodestar was 77%. (Plaintiffs' original lodestar was $2,059, 451.50, ER 262, and they were awarded $473,138.24, ER 26).

identifying a small number of errors in several different categories and then extrapolating them to all of the time records and imposing a cascading set of across-the-board reductions flies in the face of established law. There is simply no rational basis for the district court's methodology. *Moreno*'s methodology cannot be circumvented so easily. The district court could reduce Plaintiffs' hours by 10% based on this kind of analysis, but a reduction of more than 65% requires the district court to make detailed findings to justify such a huge cut in fees. The district court's arbitrary multiple across-the-board reductions should be overturned.

Moreover, the plaintiffs worked at multiple different firms with different billing practices. For several of the categories, the district court was only able to identify errors in some of the billing records for certain individuals. Where errors only appeared in limited places, the court was required by law to limit its across-the-board percentage reductions to the attorney or paralegal the errors pertained to. *Sorenson*, 239 F.3d at 1146.

B. The District Court's Methodology Constituted Improper Double Counting.

The district court here reduced Plaintiffs' hourly rates by 25 % to get to a lodestar (before its reduction in Plaintiffs' hours) of $1,400,248.13. Part of the court's analysis was based, *inter alia*, on purported inefficiency by Plaintiffs' counsel. The district court had already taken into account its conclusion that Plaintiffs' counsel spent too much time on tasks in reducing their fee request by more than 30 % across the board before any reduction in hours was made.

Reducing the hours spent when the court has already reduced the rate for spending too much time on the complaint, severance, and motions in limine constitutes double counting and the decision should be reversed on this basis alone. *Moreno*, 534 F.3d at 1115-16 (court should not impose a double penalty on counsel by applying reductions in both rates and hours for the same thing).

The categories the district court utilized are overlapping and thus result in the double-counting of factors. By utilizing six across-the-board percentage reductions the district court reduced the lodestar by $927,109.89 or approximately 66 percent. The district court does not explain the distinctions between "irregular billing format," "vague" entries, "impossible and ridiculous billing entries," and "improper billing entries." Even under the district court's flawed methodology these categories obviously overlap. Although a single across-the-board cut may sometimes be warranted in place of reviewing voluminous records, multiple across-the-board cuts based on essentially the same factors are never warranted. *See Cunningham*, 879 F.2d at 488–89 (no double penalties).

Even if the district court had reduced Plaintiffs' hours across the board by 25 % for all of the reasons the court gave, Plaintiffs would still have been entitled to the $1,025,000 they requested; that request had incorporated a cut in the lodestar of 49%. Only by engaging in this unique and unprecedented form of double counting was the district court able to bring Plaintiffs' fee award below Plaintiffs' settlement amount.

C. The District Court Erred by Refusing to Award Any Fees for Time Spent on the Fee Application.

The district court also erred by not awarding fees for the Plaintiffs' time spent in preparing the fee motion. The district court reasoned that because it found "problems in Plaintiffs' presentation of their Motion," the court had discretion to deny fees for all of the hours spent preparing the fee motion. ER 26. This total denial of fees was legal error.

The district court is required by law to determine a reasonable lodestar for the fee motion, where, as here, plaintiffs prevailed on their motion for attorney's fees. *Anderson v. Dir., Office of Workers' Comp. Programs*, 91 F.3d 1322, 1325 (9th Cir. 1996). "It would be inconsistent to dilute an award of fees by refusing to compensate an attorney for time spent to establish a reasonable fee." *Manhart v. City of L.A. Dept. of Water and Power*, 652 F.2d 904, 909 (9th Cir. 1981), *vacated on other grounds*, 461 U.S. 951 (1983); *see also Serrano IV*, 32 Cal. 3d at 643. "[I]f a request for fees on fees includes any non-compensable time, the district court should reduce the requested award rather than deny it altogether." *Cruz v. Alhambra Sch. Dist.*, 282 F. App'x 578, 581 (9th Cir. 2008). Here, the court did not examine at all whether the time spent on preparation of Plaintiffs' fee motion was reasonable.

In their settlement agreement Plaintiffs and Defendants explicitly stated that Plaintiffs should be compensated for this time. ER 6. Plaintiffs agreed to cap this sum at $25,000 in the settlement. Their records clearly demonstrated that they should be entitled to at least that sum. If the district court finds that sum

excessive, it must specify and award the amount of time it believes counsel reasonably spent on the fee motion. The reasonable amount of time spent was more than zero hours.

D. The Court Erred in Failing to Adjust the Hours Awarded According to Corrections in the Reply Declaration.

In their reply, Plaintiffs explained that they had erroneously totaled Ms. Ellison's hours as 411.54, when she had in fact billed 636.7 hours. ER 138–39. The correction included calculations and sworn affidavits. *Id*. The court ignored this revision and used 411.54 hours as the basis for its calculations and further reductions. ER 18. This was error. *See Dabbas v. Moffitt & Associates*, No. 07-CV-0040, 2008 WL 686687 at *3 (S.D. Cal. Mar. 12, 2008)("Attorney error . . . should not prevent the consideration of the merits of a case when the error is corrected in a timely fashion.").

IV. THE DISTRICT COURT ERRED BY DEEMING THE FEES PAID TO DEFENSE COUNSEL "IRRELEVANT".

Though the district court granted Plaintiffs leave to submit the defense billing and time records, the court deemed the time spent and fees paid to defense counsel "irrelevant to its decision," and did not consider them in its analysis. ER 11-12 & n.6. This was legal error It is the usual practice in the Ninth Circuit to look at the evidence of Defendants' fees in order to determine whether Plaintiffs' fees are reasonable. *Democratic Party of Wash. v. Reed,* 388 F.3d 1281, 1287 (9th Cir 2004) (Plaintiffs' hours not excessive because number of hours claimed of same 'magnitude' as opponent's hours); *Cairns v. Franklin Mint Co.*, 292 F.3d

1139, 1159 (9th Cir. 2002) (declining to reduce defendant's lodestar in part because opponent had incurred even greater fees); *Keith v. Volpe*, 644 F. Supp. 1317, 1320, *aff'd* 858 F.2d 467 (9th Cir.1988) (plaintiffs' fees generally will exceed those of defendants).

Plaintiffs were required to spend 4,330 hours on this case in order to prevail because defendants tenaciously litigated it. *See Riverside*, 477 U.S. at 580 n.11; *Burgess v. Premier Corp*., 727 F.2d 826, 840 (9th Cir. 1984)(relevant that defendants litigated the case to the hilt and spent a great deal on attorney's fees); *see also Serrano IV*, 32 Cal. at 638, n. 26. ("[t]hose who elect a militant defense ... [are responsible for] the time and effort they exact from their opponents.'). The great disparity between the two sides in hours spent – 4,330 by plaintiffs' counsel; 16,988 hours by defense counsel – strongly suggests that it was defense counsel who caused plaintiffs' counsel to spend as much time as they did. *See also* ER 522(defendants refused early attempts at mediation). It beggars reason to find that $473,138.24 is a reasonable fee for all of Plaintiffs' counsel to prosecute these cases to a successful conclusion while Defendants' counsel receive fees in an amount nearly seven times as large. Nothing in the record of this case remotely supports such a disparity in fees.

What the size of defense counsel's fees underscores is that the district court's idiosyncratic methodology resulted in an arbitrary and unreasonably reduced fee award to Plaintiffs' counsel. Had the district court simply taken a look at all of the tasks that needed to be accomplished in these cases with an open

mind, it is obvious that Plaintiffs' reduced fee request was reasonable.

Plaintiffs' counsel litigated eight separate cases with common *Monell* issues to a successful conclusion. Plaintiffs had to prepare initial pleadings. They responded to a huge amount of discovery initiated by Defendants in the case and conducted discovery of their own. ER 522–23, 513–15. There were over 50 depositions taken. ER 522-523 (Anderson-Barker Declaration ¶15). The parties each retained expert witnesses. Plaintiffs had to respond to summary judgment motions in every case which raised numerous issues. Plaintiffs had to prepare trial documents in accordance with the district court's rules. As this Court observed in *Moreno*, unlike Defendants' counsel, Plaintiffs counsel were working on a contingent fee basis for clients who could not afford to pay them. *Moreno*, 534 F.3d at 1110. Plaintiffs' counsel worked all of the hours they claimed and these hours were necessary to obtain a favorable result for their clients.

The district court in essence found that instead of spending 4,330 hours on these cases, Plaintiffs' counsel should have only spent approximately 1450 hours (while Defendants' counsel spent close to 17,000 hours). ER 24, 170. There is simply no rational basis for this conclusion in the record and the district court's analysis does more to obscure the issues than clarify them.

District courts are granted discretion to fix a reasonable fee but Plaintiffs' counsel cannot be subjected to the kind of arbitrary, result-oriented decision-making the district court's Order exemplifies.

V. THE DISTRICT COURT ERRED BY FAILING TO CONSIDER PLAINTIFFS' ENTITLEMENT TO A MULTIPLIER UNDER CALIFORNIA STATE LAW WHEN RULING ON ATTORNEYS' FEES.

Plaintiffs brought both federal and state claims in these cases. All of these claims were included in the settlement. Plaintiffs' fee motion was based on both federal and state law. Thus, Plaintiffs' entitlement to fees should have been analyzed under both federal and state law. California law allows a fee enhancement to a prevailing plaintiff on the theory that this compensates for the risk of loss inherent in contingency cases. *See Ketchum v. Moses*, 24 Cal.4th 1122, 1132–34 (2001); *Beasley v. Wells Fargo Bank* 235 Cal.App.3d 1407, 1419 (1991), overruled in part by *Olson v. Auto. Club of S. Cal.*, 42 Cal. 4th 1142 (2008)(regarding costs). In cases involving enforcement of constitutional rights, but little or no damages, such fee enhancements may make such cases economically feasible to competent private attorneys. *Weeks v. Baker & McKenzie*, 63 Cal.App.4th 1128, 1172 (1998).

This Court has previously held that a 2.0 multiplier reflected the expected market return for contingent fee cases. *See Fadhl v. City and County of San Francisco*, 859 F.2d 649, 650 (9th Cir. 1988) ("contingent fees that yield approximately two times the ordinary hourly rate for time expended is the return expected by lawyers in the relevant market"); *Wing v. Asarco, Inc.*, 114 F.3d. 986, 989 (9th Cir. 1997). In *Crommie v. California Public Utilities Commission*, 840 F. Supp. 719, 725 (N.D. Cal. 1994), *aff'd sub nom, Mangold v. California Public Utilities Commission*, 67 F.3d 1470 (9th Cir. 1995), a 2.0 contingent-risk

enhancement was applied under California state substantive law and affirmed by the Ninth Circuit. Finally, in 1999, a multiplier of 2.0 was awarded under the same California civil rights fee-shifting statute (§52) that applies here. *Chabner v. United of Omaha Life Insurance Company*, 1999 WL 33227443 at *6 (N.D. Cal. 1999).

The trial court did not consider this entitlement when analyzing the reasonableness of Plaintiffs' fee request. Even if the district court's lodestar determination of $473,138.24 was found to be reasonable, the usual multiplier used in California civil rights cases and applicable to Plaintiffs' claims would have resulted in a fee award of $946,276.48.

VI. ON REMAND, THIS FEE MOTION SHOULD BE ASSIGNED TO A DIFFERENT JUDGE.

Given the district court's belief that civil rights firms are not entitled to fees equal to other types of firms, its belief that the settlement was inadequate and that fees should be capped at the settlement amount, and the arbitrary methodology used to reach its desired result, if the case is remanded it should be assigned to a different judge.

Where discretion departs from the equitable principles that should guide it, and instead relies on factors contrary to established law, remand to a different judge is the proper remedy. *Tanner Motor Livery, Limited v. Avis, Inc.*, 316 F.2d 804, 809 (9th Cir. 1963). Under 28 U.S.C. [sec] 2106, a demonstration of "personal bias or unusual circumstances" makes remand to a different judge appropriate; factors to be considered include "(1)whether the original judge would

reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *Rhoades v. Avon Products*, 504 F.3d 1151, 1165 (9th Cir. 2007). Not all factors need weigh in favor of remand: "A finding of either of the first two factors supports remand to a different judge." *Id*.

Here, all three factors support remand to a different judge. It is by no means clear that the judge was simply unaware that to impose a proportionality cap was contrary to established law. Because he could not legally reduce the award for the prohibited reasons he mentioned in the hearing, in the order he instead attempted to justify his reductions by disregarding the evidence, taking averages, and otherwise manipulating the numbers through a series of overlapping reductions. ER 18-24. Merely affirming that the court here committed legal error and abused its discretion would not give Plaintiffs any assurance that the court would not find another route to reach its preordained result. The comments at the hearing illustrate that the judge will have substantial difficulty putting out of his mind the amount that he believes Plaintiffs should receive, regardless of the actual time records and rates in the legal market for such services. His comments also create the appearance of impropriety.

As the judge did not yet examine the records in detail, preferring to impose

across-the-board reductions, ER 18-24, the duplication of effort is minimal in comparison to the immense gain in preserving the appearance of fairness. This is the rare case which warrants remand to a different judge, given the unusual circumstances: the outrageous comments by the judge at the hearing regarding civil rights cases and proportionality of fees, his refusal to rule upon the motion until a writ of mandate was filed and his instructions to counsel to change the settlement, and the order which contained a series of legal errors and abuses of discretion.

CONCLUSION

For all of the foregoing reasons, the district court's fee award should be overturned and Plaintiffs should be awarded reasonable attorneys' fees in the amount of $1,025,000. If the case is remanded, it should be assigned to a different district judge.

Dated: May 23, 2012

Respectfully submitted,

By: s/ Paul L. Hoffman
Paul L. Hoffman
Attorney for Plaintiffs

STATEMENT OF RELATED CASES

Plaintiff-Appellants are unaware of any pending related cases before this Court as defined in Ninth Circuit Rule 28-2.6.

Dated: May 24, 2012

s/ Paul L. Hoffman
Paul L. Hoffman
Attorney for Appellants

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

I certify that pursuant to Fed. R. App. P. 32 (a)(7)(c) and Ninth Circuit Rule 32-1, the attached Appellants' Opening Brief is proportionally-spaced, has a typeface of 14 points, and contains 13, 942 words.

Dated: May 23, 2012

BY: s/Paul L. Hoffman
PAUL L. HOFFMAN

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2012, I electronically filed the foregoing **APPELLANTS' OPENING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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