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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF CALIFORNIA

8 DAVID F. JADWIN, D.O.,

9 Plaintiff,

10 v.

11 COUNTY OF KERN,

12 Defendant.

1:07-CV-00026-OWW-DLB

MEMORANDUM DECISION RE:
POST-TRIAL MOTIONS (Docs.
424, 425)

13
14 I. INTRODUCTION.

15 This case arises out of Plaintiff's former employment at the
16 Kern Medical Center, an acute care teaching hospital owned and
17 operated by the County of Kern, California. Plaintiff David F.
18 Jadwin, D.O. ("Plaintiff") claimed, among other things, that the
19 County and its employees retaliated and discriminated against him
20 in contravention of federal and state law. The employment issues
21 were tried before the Court and a jury from May 14, 2009 to June 4,
22 2009. On June 5, 2009, the jury returned verdicts in favor of
23 Plaintiff. On August 4, 2009, Findings of Fact and Conclusions of
24 Law were issued on the claims tried to the court alone. On May 4,
25 2010, Final Judgment was entered in favor of Plaintiff and against
26 Kern County in the amount of \$505,457, plus \$1 in nominal damages
27 on his civil rights claim. At trial, Plaintiff requested over \$4.2
28 million in economic damages.

1 Before the Court for decision are several post-trial motions.
2 Plaintiff has moved to amend the judgment to incorporate his bill
3 of costs and for prejudgment interest. He has also moved to
4 recover \$3,944,818.00 in attorneys' fees pursuant to 42 U.S.C. §
5 1988, 29 U.S.C. § 2617(a)(3) and California Government Code §
6 12965.¹ Defendants have moved for a new trial under Rule 59(e)
7 and, separately, to amend the judgment to reflect to reflect the
8 dismissals of several individually-named defendants.

9 Oral argument on these motions was held on July 28, 2010. The
10 Court, pursuant to *Moreno v. City of Sacramento*, 534 F.3d 1106 (9th
11 Cir. 2008), a Ninth Circuit case establishing the rules for
12 evaluating an attorney's fee request under 42 U.S.C. § 1988,
13 directed Plaintiff to supplement, organize, and refine his motion
14

15
16 ¹ During the July 28, 2010 oral argument the Court noted that
17 Plaintiff's fee motion was the highest it had received in over
18 nineteen years:

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

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

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

1 for attorneys' fees.² In particular, it was determined that
2 Plaintiff's counsel's documentary evidence concerning the hourly
3 rates and tasks performed was materially non-specific and limited
4 the district court's ability to meet *Moreno's* exacting and
5 mandatory standards imposed on district judges for calculating fee
6 awards. See *id.* at 1111 ("[w]hen the district court makes its
7 award, it must explain how it came up with the amount.") (emphasis
8 added).³ Plaintiff filed his supplemental and reply briefs, more
9 than 500 pages of argument and billing information, on August 16
10 and September 16, 2010. Defendants opposed the supplemental motion
11 on September 3, 2010. The motions are now submitted for decision.
12
13

14 ² Supplemental briefing was also requested on the issue of
15 prejudgment interest. (Doc. 440.) Plaintiff argues that prejudgment
16 interest should be awarded on the entire jury award at the state
law 7% interest rate. Defendants disagree.

17 ³ For example, the Court, pursuant to a minute order,
18 requested that counsel "include task and billing totals in their
supplemental applications for attorneys fees." (Doc. 440.)
19 However, Plaintiff's lead counsel, Mr. Eugene Lee, did not provide
20 this itemized information in his supplemental briefing. Rather, he
printed out his "Excel" billing sheet, which captured only thirty
21 characters of text. This was not helpful. Mr. Lee's purported
"documentary support" is especially problematic given the Court's
22 recitation to counsel of the Ninth Circuit case law, including
Moreno, during oral argument and the fact that his co-counsel's
23 (Ms. Herrington) declaration correctly contained the required
billing support necessary to calculate the Lodestar. Mr. Lee is
24 again reminded that "[t]he fee applicant bears the burden of
establishing entitlement to an award and documenting the
25 appropriate hours expended and hourly rates." *Hensley v.*
26 *Eckerhart*, 461 U.S. 424, 437 (1983). As a result of Plaintiff's
counsel's continued oversights, which are unexplained given the
27 number of opportunities he had been provided to amend his billing
information, part of the County's billing analysis is adopted to
28 calculate the Lodestar figure.

1 II. BACKGROUND.

2 The relevant facts and procedural history are summarized in
3 the Court's previous Memorandum Decisions in this case, filed on
4 April 8, 2009 and March 31, 2010, in brief:⁴ In this employment
5 case, trial commenced on May 14, 2009 and concluded on June 5,
6 2009. The jury returned verdicts, entered on June 8, 2009, in
7 favor of Plaintiff. (Doc. 384.) The jury found that Defendant
8 County: (1) retaliated against Plaintiff for engaging in certain
9 activities in violation of the Family and Medical Leave Act
10 ("FMLA") and the California Fair Employment and Housing Act
11 ("FEHA"); (2) retaliated against Plaintiff for taking medical
12 leave under the FMLA and the California Family Rights Act ("CFRA");
13 (3) discriminated against Plaintiff on the basis of his mental
14 disability in violation of the FEHA; (4) failed to reasonably
15 accommodate Plaintiff's mental disability in violation of the FEHA;
16 and (5) failed to engage in an interactive process with Plaintiff
17 in violation of the FEHA. The jury found against the County on its
18 defense that Plaintiff's employment contract was not renewed by
19 reason of his conduct and alleged violation of the employer's rules
20 and contract requirements and/or that Plaintiff's improper behavior
21 was the cause of the nonrenewal of his contract. The jury awarded
22 damages as follows:

23	Mental and emotional distress and	\$0.00
24	suffering.	

25
26
27 ⁴ *Jadwin v. County of Kern*, 2010 WL 1267264 (E.D. Cal. Mar.
28 31, 2010); *Jadwin v. County of Kern*, 610 F. Supp. 2d 1129 (E.D.
Cal. Apr. 08, 2009)

1	Reasonable value of necessary medical	\$30,192.00
2	care, treatment, and service received to	
3	the present time.	
4	Reasonable value of necessary medical	\$0.00
5	care, treatment and services which with	
6	reasonable probability will be required in	
7	the future.	
8	Reasonable value of earnings and	\$321,285.00
9	professional fees lost to the present	
10	time.	
11	Reasonable value of earnings and	\$154,080.00
12	professional fees with which reasonable	
13	probability will be lost in the future.	
14		<hr/>
15	Total damages	\$505,457.00

16 Certain claims were not submitted to the jury, specifically,
 17 Plaintiff's claim for interference with his rights under the
 18 FMLA/CFRA and a deprivation of Plaintiff's due process rights under
 19 the Fourteenth Amendment (made actionable by 42 U.S.C. § 1983).⁵
 20 On August 4, 2009, Findings of Fact and Conclusions of Law were
 21 issued on those claims. As to the FMLA/CFRA claim, it was
 22 determined that Plaintiff lacked standing to assert his claim or,
 23 *arguendo*, assuming standing existed at the time of the operative
 24 pleading, the claim was moot. As to the procedural due process
 25 claim, it was determined that Plaintiff's due process rights were
 26 violated and he was awarded nominal damages. On May 4, 2010, Final
 27 judgment was entered in favor of Plaintiff and against Kern County
 28 in the amount of \$505,457, plus \$1 in nominal damages on

25 ⁵ The parties stipulated that these claims should be tried by
 26 the court sitting without a jury, and each party, pursuant to
 27 Federal Rule of Civil Procedure 38(d); voluntarily and knowingly
 28 waived on the record in open court any right to try these claims to
 a jury. The stipulation was accepted on the twelfth day of the
 jury trial, June 6, 2009, and a corresponding order entered.

1 Plaintiff's due process claim, and any costs as permitted by law.

2 On May 28, 2010, Defendant filed two post-trial motions. The
3 first, to amend the Final Judgment to incorporate the dismissals of
4 several individually-named defendants. (Doc. 414.) According to
5 the County, these individually-named defendants are "prevailing
6 parties" in this action and are entitled to recover their costs of
7 suits. The motion concerns the following individually-named
8 defendants, who were named in the original and first amended
9 complaint: Dr. Eugene Kercher, Dr. Jennifer Abraham, Dr. Scott
10 Ragland, Dr. William Roy, Dr. Irwin Harris, Toni Smith and Peter
11 Bryan.⁶ Defendant's second post-trial motion was for a new trial
12 pursuant to Rule 59 of the Federal Rules of Civil Procedure. (Doc.
13 415.) The County argues that Ninth Circuit case law mandates a new
14 trial based on Plaintiff's counsel's wrongful misconduct during
15 trial.

16 Plaintiff also filed two post-trial motions. On May 28, 2010,
17 Plaintiff moved to amend the Final Judgment to incorporate in the
18 final judgment, prejudgment interest and his recoverable costs.
19 (Doc. 424.) On June 1, 2010, Plaintiff moved for attorney's fees
20 of \$3,944,818.00 pursuant to 42 U.S.C. § 1988, 29 U.S.C. §
21 2617(a)(3), Cal. Gov't Code § 12965, and E.D. Local Rule 54-293.
22 (Doc. 425.)

23 Oral argument on the post-trial motions was held on July 28,
24

25 ⁶ Defendant's "Motion to Amend the Judgment" to incorporate
26 the dismissals of several individually-named defendants was
27 resolved pursuant to Court Order on August 12, 2010. (Doc. 445.)
28 The motion was granted as to Defendants Peter Bryan and Irwin
Harris only. Defendant's motion was, in all other respects,
denied. The Final Judgment is amended to reflect the dismissals
with prejudice of Mr. Bryan and Mr. Harris.

1 2010. At the conclusion of the hearing, it was determined that
2 supplemental briefing and specific justification was necessary to
3 resolve the motions for prejudgment interest and attorney's fees.
4 (Doc. 450.) Opening supplemental briefs/oppositions on these
5 issues were filed on August 6, 13, 16, and 18, 2010. (Docs. 444,
6 447-49.) The final opposition and reply briefs were filed on
7 September 3 and 16, 2010. (Docs. 450 and 451.)

8
9 III. DISCUSSION.

10 A. New Trial Motion

11 1. Introduction and Argument

12 The County moves for a new trial pursuant to Rule 59 of the
13 Federal Rules of Civil Procedure.⁷ The County argues that there
14 are several independent reasons to grant a new trial, including:
15 the intentional attorney misconduct of Plaintiff's counsel, Mr.
16 Eugene Lee, during trial; Mr. Lee's repeated use of the word
17 "demotion" in violation of an in limine order and despite numerous
18 admonitions during trial; Mr. Lee and his co-counsel's
19 inappropriate gesturing, mocking, and disruptive behavior at
20 Plaintiff's counsel table in the juries' presence during trial; Mr.
21 Lee's interference with the County's attempt to evaluate Plaintiff
22 during discovery; and Mr. Lee's intentional "blurring" to the jury
23 of Plaintiff's employment-based claims, which allegedly resulted in
24 an erroneous award of "front pay" and a violation of the "primary
25 rights" doctrine.

26 _____
27 ⁷ An Order denying the County's Motion for New Trial was
28 entered on August 12, 2010. (Doc. 446.) The merits are discussed
in this Memorandum Decision to fully develop the record.

1 The County filed its motion for a new trial on May 28, 2010.⁸
2 In support of its motion, Defendant submitted: (1) a Memorandum
3 supporting the County's motion; (2) the declaration of Mark A.
4 Wasser, the County's lead counsel; (3) the declaration of Karen S.
5 Barnes, an in-house attorney for Kern County, who was present
6 throughout and testified at trial; (4) the declaration of Amy
7 Remly, Mr. Wasser's paralegal; (5) the declaration of Joanne
8 DeLong, an attorney who observed the entire trial in the courtroom;
9 (6) the declaration of Dr. Robert Burchuk, the County's medical
10 expert; (7) the declaration of Dr. Irwin Harris, who provided
11 expert testimony during trial; and (8) the declaration of Renita
12 Nunn, who testified on May 20 and June 2, 2009. (Docs. 417-423.)

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

22 a. Use of Word "Demotion" at Trial

23 1. Mr. Wasser

24 Early in trial, Mr. Lee began using the words "demoted"
25 and "demotion" to refer to Plaintiff's removal from his
26 chairmanship position at Kern County Medical Center

27 ⁸ It is undisputed that the County's motion is timely under
28 Rule 59(b). See Fed R. Civ. Proc. 59(b) ("A motion for a new trial
must be filed no later than 28 days after the entry of judgment.").

1 despite the absence of any evidence that Plaintiff was
2 demoted. Every time he used these words, I objected.
3 The Court sustained all of my objections. After Mr.
4 Lee's third or fourth continued usage of the words, the
5 Court admonished Mr. Lee and told him he was dangerously
6 close to being held in contempt. Mr. Lee never stopped
7 using the words. He even used them in his closing
8 argument, prompting yet another admonition from the
9 Court. On at least one occasion, Mr. Lee sought to
10 excuse his misconduct by claiming it was his first trial.

11 (Doc. 417 at ¶ 6.)

12 2. Joanne Delong

13 During the course of the trial, in the presence of the
14 jury, Plaintiff's attorney, Eugene Lee, used the word
15 "demotion" several times in reference to Plaintiff's
16 removal from the chairmanship of the Pathology Department
17 at Kern Medical Center. On at least one occasion, after
18 trial had concluded for the day but before the attorneys
19 were dismissed, the Court admonished Mr. Lee for his
20 continued use of the word "demotion." I remember the
21 admonishment was lengthy and quite stern.

22 (Doc. 420 at ¶ 3.)

23 3. Karen Barnes

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

b. Gesturing, Shrugging, and Scoffing

1. Amy Remly

During the trial, I sat in the gallery. I had an
unobstructed view of the Plaintiff's counsel table. Mr.
Lee often became agitated and, when he did, he frequently
threw himself back into his chair and threw his arms up

1 into the air. Joan Herrington frequently turned her face
2 toward Mr. Lee and made facial expressions in response to
3 witness' testimony. She rolled her eyes, arched her
4 eyebrows and shook her head. This behavior lasted
5 throughout the trial.

6 (Doc. 419 at ¶ 2.)

7 2. Dr. Irwin Harris

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

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

17 Every few minutes, Plaintiff's other attorney, Joan
18 Herrington, would respond to my answers by raising her
19 eyebrows, looking surprised, and then she would lean over
20 and whisper into the ear of Mr. Lee, who would suspend
21 that line of questioning until another approach was taken
22 with that line of questioning. I found these pauses to
23 be filled with drama, and it disturbed my concentration.

24 (Doc. 422 at ¶ 3-4.)

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

27 Karen Barnes and Renita Nunn, two trial witnesses, submitted
28 sworn declarations describing similar conduct by Plaintiff's
29 counsel during trial. (Docs. 418 & 423.) According to Ms. Barnes,
30 she was "uncomfortable" and "distracted" by the constant gesturing,
31 facial grimaces, and snickers from Plaintiff and his attorneys.
32 (Doc. 418 at ¶ 4.) Renita Nunn states that Mr. Lee and Ms.
33 Herrington made "huffing sounds" and rolled their eyes when they

1 disagreed with a witness or opposing counsel. (Doc. 423 at ¶ 3.)
2 Ms. Nunn further recounts an incident where Mr. Lee was admonished
3 by the court after he yelled "come on" in response to one of her
4 answers. (Id. at ¶ 4.) She also states that Mr. Lee "threw his
5 arms about" and engaged in "theatrics" during trial. (Id. at ¶ 3.)
6

7 d. Inappropriate Comments During Closing Argument

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

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

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

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

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

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

Each time Mr. Lee was admonished he apologized and on more
than one occasion stated that it was his first trial and he was

1 "trying."⁹ The court's response, in keeping with its duty to
2 recognize the inexperience of counsel, attempted to balance Mr.
3 Lee's violation of rudimentary rules of trial decorum, against the
4 rights of all parties to a fair trial, and refrained from
5 interfering with or chilling Mr. Lee's advocacy while reminding him
6 of his professional responsibility to abide by the rules. Mr. Lee,
7 notwithstanding, continued to violate the rules.

8
9 **2. Merits**

10 Rule 59(a) of the Federal Rules of Civil Procedure provides
11 that a court may grant a new trial "for any reason for which a new
12 trial has heretofore been granted in an action at law in federal
13 court." Fed. R. Civ. P. 59(a). Rule 59 does not specify the
14 grounds on which a motion for a new trial may be granted. *Zhang v.*
15 *Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1035 (9th Cir. 2003).
16 Rather, the court is "bound by those grounds that have been
17 historically recognized." *Id.* Historically recognized grounds
18 for a new trial include a verdict that is against the weight of the
19 evidence, damages that are excessive, or a trial that was not fair

20
21 ⁹ On June 2, 2009, following Mr. Lee's cross-examination of a
22 defense expert witness, the Court, outside the presence of the
23 jury, reminded Mr. Lee that Courtroom Decorum Rule No. 13 states:
"counsel shall not repeat, comment on or echo the answer given by
the witness." Mr. Lee responded:

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

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

1 to the moving party. *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729
2 (9th Cir. 2007). A new trial may be granted only if, after
3 weighing the evidence as the court saw it, "the verdict is contrary
4 to the clear weight of the evidence, is based upon false or
5 perjurious evidence, or to prevent a miscarriage of justice."
6 *Molski*, 481 F.3d at 729 (quoting *Passantino v. Johnson & Johnson*
7 *Consumer Prods.*, 212 F.3d 493, 510 n. 15 (9th Cir. 2000)). The
8 decision whether misconduct of trial counsel has been so egregious
9 to require a new trial is committed to the broad discretion of the
10 court. See *Landes Const. Co. v. Royal Bank of Canada*, 833 F.2d
11 1365, 1371-72 (9th Cir. 1987); see also *Allied Chemical Corp. v.*
12 *Daiflon, Inc.*, 449 U.S. 33, 36 (1980) ("The authority to grant a
13 new trial [...] is confided almost entirely to the exercise of
14 discretion on the part of the trial court."

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

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

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

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

1 the County's interpretation of Ms. Herrington's alleged gesturing
2 and misconduct, which he describes as minimal and not impacting the
3 Rule 59 analysis.

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

14 Here, Plaintiff's counsel's comments concerning the County's
15 size and available resources were improper, as he readily concedes.
16 (RT, July 28, 2010 at 88:2-88:3) ("the Court gave an admonition at
17 that time, sua sponte [...] and Mr. Lee accepted the admonition
18 [...] He apologized."). However, there is no indication that Mr.
19 Lee's comments so permeated the trial that the jury was necessarily
20 prejudiced, as required by *Settlegoode v. Portland Pub. Schs*, 371
21 F.3d 503 (9th Cir. 2004). First, immediately following Mr. Lee's
22 comments, the Court, *sua sponte*, instructed the jury to disregard
23 Mr. Lee's statement about size and the County's power. It did so
24 in a neutral and dispassionate manner to avoid emphasizing any
25 prejudice and so as to not reflect adversely on either party. The
26 law presumes that the jury carefully follows the instructions given
27 to it. See *Doe v. Glanzer*, 232 F.3d 1258, 1270 (9th Cir. 2000);
28 see also *United States v. Sarkisian*, 197 F.3d 966 (9th Cir. 1999)

1 ("Given that the district court sustained the objection, coupled
2 with the district court's earlier instruction to the jury ..., if
3 there was any error, it was harmless."). Here, the prejudicial
4 effect on the jury, if any, was minimal and a new trial is not
5 warranted on that basis. See *Keher v. Smith Barney, Harris Upham &*
6 *Co.*, 736 F.2d 1283, 1286 (9th Cir. 1986) (explaining that the trial
7 court is in the best position to gauge the prejudicial effect of
8 improper comments).

9 As the Court stated during oral argument on the Motion for New
10 Trial on July 28, 2010, the comment was improper but was
11 immediately and appropriately remedied:

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

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

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

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

29 Second, the "size" comments alleged to have deprived the
30 County of a fair trial were isolated rather than persistent. They
31 occurred only during closing argument. See *Cooper v. Firestone*
32 *Tire & Rubber Co.*, 945 F.2d 1103, 1107 (9th Cir. 1991) (declining
33 to grant a motion for a new trial where "the alleged misconduct

1 occurred only in the argument phase of the trial ... most of
2 counsel's comments were not objected to at trial and appellants did
3 not move for a mistrial at the end of the argument"). The
4 misconduct complained of in this case is substantially different
5 from the "closing argument misconduct" supporting a new trial in
6 *Bird v. Glacier Electric Coop. Inc.*, 255 F.3d 1136 (9th Cir. 2001).
7 In *Bird*, the Ninth Circuit concluded that counsel's closing
8 arguments offended fundamental fairness because counsel: (1) argued
9 in inflammatory terms; (2) linked the defendant's behavior to white
10 racism in exploitation of Indians; (3) appealed to historical
11 racial prejudices of or against the white race; and (4) used
12 incendiary racial and nationalistic terms to encourage the
13 all-tribal member jury to make an award of damages against the
14 non-Indian defendant. *Id.* at 1152. *Bird* is distinguishable.

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

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

23 Both Plaintiff's attorneys, Mr. Lee and Ms. Herrington,
24 while seated at counsel table listening to witnesses
25 testify, grimaced, sighed, snickered, rolled their eyes,
26 shook their heads, huffed, made facial expressions of
27 disapproval, and feigned exaggerated looks of
28 exasperation. Ms. Herrington constantly arched her
eyebrows and shook her head. Mr. Lee made guttural
sounds and grunts and would lean back in his chair, throw
his arms up and slap the armrests when he did not like an
answer. While he examined witnesses, Mr. Lee routinely
repeated the witness' answers back to the witness. He

1 was admonished several times by the Court to stop it. He
2 made sarcastic statements like, 'of course you would say
that' and 'come on' [...]

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

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

7 The starting point is the County's failure to object to these
8 alleged gestures, facial expressions, or grunts during trial. The
9 objections are made for the first time in the County's motion for
10 a new trial. The "non-objection" issue was discussed during the
11 July 28, 2010 oral argument, at which point the Court stated that
12 it did not observe the alleged inappropriate gesturing and mocking,
13 in part because defense counsel did not bring the conduct to the
14 Court's attention. Rather, the Court was focused primarily on the
15 witness, jury, trial exhibits, real-time testimony on the Court's
16 monitor, and its taking of trial notes; not on Plaintiff's
17 attorneys or the individuals sitting near Plaintiff's table.¹⁰
18 Defense counsel stated that he did not personally witness the
19 conduct because he "was examining the witness [...] [the gesturing
20 and comments] it's behind me." (RT, July 28, 2010 at 80:18-80:23.)

21
22 ¹⁰ With respect to witnessing the alleged improper trial
conduct, the Court stated:

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

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

1 This explains why no objection was then raised, but does not
2 explain why the subject was not raised at a recess or the close of
3 the court day, to give the judge an opportunity to address the
4 claim. Nor was a motion for mistrial made.

5 The Ninth Circuit holds that a new trial should only be
6 granted where the "flavor of misconduct ... sufficiently
7 permeate[s] an entire proceeding to provide conviction that the
8 jury was influenced by passion and prejudice in reaching its
9 verdict." *Settlegoode*, 371 F.3d at 516-17. An even higher
10 threshold governs where, as here, defendant failed to object to the
11 alleged misconduct during trial.¹¹ *Id.* at 518. Under those
12 circumstances, the Ninth Circuit reviews for "plain or fundamental
13 error," which requires: "(1) an error; (2) that the error be plain
14 or obvious; (3) that the error have been prejudicial or affect
15 substantial rights; and (4) that review be necessary to prevent a
16 miscarriage of justice." *Id.*

17
18 a. Counsel's Misconduct.

19 Here, the conduct at issue does not meet this high threshold.
20 *See, e.g., A.D. v. Cal. Highway Patrol*, No. C-07-5483-SI, 2009 WL
21 1817004, at 5 (N.D. Cal. June 23, 2009) (finding that defendants
22 did not meet *Settlegoode's* high threshold).

23
24 ¹¹ In *Settlegoode*, the Ninth Circuit stated that a higher
25 threshold is necessary for two reasons: "First, raising an
26 objection after the closing argument and before the jury begins
27 deliberations 'permit[s] the judge to examine the alleged prejudice
28 and to admonish ... counsel or issue a curative instruction, if
warranted. This was not done. Second, allowing a party to wait to
raise the error until after the negative verdict encourages that
party to sit silent in the face of claimed error." *Id.* at 516-17
(internal quotations omitted).

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

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

19 None of the objected-to conduct satisfied the *Settlegoode*
20 standard; it did not permeate the entire proceeding so as to
21 influence and/or prejudice the jury. A review of the record
22 reveals that Mr. Lee's cross-examination of several witnesses was
23 contentious and at times sarcastic, particularly as to Plaintiff's
24 former professional colleagues at Kern Medical Center. However,
25 the discordant nature of the examination was often brought on by
26 the witnesses, who themselves argued or were adverse in response to
27 points Defendant sought to establish. Further, the record does not
28 indicate that Mr. Lee's extraneous comments were actually heard by

1 any member of the jury. It is also possible that the jury viewed
2 Plaintiff and his counsel in a less favorable light by observing
3 the complained-of behavior.

4 The same reasoning applies to the argument that "Mr. Lee's
5 continued use of the word 'demotion' was prejudicial to the County
6 because it implied Plaintiff was punished even though neither party
7 introduced evidence to support such a finding." The objections
8 were sustained and, as the County explains: "the Court gave Mr. Lee
9 a lengthy admonition and warning, outside the presence of the jury,
10 for his continued use of the word [...] Mr. Lee extravagantly
11 apologized and assured the Court he would stop." Contrary to the
12 County's assertions, there is no evidence in the record that Mr.
13 Lee made "insincere apologies" to the Court or that his language
14 choice was "calculated and pervasive in nature." Rather, the
15 record demonstrates Mr. Lee's misstatements were due to his total
16 inexperience as a trial attorney and unfamiliarity with the federal
17 rules of evidence.¹²

18 Here, in contrast to cases such as *Cadorna v. City and County*
19

20 ¹² With respect to the "demotion" issue, the Court stated
21 during oral argument on July 28, 2010: "And so on this issue, and
22 particularly the use of the term 'demotion,' the Court sustained
23 the objections and did not admonish Mr. Lee in front of the jury.
24 And so I don't think there was any prejudice to the plaintiff. And
25 since the objections were sustained and -- it was a close issue,
26 and an arguable point, the Court doesn't believe that either
27 cumulatively, or standing alone, that that was the kind of
28 intentional black-hearted misconduct that can essentially -- those
cases are where the attorney very purposefully and with malice
aforethought, knowing what the off limits areas of the Court are,
are knowing that what the attorney's going to appeal to, matters
that are categorically inadmissible, that are prejudicial, sets
out, if you will, on a course to flout and violate the orders to do
nothing but prejudice the jury." (RT, July 28, 2010 at
73:7-73:21.)

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

11
12 b. Confusing Federal and State Front Pay Claims

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

27 The County's first argument is an extension of the "liquidated
28 damages" analysis contained in the March 31, 2010 Memorandum

1 Decision. The Memorandum Decision explained that the statutory
2 basis for the claimed "reasonable value of earnings and
3 professional fees" award was unintelligible, therefore liquidated
4 damages were not available. It also discussed the impact of the
5 general jury verdict in the context of prejudgment interest, which
6 was unavailable for the same reasons. Here, the County adds an
7 additional element to the analysis: If liquidated damages were
8 improper because the foundation for "future damages" was unclear,
9 then the entire "future damage" award is infirm.

10 This issue is discussed in detail in the "prejudgment
11 interest" section, § III(B)(1), *infra*. Both parties argue that the
12 award must be modified (upward or downward) because the jury did
13 not award damages based on federal (FMLA) or state (FEHA or CFRA)
14 violations. According to the County, the entire future damage
15 award must be thrown out because "it might be based on the FMLA."
16 It does not follow that the entire "future" damage award is infirm.
17 While the federal FMLA does not provide for "front pay," the award
18 of reasonable value of earnings and professional fees is properly
19 supported under the state FEHA and CFRA claims. Although Mr. Lee
20 did not make this explicitly clear during trial, the County did not
21 object to Mr. Lee's statements at that time. More critically, Mr.
22 Lee's intermingling of the statutory frameworks did not result in
23 Rule 59 error; the jury award is supported by state statutory law.¹³

24
25 ¹³ It is undisputed that the jury heard evidence to properly
26 support an award for future losses. The March 31, 2010 Memorandum
27 Decision provides:

28 At trial, Plaintiff put on evidence of his future
losses through his economist, Stephanie Rizzardi, who

1 The County's second argument, that counsel "equivocated"
2 during closing argument, is resolved under the "misconduct"
3 framework, discussed in detail above. Here, the "equivocation"
4 allegedly took place during closing arguments and was not objected
5 to by the County. On these facts, there is no basis to grant a new
6 trial. See *Cooper v. Firestone Tire & Rubber Co.*, 945 F.2d 1103,
7 1107 (9th Cir. 1991) (declining to grant a motion for a new trial
8 where "the alleged misconduct occurred only in the argument phase
9 of the trial [...] most of counsel's comments were not objected to
10 at trial and appellants did not move for a mistrial at the end of
11 the argument"). Defendant did not move for a mistrial based on the
12 Plaintiff's arguments. Taking Mr. Lee's "equivocation"
13 independently or in the aggregate, there is insufficient evidence
14 to conclude that this alleged misconduct permeated the trial and
15 irreversibly prejudiced the County. Mr. Lee's (mis)expressions in

16
17 testified that she calculated future losses based on
18 the salary and other forms of compensation (such as
19 professional fees) Plaintiff lost by virtue of not
20 having his contract renewed, i.e., what he expected
21 to receive had he remained employed with the County.
22 Plaintiff's damages expert projected this loss out to
23 February 2016, Plaintiff's worklife expectancy. The
24 expert also prepared a damages report, which was
25 submitted into the evidence. (Exhibit No.
26 451.1-451.6.) Given the nature of Plaintiff's
evidence regarding future losses, it is apparent that
the \$154,080 the jury awarded for the "[r]easonable
value of earnings and professional fees which with
reasonable probability will be lost in the future"
represents an award of front pay. Accordingly, even
assuming it stems from an FMLA violation, the
\$154,080 amount is not eligible for inclusion in a
liquidated damages computation under the FMLA.

27 *Jadwin v. County of Kern*, 2010 WL 1267264, at 11 (E.D. Cal. 2010).
28

1 this area are indicative of counsel's inexperience, not gross
2 incompetence or intentional misconduct.

3
4 c. Primary Rights Doctrine.

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

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

15 *Mycogen Corp. v. Monsanto Co.*, 28 Cal.4th 888, 904 (2002)
16 (citations omitted). A party may bring only one cause of action to
17 vindicate a primary right. *Id.* at 897. Claims not raised in this
18 single cause of action may not be raised at a later date. *Id.*

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

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

1 rights doctrine:

2 MHC's claims in federal and state court all involve a
3 single primary right: the right to receive a fair return
4 on its investment at Westwinds. They all stem from a
5 single injury MHC claims to suffer. See *Takahashi v. Bd.*
6 *of Trs.*, 783 F.2d 848, 851 (9th Cir.1986) (holding the
7 plaintiff's statutory mandamus proceeding in state court
8 barred the plaintiff's constitutional claims in federal
9 court because both actions stemmed from a single primary
10 right: the contractual right to employment). MHC's
11 claims all relate to a single Ordinance and the City's
12 application of that Ordinance to MHC's petition for a
13 rent increase. MHC's different Counts are simply
14 different legal theories under which MHC may recover.
15 Different theories of recovery are not separate primary
16 rights. *Mycogen Corp.*, 28 Cal.4th at 897, 123 Cal.Rptr.2d
17 at 438, 51 P.3d at 307; see also *Slater v. Blackwood*, 15
18 Cal.3d 791, 795, 126 Cal.Rptr. 225, 226-27, 543 P.2d 593,
19 594-95 (1975)

20 *Id.* at 1031-31.

21 Plaintiff responds that the County "fundamentally
22 misunderstands the primary rights theory." Plaintiff relies on
23 *Agarwal v. Johnson*, 25 Cal. 3d 932 (1979) for the proposition that
24 "one adverse employment action could involve the violation of more
25 than one primary right."

26 On this point, Plaintiff also cites *Los Angeles Branch NAACP*
27 *v. Los Angeles Unified School Dist.*, 750 F.2d 731 (9th Cir. 1994):
28 "As both *Mattson* and *Agarwal* indicate, the single most important
factor in determining whether a single course of conduct has
violated more than one primary right is whether plaintiff suffered
injury to more than one interest." Plaintiff then recounts eight
"interests," including the right to a reasonable accommodation in
employment; right to a workplace free from discrimination; right to
an interactive process; and right to workplace free from
retaliation as separate "interests," involving distinct primary

1 rights, which were included in the second amended complaint.

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

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

18 So there's five separate primary rights that were
19 identified by claims, that were separately stated
20 correctly in the complaint. And so I don't believe that
21 there's only one injury or only one primary right that
22 was at issue in the case, or on which the jury could
23 have found a basis to award damages.

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

And again, an experienced trial lawyer makes strategic

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

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

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

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

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

19 The trial of this case culminated in a result that was
20 supported by substantial evidence. The testimony of members of the
21 Medical Board of Kern Medical Center show that they had personal
22 disputes with and animosities toward the Plaintiff arising out of
23 conflicts. Trial testimony given by members of the Board could
24 have been perceived by the jury as condescending, if not arrogant,
25 and unduly critical of the Plaintiff. Even accepting the defense
26 theory that the Plaintiff was a difficult colleague to interact
27 with; unreasonable in his insistence on conformity with his views
28 as to medical quality assurance; and unduly sensitive in
withdrawing from professional practice at the hospital; there was

1 countervailing evidence that demonstrated that Plaintiff was well
2 thought of by nurses and other Department of Pathology staff; that
3 he was a dedicated scientist and committed in good faith to medical
4 quality assurance. That his personal idiosyncracies were not
5 consonant with the culture of the Board and Medical Directors at
6 Kern Medical Center, in the jury's view did not justify removing
7 him from medical practice in the Department of Pathology, even if
8 his removal as the Director was required by his chronic absences.
9 It is also likely that the jury did not accept the Defendant's view
10 that Dr. Jadwin was "too disruptive" to be permitted to continue in
11 residence in the practice of pathology at the hospital.

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

17 This was Plaintiff's lead counsel's (Mr. Lee) first trial.
18 His inexperience was obvious, he violated a number of the
19 applicable Rules of Court Decorum that governed the trial. A copy
20 is attached to this opinion marked Exhibit A and incorporated
21 herein by this reference.¹⁴ Mr. Lee was disputatious, ultimately

22
23 ¹⁴ The Court's Rules of Courtroom Decorum were served on all
24 counsel on April 23, 2009, before the trial commenced. Rules 4 and
16 provide, in relevant part:

25 4. Avoid disparaging personal remarks or acrimony toward
26 opposing counsel and/or parties. Remain detached from
27 any ill feeling between the litigants or witnesses [...]

1 unaccepting of the Court's guidance, and quarrelsome with opposing
2 counsel and with the Court's rulings. His performance in closing
3 argument was at the limit of acceptable professional conduct. He
4 crossed the line a number of times, however, the Court accommodated
5 his inexperience and undue contentiousness to endeavor to assure a
6 fair trial to both sides.

7 Defense counsel was very competent and experienced. The
8 defense made numerous strategic choices to not object, to not
9 assign misconduct, not move for a mistrial, or otherwise request
10 admonitions or jury instructions that would have addressed the
11 specific problems now raised by the now-surfacing post-trial
12 objections to the trial conduct of Plaintiff's counsel. As the law
13 of this Circuit cited in this decision pellucidly establishes, the
14 time to address and to cure trial counsel's misconduct is when it
15 occurs. There are many strategic reasons not to do so, all within
16 the sound judgment of an experienced trial lawyer. Such reasons
17 include not alienating the jury; not wishing to appear
18 obstructionist; not repeatedly objecting to the point that the
19 jury is disaffected; not appearing to be unduly hostile toward
20 opposing counsel which may engender an adverse response from the
21 jury; not wishing to emphasize a negative comment from the judge

22
23 16. Counsel shall admonish all persons at counsel table
24 and parties present in the courtroom that gestures,
25 facial expressions, laughing, snickering, audible
26 comments, or other manifestations of approval,
disapproval or disrespect during the testimony of
witnesses are prohibited.

27 (Doc. 319.)

1 or conduct which would unduly prejudice the jury; and attempting to
2 focus the jury on the points the defense sought to establish,
3 rather than concentrating on the Plaintiff's arguments and
4 contentions. The Court attempted not to intervene, except where
5 absolutely necessary, and attempted to treat counsel for both sides
6 with respect and courtesy. The Court did not use a raised voice,
7 did not express anger, irritation, was neutral in addressing each
8 counsel, and ultimately endeavored to focus counsel and the parties
9 on the merits of the case.

10 The County's Rule 59 motion for a new trial is DENIED.¹⁵

11
12 **B. Remaining Post-Trial Motions**

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

16
17 **1. Prejudgment Interest**

18 Plaintiff moves to amend or correct the Final Judgment to
19 include prejudgment interest of \$32,286.39. Plaintiff first moved
20 for an award of prejudgment interest on August 10, 2009, citing
21 *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 922 (9th Cir. 1995),
22 *Criswell v. Western Airlines, Inc.* 709 F2d 544, 556-557 (9th Cir.

23
24
25 ¹⁵ As stated by the Ninth Circuit, a civil litigant is
26 "entitled to a fair trial, [he is] not entitled to a perfect trial,
27 for there are no perfect trials." *In re First Alliance Mortgage*
28 *Co.*, 471 F.3d 977, 991 (9th Cir. 2006) citing *United States v.*
Payne, 944 F.2d 1458, 1477 (9th Cir. 1991). The parties received
a fair trial in this case.

1 1983), *Currie v. Workers' Comp. Appeals Board*, 24 Cal.4th 1109,
2 1115, (2001) and California Civil Code § 3287(a). That motion was
3 denied on March 31, 2010 on grounds that the jury did not allocate
4 the amount of damages attributable to the federal (FMLA) or state
5 (FEHA or CFRA) violations. Nor did the jury itemize damages by
6 each adverse employment action. These two "shades of grey"
7 precluded an award of prejudgment interest:

8 Here, the jury did not specifically allocate the amount
9 of damages attributable to a FMLA violation, making it
10 impossible to select any amount on which to award
11 prejudgment interest exclusively under the FMLA. The
12 only amount on which prejudgment interest could be
13 theoretically awarded under the FMLA is the \$321,285 the
14 jury awarded for the reasonable value of earnings and
15 professional fees lost to the present time. As to the
16 other amounts, because this is a compensation loss case
17 under § 2617(a) (1) (A) (i) (I), the jury's award of \$30,192
18 for the "[r]easonable value of necessary medical care,
19 treatment, and services received to the present time" is
20 not recoverable as damages under the FMLA and, by
21 extension, interest could not be awarded on this amount
22 under the FMLA. Because the \$154,080 the jury awarded
23 for the "[r]easonable value of earnings and professional
24 fees which with reasonable probability will be lost in
25 the future" represents an award of front pay, this amount
26 falls under § 2617(a) (1) (B) and could not be included in
27 a prejudgment interest computation under §
28 2617(a) (1) (A) (ii) [...]

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

Plaintiff's reliance on Currie and California Civil Code
§ 3287(a) is nevertheless problematic because, even
assuming any backpay awarded in this case is linked to a
FEHA/CFRA violation, the jury awarded backpay in one lump
sum - \$321,285 - without specifying which particular

1 adverse employment action(s) caused what amount of
2 backpay damages. Because this case involves multiple
3 adverse employment actions that occurred at different
4 points in time - not just a one-time wrongful denial of
reinstatement as in Currie - the generalized backpay
award makes it difficult to compute prejudgment interest.

5 Under California Civil Code § 3287(a), Plaintiff can, in
6 theory, recover prejudgment interest on backpay awarded
7 to him. This interest runs from the day the right to
8 recover the backpay "vested in him." § 3287(a). The
9 jury's verdict does not, however, specify the particular
10 adverse employment action(s) on which they based their
11 backpay award, nor the amount of backpay attributable to
12 any particular adverse employment action(s), making it
13 difficult to determine when Plaintiff's entitlement to
14 any discrete amount of the awarded backpay "vested in"
15 Plaintiff. In this case, at least three adverse
16 employment actions that could have lead to an award of
17 backpay are Plaintiff's wrongful removal from his
18 position as Chair of the Pathology Department, his
19 wrongful placement on administrative leave, and the
20 wrongful non-renewal of his contract, all of which
21 occurred on different dates (July 2006, December 2006,
22 and October 2007 respectively). To the extent the
23 \$321,285 the jury award consists of backpay damages
24 caused by these different events, what amount of backpay
25 did the jury attribute to each event? The current state
26 of the briefing does not adequately address these issues
27 and prejudgment interest cannot be computed at this time.

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

19 *Jadwin v. County of Kern*, 2010 WL 1267264, at 16-7 (E.D. Cal.
20 2010).

21 Plaintiff renewed his motion for prejudgment interest on May
22 28, 2010. The second time around, Plaintiff argues that the
23 \$505,457.00 damage award does not include "front pay," which is not
24 recoverable under the FMLA, but rather "past damages" and "future
25
26
27
28

1 damages" which are both recoverable under Civil Code § 3287(a).¹⁶
2 Applying Plaintiff's reasoning, state law violations, not federal,
3 provided the basis for the damage award, therefore he is entitled
4 to prejudgment interest on the entire \$505,457.00, not \$321,285.
5 Plaintiff's restyled theory, however, overlooks the fact that the
6 jury did not assign damages based on federal (FMLA) or state (FEHA
7 or CFRA) violations. Plaintiff's new argument also ignores the fact
8 that he previously argued, in his trial brief, that he was entitled
9 to "front pay" damages under the FMLA, (Doc. 325 at 11:20-
10 11:21) ("Plaintiff is also entitled to back pay, front pay,
11 liquidated damages and compensatory damages on his FMLA claim"), and
12 introduced "front pay evidence" at trial, see *Jadwin v. County of*
13 *Kern*, 2010 WL 1267264, at 11 ("Given the nature of Plaintiff's
14 evidence regarding future losses, it is apparent that the \$154,080
15 the jury awarded for the '[r]easonable value of earnings and
16 professional fees which with reasonable probability will be lost in
17 the future' represents an award of front pay.").¹⁷

18
19 ¹⁶ Civil Code § 3287(a) provides, in relevant part: "Every
20 person who is entitled to recover damages certain, or capable of
21 being made certain by calculation, and the right to recover which
22 is vested in him upon a particular day, is entitled also to recover
23 interest thereon from that day, except during such time as the
24 debtor is prevented by law, or by the act of the creditor from
25 paying the debt. This section is applicable to recovery of damages
26 and interest from any such debtor, including the state or any
27 county, city, city and county, municipal corporation, public
28 district, public agency, or any political subdivision of the
state."

26 ¹⁷ Specifically, as discussed in the March 31, 2010 Memorandum
27 Decision: "At trial, Plaintiff put on evidence of his future losses
28 through his economist, Stephanie Rizzardi, who testified that she
calculated future losses based on the salary and other forms of

1 Without any guidance from the verdict form or case law,
2 Plaintiff now asks the Court to ignore the FMLA claims and evidence,
3 which he failed to differentiate for the jury and failed to request
4 separate verdict findings on each state and federal claim to
5 eliminate the ambiguity of what the jury findings are on these
6 claims, and to calculate interest under the "prejudgment interest
7 friendly" FEHA and CFRA. This is unprecedented and requires
8 impermissible post-trial judicial interpretation of a "stipulated"
9 general verdict form. Contrary to Plaintiff's arguments, there is
10 no basis to conclude that the damage award was based on state law
11 violations, or vice versa.¹⁸ On the present record, the Court
12 cannot interpret and give meaning to a general verdict form that did

13 _____
14 compensation (such as professional fees) Plaintiff lost by virtue
15 of not having his contract renewed, i.e., what he expected to
16 receive had he remained employed with the County. Plaintiff's
17 damages expert projected this loss out to February 2016,
18 Plaintiff's worklife expectancy. The expert also prepared a
19 damages report, which was submitted into the evidence. (Exhibit No.
20 451.1-451.6.) [...] Accordingly, even assuming it stems from an
21 FMLA violation, the \$154,080 amount is not eligible for inclusion
22 in a liquidated damages computation under the FMLA." *Jadwin v.*
23 *County of Kern*, 2010 WL 1267264, at 11.

24 ¹⁸ To support his latest round of arguments, Plaintiff
25 disingenuously submits that there was no mention of "front pay"
26 during trial and the jury did not have authority to award "front
27 pay" under the FMLA. First, in his original motion, Plaintiff
28 argued that prejudgment interest was proper based on both the
federal and state law violations, which is inconsistent with his
current position. Second, even if the term "front pay" was not
used, the jury awarded "future" damages for lost earnings and did
not differentiate between federal and state law violations. That
determination was based on the "front pay" evidence presented by
Plaintiff's counsel at trial. Plaintiff's argument is inconsistent
with his original position and merely incorporates a correct
recitation of the law, which was first brought to his attention in
the March 31, 2010 Memorandum Decision.

1 not allocate damages based on the underlying statutory violations
2 and adverse employment actions.¹⁹ Plaintiff's argument that the
3 entire jury award can be characterized as a Civil Code § 3287(a)
4 damage award is without merit. The jury's verdict did not so
5 specify, and such an award is inconsistent with Plaintiff's evidence
6 and argument at trial.²⁰ Moreover, no formula or other finite
7 predetermined calculation formula was introduced into evidence.

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

11 A reasonable basis for approximating interest would be to
12 calculate interest on past and future economic damages
13 from the date on which the jury rendered its verdict,
14 6/9/09, up through the date of entry of judgment, 5/4/10.
15 This is a conservative method by any measure as the jury
16 was not instructed to include interest on past damages
17 "to the present time", and so the jury's past damages

18 ¹⁹ Contrary to Defendant's arguments, there is no support to
19 deny prejudgment interest in its entirety based on the general jury
20 finding. As stated in the March 31, 2010 Memorandum Decision,
21 "[b]ecause prejudgment interest is theoretically available on all
22 of Plaintiff's claims submitted to the jury, the fact that the jury
23 did not specifically allocate the damages among Plaintiff's various
24 claims does not outright preclude an award to Plaintiff for
25 prejudgment interest." *Jadwin*, 2010 WL 1267264, at 15.

26 ²⁰ The record reveals that the parties expressly agreed to the
27 use of a single verdict question on the issue of damages and,
28 specifically, that the County agreed to the "undifferentiated jury
verdict." As in *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259
F.3d 1101 (9th Cir. 2001), the parties could have objected to the
verdict form after the verdict was announced, before the jury was
excused, but did not. As stated by the Ninth Circuit, "[b]y
waiting until post-trial motions to raise its specific contentions,
Deckers prevented the court from correcting any problems *ex ante*
and, for some of these contentions, prevented the development of an
adequate record." *Id.* at 1110. That language applies with equal
force here.

1 award likely did not include interest.

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

3 Plaintiff offered the following prejudgment interest
4 calculation:

5 1. $333 \text{ days} / 365 \text{ days} \times 7\% \text{ interest} \times 505,557 = 32,286.39$

6 (Id. at 6:25.)

7 Plaintiff's proposal is a reasonable solution to a unique
8 problem, i.e., absence of itemized damages referable to each adverse
9 employment action or identifying the underlying theory of recovery.
10 The general approach submitted by Plaintiff is adopted to calculate
11 prejudgment interest. Plaintiff's specific calculations, however,
12 are rejected as they are based on the entire jury award,
13 \$505,457.00. As discussed in detail in this Memorandum Decision,
14 in open court on July 28, 2010, and in the March 31, 2010 Memorandum
15 Decision, the jury did not allocate the amount of damages
16 attributable to the federal or state violations. There is nothing
17 in the record to ascertain whether the jury's damage award was based
18 entirely on state law violations. The jury, pursuant to its general
19 findings on June 5, 2009, established that the "principal" amount
20 of damages for any potential claim for prejudgment interest is
21 \$321,285.²¹ Plaintiff has been unable to present, after three
22

23
24 ²¹ The \$321,285 represents the "reasonable value of earnings
25 and professional fees lost to the present time," the only amount
26 for which prejudgment interest is available. See *Jadwin*, 2010 WL
27 1267264, at 15 ("The only amount on which prejudgment interest
28 could be theoretically awarded under the FMLA is the \$321.285 the
jury awarded for the reasonable value of earnings and professional
fees lost to the present time.").

1 rounds of briefing, any binding or persuasive authority to support
2 his arguments, which conflict with the jury's unanimous verdicts.

3 This does not the end the analysis. The parties dispute
4 whether federal or state law provides the applicable prejudgment
5 interest rate. Plaintiff originally argued that the correct rate
6 was 10% per annum, the maximum state law rate for post judgment
7 interest; but has since revised his request to 7% per annum.
8 Plaintiff argues that this is the correct interest rate because
9 "state law is controlling with regard to the prejudgment interest
10 rate." (Doc. 449 at 4:17-4-18.) In support, Plaintiff cites
11 *Evanston Ins. Co. v. OEA, Inc.*, 566 F.3d 915 (9th Cir. 2009) and the
12 March 31, 2010 Decision, which stated that "prejudgment interest is
13 substantive for Erie purposes [...] that makes California law
14 applicable to prejudgment interest on Plaintiff's state law claims."
15 (Doc. 408 at 32:12-32:13.)

16 Plaintiff once again ignores the seminal dispute in this case,
17 that the jury did not allocate the amount of damages attributable
18 to the federal or state violations. Without a specific jury
19 determination on that issue, there is no basis to support an omnibus
20 "state law" prejudgment interest calculation to the exclusion of the
21 federal rate. To illustrate, a 7% interest rate is appropriate in
22 diversity cases, when a party prevails on a state law claim.²² It
23 is undisputed that *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and
24 its progeny supply the relevant interest rate in that instance.
25 However, this case is different. Here, the jury determined that

26
27 ²² This hypothetical assumes that the forum employs a 7%
28 interest rate to calculate prejudgment interest.

1 both Plaintiff's federal and state law employment rights were
2 violated, without distinction as to the separate claims for relief.
3 Plaintiff explicitly acknowledged as much in his August 6, 2010
4 supplemental brief: "Here, the jury found that medical leave was a
5 'motivating factor' in all 4 of the adverse actions taken by Kern
6 County against Plaintiff, in violation of the FMLA (as well as the
7 California Family Rights Act) and awarded Plaintiff both past and
8 future lost wages." (Doc. 444 at 3:12-3:14.)

9 The Defendant's reciprocal contention is unavailing.²³ Like
10 the state interest rate arguments, the federal interest rate,
11 statutory or prime, cannot be adopted in its entirety because it is
12 unclear whether the award was based on federal or state law
13 violations. The jury award *could* be based on federal violations,
14 but it is also arguable that the entire award was based on
15 violations of the FEHA/CFRA.

16 There is no clear solution on how to best to calculate
17 prejudgment interest in this case. If the jury award was based
18 purely on state law, a 7% interest rate applies. See *Pro Value*
19 *Properties, Inc. v. Quality Loan Service Corp.*, 170 Cal.App.4th 579,
20 582 (2009). On the other hand, if the jury award was based solely
21 on the FMLA, prejudgment interest must be calculated according to
22 either the rate of interest published by the Board of Governors of
23

24
25 ²³ According to Defendant, the Court cannot award 7%
26 prejudgment interest because "it is impossible to differentiate the
27 state and federal claims, determine when they accrued and which
28 adverse employment actions they were based on [and] to the extent
the claims are co-mingled in the verdict they bear interest at
different rates." This contention is without merit.

1 the Federal Reserve System, 28 U.S.C. § 1961(a),²⁴ or the "prime
2 rate."²⁵ See *Hite v. Vermeer Mfg. Co.*, 361 F. Supp. 2d 935, 949
3 (S.D. Iowa 2005) (discussing potential prejudgment interest rate
4 calculations under the FMLA), aff'd 446 F.3d 858 (8th Cir. 2006);
5 see also *Bell v. Prefix, Inc.*, No. 05-74311, 2010 WL 4260081, at 2
6 (E.D. Mich. Oct. 22, 2010) (applying the federal reserve interest
7 rate to determine prejudgment interest in an FMLA case). Defendant
8 argues for a federal "prime rate" of 3.25%. In view of the
9 historical reduction of interest rates while this case has been
10 pending, this is a fair measure for the federal prime rate.

11 The Ninth Circuit has made clear that prejudgment interest is
12 an element of compensation, not a penalty, and has the primary goal
13 of making an aggrieved party whole. See generally *Dishman v. UNUM*
14 *Life Ins. Co. of Am.*, 269 F.3d 974, 988 (9th Cir. 2001); accord
15 *Drumm v. Morningstar, Inc.*, 695 F. Supp. 2d 1014, 1022 (N.D. Cal.
16 2010) ("The purpose of prejudgment interest 'is to provide just
17 compensation to the injured party for loss of use of the award

18
19 ²⁴ Under 28 U.S.C. § 1961(a), the applicable interest rate is
20 "the average accepted auction price for the last auction of
21 fifty-two week United States Treasury bills settled immediately
22 prior to the date of judgment." 28 U.S.C. § 1961(a). This rate
23 may be found by referring to the Federal Reserve website, located
at: <http://www.federalreserve.gov/RELEASES/h15/>. Here, the
relevant Weekly Average 1-year constant maturity treasury yield is
.44%.

24 ²⁵ The prime rate is the rate that banks charge for short-term
25 unsecured loans to credit-worthy customers. *Forman v. Korean Air*
26 *Lines Co., Ltd.*, 84 F.3d 446, 450 (D.C. Cir.), cert. denied, 519
27 U.S. 1028 (1996). The prime rate set by the Federal Reserve for
the relevant period is 3.25%,
[http://www.federalreserve.gov/releases/h15/data/Daily/H15_PRIME_N
A.txt](http://www.federalreserve.gov/releases/h15/data/Daily/H15_PRIME_NA.txt).

1 during the prejudgment period - in other words, to make the
2 plaintiff whole as of the date of the injury.'") (citing *Lakin v.*
3 *Watkins Assoc.'d Indus.*, 6 Cal.4th 644, 663 (1993)).²⁶ Based on
4 such a compensatory rationale, some district courts have determined
5 that the federal statutory interest rate did not fulfill the purpose
6 of awarding prejudgment interest, see, e.g., *Perez v. Cozen &*
7 *O'Connor Group Long Term Disability Coverage*, No.07-cv-0837-DMS-AJB,
8 2008 WL 6693714, at 2 (C.D. Cal. Aug. 19, 2008) and *Hite*, 361 F.
9 Supp. 2d at 949, while others have found that the federal rate
10 prescribed in 28 U.S.C. § 1961 appropriately compensated the
11 aggrieved party, see, e.g., *Traxler v. Multnomah County*, No.
12 06-1450-KI, 2010 WL 3069340, at 1 (D. Or. Aug. 2, 2010) and *Austin*
13 *v. Jostens, Inc.*, No. 07-2380-JAR, 2009 WL 902417 (D. Kan. Mar. 31,
14 2009). As no clear guidepost exists and the parties have not
15 offered a reasonable solution on how to calculate prejudgment
16 interest in this case, the Ninth Circuit's preferred "compensatory
17 approach" governs. To properly compensate Plaintiff and to account
18 for the possibility that the jury returned a verdict supported only
19 by the FMLA or the FEHA/CFRA, Plaintiff is entitled to prejudgment
20 interest at the average of the "prime rate," 3.25%, and the
21 California rate, 7%, for an average rate of 5.125%. Although this
22 rate does not correlate exactly with either the federal (prime) or
23 state (statutory) rates, it is reasonably proximate to both, and it
24 will ensure Plaintiff is fully compensated.

25
26 ²⁶ Although *Dishman v. UNUM Life Ins. Co. of America*, 269 F.3d
27 974 is not on all fours with this case - it was decided under ERISA
28 -, it did analyze the rationale and purpose behind prejudgment
interest awards.

1 Plaintiff is awarded prejudgment interest from the date of the
2 jury's verdict, June 5, 2009, to the date of entry of final
3 judgment, May 4, 2010. However, based on the uncertainty in the
4 jury's general verdict award, which was proposed, given, and
5 accepted by the parties without objection, or request for an
6 alternate verdict form, Plaintiff is awarded prejudgment interest
7 at a rate of 5.125% on the principal damages award of \$321,285. The
8 total prejudgment interest award is \$15,022.27.²⁷ The May 4, 2010
9 Judgment is amended to include this amount.

10
11 **2. Post-Judgment Interest**

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

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

20
21 **3. Attorney's Fees**

22 **a. Introduction**

23 Plaintiff requests an award of attorney's fees under both
24 Federal law (42 U.S.C. § 1988 and 29 U.S.C. § 2617(a)(3)) and
25

26
27 ²⁷ Graphical representation: 333 days/365 days x 5.125%
28 interest x 321,285 = \$15,022.27.

1 California law (Cal. Gov't Code § 12965).²⁸ Plaintiff seeks a total
2 of \$3,944,818.00 in attorneys' fees, broken down as follows: a
3 lodestar of \$1,972,409.00 in fees, with a 2.0 multiplier for
4 extraordinary litigation efforts and expertise in the area of
5 employment law.²⁹ The total amount requested is based on the work
6 of four counsel at out-of-town hourly rates: (1) lead counsel
7 Eugene Lee, \$400/hr.; (2) counsel Joan Herrington, \$500/hr.; (3)
8 contract counsel Marilyn Minger, \$385/hr.; (4) fee counsel David
9 Hicks, \$660/hr.

10 The statutes cited by Plaintiff provide that a district court,
11 in its discretion, may award reasonable fees to the prevailing
12 party. See 42 U.S.C. § 1988 ("In any action or proceeding to
13 enforce a provision of section ... 1983 of this title, ... the
14 court, in its discretion, may allow the prevailing party ... a
15 reasonable attorney's fee as part of the costs...."); *Dotson v.*
16 *Pfizer, Inc.*, 558 F.3d 284, 295 (4th Cir. 2009) ("The FMLA directs
17 the award of reasonable attorneys' fees to a prevailing plaintiff
18 [...] [t]he amount of attorneys' fees awarded is at the trial
19 court's discretion.") (citations omitted); see also Cal. Gov't Code
20 § 12965(b) ("the court, in its discretion, may award to the
21 prevailing party reasonable attorney's fees and costs.").

22 The County does not dispute that Plaintiff is the prevailing
23 party under the cited statutes and case law, however, it argues that

24
25 ²⁸ Generally, litigants "are required to bear the expenses of
26 their litigation unless a statute or private agreement provides
27 otherwise." *Carbonell v. I.N.S.*, 429 F.3d 894, 897-98 (9th Cir.
28 2005).

²⁹ (See Doc. 451 at 23:18-23:25.)

1 the motion should be denied in its entirety due to Plaintiff's
2 counsel's unprofessional conduct/behavior and egregious
3 over-litigation and limited success.³⁰ In the event fees are
4 awarded, the County asserts that Plaintiff is not entitled to
5 recover the total amount of fees requested because such amount is
6 unreasonable and the Court should, instead, reduce Plaintiff's
7 attorney's fees request to between \$125,000 and \$250,000.³¹

8
9 b. Should the Fee Request Be Denied in its Entirety?

10 Acknowledging that Plaintiff is a prevailing party under
11 the relevant federal and state statutes, the County still argues
12 that no attorney fees should be awarded because his fee request was
13 poorly documented and overstated. The County also asserts that a
14 complete denial is support by Plaintiff's counsel's "substantial and
15

16 ³⁰ In the typical attorney's fees case, the analysis begins
17 with the definition of "prevailing party" set forth by the Supreme
18 Court in *Buckhannon Board & Care Home, Inc. v. West Virginia*
19 *Department of Health & Human Res.*, 532 U.S. 598, 600 (2001). In
20 *Buckhannon*, the Supreme Court noted that prevailing party status
21 requires that a party "received a judgment on the merits, or
22 obtained a court-ordered consent decree." 532 U.S. at 605
23 (citations omitted). Additionally, such relief must "create the
24 material alteration of the legal relationship of the parties
25 necessary to permit an award of attorney's fees." *Id.* at 604.
26 Applying *Buckhannon* to the facts of this case, it is clear that
27 Plaintiff is the "prevailing party." Because Plaintiff is the
28 prevailing party, he is entitled to attorneys' fees under both
federal and state law.

³¹ Specifically, the County asserts that the "amount awarded
should be reduced to a small fraction of Plaintiff's request."
(Doc. 432 at 1:20-1:21.) The County argues that "a reasonable fee
in this matter is in the range of \$125,000 to \$250,000." (*Id.* at
1:22-1:23.)

1 continuing misconduct and unprofessional behavior." The County
2 cites *Serrano v. Unruh*, 32 Cal.3d 621, 635 (1982), for the
3 proposition that a trial court may "reduce the award or deny one
4 altogether" if the fee request "appears unreasonably inflated."

5 Here, while the litigation was contentious and counsel was
6 inexperienced, there are no facts to justify a complete denial of
7 attorney's fees under either Federal or California law. Courts in
8 both fora have limited the complete denial of fee awards to cases
9 involving "special circumstances."³² See *Chavez v. City of Los*
10 *Angeles*, 47 Cal.4th 970, 976 (2010) ("[FEHA] has been interpreted
11 to mean that in a FEHA action a trial court should ordinarily award
12 attorney fees to a prevailing plaintiff unless special circumstances
13 would render a fee award unjust.") (citations omitted); see also
14 *Child Evangelism Fellowship of Greater San Diego v. Acle*, No.05-CV-
15 1166-IEG-WMc, 2009 WL 484204, at 4 (S.D. Cal. Feb. 24, 2009) ("the
16 Court finds the Plaintiff's success in this case was not merely de
17 minimus or technical and there are no 'special circumstances'
18 warranting a complete denial of fees"). For example, in *Young v.*
19 *Exxon Mobil Corp.*, 168 Cal.App.4th 1467 (2008), it was determined
20 that "special circumstances" existed because the fee award was
21 "unjust." The *Young* Court stated: "[J]ust as there are
22 circumstances in which a prevailing plaintiff, who ordinarily should
23 recover attorney fees, may not recover them - when special
24 circumstances make an award unjust - the same is true of a

25
26 ³² Although arising in a slightly different context, the Ninth
27 Circuit's discussion of "special circumstances" in *Saint John's*
28 *Organic Farm v. Gem County Mosquito Abatement Dist.*, 574 F.3d 1054
(9th Cir. 2009) is instructive.

1 prevailing defendant in a frivolous case [...] [t]his is just such
2 a case: where the fee award to the prevailing defendant would
3 redound to the benefit of another defendant who is not entitled to
4 recover fees." *Id.* at 1575-76. There are no "unjust" facts to
5 support a complete denial of fees in this case.

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

24 The same approach was followed here. Although Plaintiff's
25 counsel's fee request is less detailed and developed than the
26
27
28

1 prevailing party in *Fischer*,³³ there are no special circumstances to
2 justify a complete denial of attorney's fees. Rather, the remedy
3 is a reduction of any fee award, not, as the County seeks, complete
4 denial of a fee award. The facts of this case are distinguishable
5 from those involving attorney misconduct or "unjust" fee recovery.
6 See *Meyler v. Commissioner of Social Sec.*, No.04-CV-4669-GEB, 2008
7 WL 2704831, at 3 (D.N.J. July 7, 2008) (cataloging "special
8 circumstances" cases). Plaintiff's counsel, while inexperienced and
9 apparently unwilling to follow the Federal Rules of Evidence and
10 Civil Procedure, has not attempted to deceive the Court and has not
11 been duplicitous or dishonest. Although Mr. Lee made many errors,
12 some repeated after admonition, his overall conduct as a vigorous
13 advocate does not raise to the level of intentional bad faith
14 misconduct. The fee request is excessive. A complete denial of
15 attorney fees is not authorized.

16
17 c. Legal Standards - The Lodestar Calculation

18 Once a determination is made that attorney's fees are
19 appropriate, the standard to be applied in calculating an award of
20 attorney's fees is that of "reasonableness." Whether under the
21

22 ³³ In contrast to the plaintiff in *Fischer*, Plaintiff's counsel
23 in this case did not provide a "summary of the time spent on a
24 broad category of tasks such as pleadings and pretrial motions."
25 Not a single task total is provided in this case. That omission
26 frustrated any attempt to compose a Memorandum Decision on the many
27 issues raised in post-trial briefing. In addition, unlike the
28 plaintiff in *Fischer*, Plaintiff's counsel was given three
opportunities to produce a properly documented fee motion, to no
avail. Because his motion fails to meet the clear standards for
fee awards, after three attempts, the Court is required to analyze
what was provided.

1 California state law, or federal law, a determination of
2 reasonableness generally involves a two-step process. First, the
3 court calculates the "lodestar figure" by taking the number of hours
4 reasonably expended on the litigation and multiplying it by a
5 reasonable hourly rate. See, e.g., *Ketchum v. Moses*, 24 Cal.4th
6 1122, 1131-32; *PLCM Group, Inc. v. Drexler*, 22 Cal.4th 1084, 1095
7 (2000); see also *McGrath v. County of Nevada*, 67 F.3d 248, 252 (9th
8 Cir. 1995). In determining the lodestar amount, the California
9 Supreme Court has "expressly approved the use of prevailing hourly
10 rates as a basis for the lodestar." *Ketchum*, 24 Cal.4th at 1132.
11 The "relevant legal community" in the lodestar calculation is
12 generally the forum in which the district court sits. *Mendenhall*
13 *v. NTSB*, 213 F.3d 464, 471 (9th Cir. 2000).

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

25 Courts may reduce a requested fee award, or deny one
26 altogether, where a fee request appears unreasonably inflated. See
27 *id.* at 1137; see also *Hensley v. Eckerhart*, 461 U.S. at 434 (court
28

1 may deny compensation for "hours that are excessive, redundant, or
2 otherwise unnecessary").

3 The fee applicant bears the burden of documenting the
4 appropriate hours expended in the litigation and must submit
5 evidence in support of those hours worked. *Hensley*, 461 U.S. at
6 437. The party opposing the fee application has a burden of
7 rebuttal that requires submission of evidence to the district court
8 challenging the accuracy and reasonableness of the hours charged or
9 the facts asserted by the prevailing party in its submitted
10 affidavits. *Toussaint v. McCarthy*, 826 F.2d 901, 904 (9th Cir.
11 1987).

12
13 d. Lodestar - Hours Reasonably Expended

14 1. *Introduction*

15 Plaintiff argues that 4,026.1 hours expended by Mr. Lee and the
16 862 hours expended by Ms. Herrington were reasonable.³⁴ Defendant
17 responds that Mr. Lee and Ms. Herrington should be awarded "no more
18 than 1396 hours [] 1145.2 hours for Mr. Lee and 250.5 for Ms.
19 Herrington."³⁵ According to Defendant, the number of hours spent by
20 Plaintiff's attorneys should be reduced because Plaintiff's counsel
21 expended an excessive amount of time: (1) drafting complaints; (2)
22 noticing, attending and conducting more than forty depositions,
23

24 ³⁴ (See Doc. 451 at 40:16-40:17.)

25 ³⁵ Defendant accumulated and revised the billing totals because
26 Plaintiff's counsel did not adequately respond to the Court's July
27 28, 2010 oral requests and subsequent Minute Order. Several of the
28 County's billing figures are incorporated into the lodestar
analysis.

1 including Plaintiff's; (3) preparing Plaintiff's motion for summary
2 judgment; (4) opposing Defendant's motion for summary judgment; (5)
3 researching and drafting the motion to strike Defendant's fifth
4 affirmative defense; (6) researching and drafting motions for
5 reconsideration; (7) preparing for the pre-trial conference and
6 drafting the joint pre-trial statement; (9) composing and objecting
7 to proposed jury instructions and verdict forms; (10) filing a
8 reply to Defendant's objections to Plaintiff's motion for costs;
9 (11) drafting an 88-page opposition to an ex parte application to
10 shorten time, which was granted on May 7, 2008; (12) alleging
11 spoliation of evidence; (13) communicating with his client; (14)
12 advancing "whistleblowing" claims; and (15) researching appellate
13 procedure and extraordinary writs.³⁶ Defendant also argues that the
14 attorneys' fee award should be reduced for the administrative or
15 secretarial work undertaken by Plaintiff's attorneys.

16 To determine the hours reasonably expended, it is necessary to
17 profile the post-trial briefing in this case, namely the
18 documentation used to support Plaintiff's motion for attorneys'
19 fees. Here, the voluminous documentary evidence submitted by
20 Plaintiff's counsel is inadequate to support an attorney's fee
21 petition in this Circuit, especially one that requests nearly \$4
22 million from a public entity.³⁷ While Plaintiff's counsel's
23

24 ³⁶ These subject areas are not exhaustive. Other time entries
25 and subjects are addressed as relevant to the analysis.

26 ³⁷ The analysis focuses on Mr. Lee's deficient documentation
27 and billing records, as well as his confusion over the Court's
28 requests for specific billing information and task totals. As
explained on July 28, 2010, co-counsel Ms. Herrington provided

1 inexperience and unnecessarily adversarial practices have been noted
2 throughout this Memorandum Decision, his refusal to provide a
3 properly documented fee motion continuing adequate descriptions of
4 hours expended for specific services provided on identifiable
5 subject matter. This includes failing to provide a functional
6 delineation of the number of hours spent litigating this case with
7 a description of the services performed.

8 Based on the state of law in the Ninth Circuit, including
9 *Moreno v. City of Sacramento*, 534 F.3d 1106, it is difficult to
10 understand why Plaintiff's lead counsel submitted voluminous billing
11 records without delineating a specific total for each of the
12 categories of work he performed.³⁸ Unlike the prevailing party in
13 *Fischer*, lead counsel's fee request in this case consisted of a bare
14 request for \$4 million dollars and more than 500 pages of "Excel"
15 or "Quick Books" spreadsheets. Not a single task total was provided

16 _____
17 discrete task totals in her declaration consistent with generally
18 accepted billing practices and documentation for fee requests in
19 fee litigation. Mr. Lee, lead counsel, did not provide a single
20 task total in his request for over 4,000 fee hours. Given the
21 fact that Ms. Herrington provided task totals and the Court
specifically requested them, Mr. Lee's confusion and omissions are
incomprehensible.

22 ³⁸ The Ninth Circuit has previously held that "plaintiff's
23 counsel can meet his burden - although just barely - by simply
24 listing his hours and identify[ing] the general subject matter of
25 his time expenditures." *Fischer*, 214 F.3d at 1121. This low
26 production threshold does not completely sync with *Moreno*,
27 especially in cases involving voluminous requests for fees, here,
28 lengthy briefs/objections, hundreds of pages of billing records and
nearly 5,000 hours requested. *Cf. Perez v. Safety-Kleen Systems, Inc.*, No. C-05-5338 PJH, 2010 WL 934100, at 7-8 (detailing the difficulties presented by plaintiffs' failure to set forth detailed billing statements).

1 in his hundreds of pages of supporting documentation. In addition,
2 most of the original spreadsheets were limited to thirty characters,
3 further frustrating any attempt to calculate an accurate lodestar.

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

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

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

14 As is often the case in law, the world appears to be
15 changing, at least as Chief Judge Kozinski is there, it's
16 going to change. In *Moreno versus the City of*
17 *Sacramento*, which is found at 534 Fed 3d 1106, case about
18 two years old now, it's a July of 2008 decision. Here's
19 what has happened in the Ninth Circuit. In this case,
20 Judge Levy was hearing a civil rights case brought
21 against Sacramento City involving inverse condemnation,
22 substantive due process, Fourth Amendment unreasonable
23 search and seizure and procedural due process violations
in a case where an owner's building was demolished. And
Judge Levy, based on his experience and understanding and
knowledge, made some across the board reductions, 25
percent to the requested hours for legal research, 50
percent reduction for trial preparation hours, 33 percent
reduction in actual appeal preparation hours, 50 percent
reduction for hours spent interviewing and investigating,
50 percent per hour reduction in the hourly rate, which
the panel found was impermissible double counting.

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

1 If private citizens are to be able to assert their civil
2 rights, and if those would violate the nation's
3 fundamental laws are not to proceed with impunity, then
4 citizens must have the opportunity to recover what it
5 cost them to vindicate these rights in court. At the same
6 time, fee awards are not negotiated at arms length. So
7 there is a risk of overcompensation. A district court
8 thus awards only the fee that it deems reasonable." And
9 it cites the case of Hensley v Eckerhart, 461 US 421 at
10 433 [...]

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

21 The Court further excluded fees incurred because the
22 Court requested supplemental information that made an
23 additional 10 percent across the board reduction for
24 excessive and redundant work, which was found to be a
25 reasoned exercise of discretion.

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

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

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

Because there's no way a district court, as we are
commanded by the Ninth Circuit, can make a painstaking

1 and exacting analysis of the basis for a lodestar award
2 without having a comprehensive description of services
3 and allocation of time, normally to the tenth of an hour,
4 spent on all matters with a designation of the identity
5 of the attorney and/or the paralegal who is performing
6 the services.

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

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

10 Also on June 28, 2010, the Court, pursuant to a Minute Order,
11 requested that counsel "include task and billing totals in their
12 supplemental applications for attorneys fees."³⁹ (Doc. 440.) Task
13 totals were requested to facilitate a thorough and careful review
14 of the lengthy objections/arguments and voluminous billing records
15 in this case. See *Moreno*, 534 F.3d at 1111 ("[w]hen the district
16 court makes its award, it must explain how it came up with the
17 amount.").

18 Plaintiff filed supplement billing information on August 16,
19 2010. (Doc. 448.) In particular, Plaintiff filed a Memorandum of
20 Points and Authorities and Mr. Eugene Lee's supplemental

21 ³⁹ The Court in *Smith v. District of Columbia*, 466 F. Supp. 2d
22 151, 158 (D.D.C. 2006) stated:

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

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

1 declaration, a 76-page amendment to his original 96-page
2 declaration.⁴⁰ (Doc. 448-1.) The supplemental filing, however, did
3 not improve on the original fee motion. None of the billing
4 information requested in open court or via Minute Order was
5 included.

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

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

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

27 In a last ditch attempt to meet Ninth Circuit fee standards,
28 Plaintiff filed a reply on September 16, 2010.⁴¹ In his reply,

25 ⁴⁰ Plaintiff also filed the declarations of David Hicks,
26 Lawrence Bohm, and Christina Krasomil. (Docs. 448-2 to 448-4.)

27 ⁴¹ Plaintiff's most recent supplemental fee brief, (Doc. 451),
28 provides several unexplained and untethered fee totals. While

1 Plaintiff admits that the requested task and billing totals were not
2 included, apologizing to the Court for yet another "oversight."
3 (Doc. 451 at 7:18-7:20 ("In its August 4 Minute Order, the Court
4 wrote, 'Counsel are requested to include task and billing totals in
5 their supplemental applications for attorneys' fees' [...]
6 Plaintiff's counsel did not do that [...] [t]his was an oversight
7 for which Plaintiff apologizes.")) Plaintiff nonetheless suggests
8 that the Court and Defendant had enough information to calculate an
9 accurate Lodestar.⁴² Mr. Lee also attached a third "fee"
10 declaration to his reply, the latest iteration/addendum totaling 366
11 pages. While the declaration includes sporadic and unexplained task
12 totals - the first time doing so after three rounds of briefing -,
13 it omitted the critical task totals/subtotals and other billing
14 analysis requested on July 28, 2010.⁴³

15 _____
16 Plaintiff argues that this effort is adequate, he overlooks that
17 the complete failure to follow the Court's July 28, 2010 Order or
18 adhere to Ninth Circuit law (which was explained to him during the
19 hearing). He further neglects to consider the burden these actions
20 had on the Court, as well as Defendant's ability to file an
21 opposition. However, when a subtotal was provided by Plaintiff, an
22 attempt was made to analyze it within the lodestar framework.

23 ⁴² (See Doc. 450 at 7:18-7:20) ("Plaintiff would point out that
24 it appears Defendant was able to calculate these totals anyway.")
25 Plaintiff's counsel is reminded that the Court presides over one of
26 the heaviest caseloads in the nation, over 1,220 criminal and civil
27 cases.

28 ⁴³ Plaintiff intersperses certain task totals throughout the
latest reply brief. These subtotals are not helpful as they are
incomplete, infrequent and not calibrated to the total hours
billed. For example, Plaintiff states that Mr. Lee and Ms.
Herrington recorded 453.8 hours (327.2 and 126.6 hours) preparing
and attending depositions. The deposition subtotal, one of the few
subtotal amounts included in the reply, is not separately broken

1 The United States Supreme Court has made clear that "[t]he fee
2 applicant bears the burden of establishing entitlement to an award
3 and documenting the appropriate hours expended and hourly rates."
4 *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Plaintiff has not
5 met that burden in this case. As a result of Plaintiff's counsel's
6 continued oversights, which are unexplained given the number of
7 opportunities he has been afforded to amend his billing information
8 and the Court's recitation of the relevant legal standards, an
9 independent calculation of an accurate lodestar is required.

10
11 **2. Specific Legal Standard**

12 Although district courts have discretion to determine the
13 amount of a fee award, "it remains important ... for the district
14 court to provide a concise but clear explanation of its reasons for
15 the fee award." *Hensley*, 461 U.S. at 437. The district court
16 should give at least some indication of how it arrived at the amount
17 of compensable hours for which fees were awarded to allow for
18 meaningful appellate review. *Cunningham v. County of Los Angeles*,

19 _____
20 down by deponent, location, related expenses, in relation to the
21 total billed amount. They are not separately tallied to produce an
22 omnibus total, i.e., "added together" in a spreadsheet, text box,
23 graph or separately delineated in the body of the reply brief.
24 Plaintiff does not satisfy his burden by producing a few task
25 totals in his third supplemental brief, while ignoring the bulk of
26 the remaining task totals (which encompass most of the billed
27 time). It is impossible to calculate an accurate lodestar on
28 Plaintiff's evidence, the house spent on each item of legal work
billed for, which, after three rounds of supplemental briefing, is
nearly a thousand pages of unorganized argument, declarations and
computer spreadsheets. It is not the Court's duty to organize and
order the underlying records that provide the basis for the
lodestar calculation.

1 879 F.2d 481, 485 (9th Cir. 1988) ("Courts need not attempt to
2 portray the discretionary analyses that leads to their numerical
3 conclusions as elaborate mathematical equations, but they must
4 provide sufficient insight into their exercises of discretion to
5 enable [the appellate court] to discharge our reviewing function").
6 "When the district court makes its award, it must explain how it
7 came up with the amount [...] [t]he explanation need not be
8 elaborate, but it must be comprehensible." *Moreno*, 534 F.3d at
9 1111.

10 "The fee applicant bears the burden of documenting the
11 appropriate hours expended in litigation and must submit evidence
12 in support of those hours worked." *Gates v. Deukmejian*, 987 F.2d
13 1392, 1397 (9th Cir. 1992). A court must guard against awarding
14 fees and costs which are excessive and must determine which fees and
15 costs were self-imposed and avoidable. *INVST Fin. Group v.*
16 *Chem-Nuclear Sys.*, 815 F.2d 391, 404 (6th Cir.1987)). A court has
17 "discretion to 'trim fat' from, or otherwise reduce, the number of
18 hours claimed to have been spent on the case." *Soler v. G & U,*
19 *Inc.*, 801 F. Supp. 1056, 1060 (S.D.N.Y. 1992) (citation omitted).
20 Time expended on work deemed "excessive, redundant, or otherwise
21 unnecessary" shall not be compensated. See *Gates*, 987 F.2d at 1399
22 (quoting *Hensley*, 461 U.S. at 433-34).

23
24 3. *Merits*

25 a. *Preface*

26 Determining the appropriate fee award in a case involving
27 voluminous fee materials and resistance by the moving party to
28

1 comply with the law will inevitably be imprecise. To the extent
2 possible, an attempt was made to address each time entry and
3 objection filed by the parties. If an entry or objection was not
4 addressed, it was either incorporated into a task total without
5 specific reference or, alternatively, was too vague and unnecessary
6 to consider. See *Ravet v. Stern*, No. 07CV31-JLS-CAB, 2010 WL
7 3076290, at 6 (S.D. Cal Aug. 6, 2010) (explaining the "vague entry"
8 case law and excluding fees because "the Court cannot reasonably
9 ascertain whether these conversations were pertinent or irrelevant
10 to the [fee motion]."). A number of time entries were excluded
11 based on the Supreme Court's decision in *Hensley v. Eckerhart*, 461
12 U.S. 424:

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

17 *Id.* at 437.

18 The confusion and resistance of Plaintiff's counsel to organize
19 and chronologically catalogue and/or describe the specific service
20 giving rise to the fees in this case further complicated an already
21 arduous undertaking.

22
23
24 **b. Complaint Drafting**

25 According to Defendant, Plaintiff's counsel spent an excessive
26 number of hours drafting the original, amended and supplemental
27 complaints. Defendant argues that the Court should "substantially
28

1 reduce" the claimed number of hours spent on these tasks, which it
2 estimates at 415 hours:

3 Mr. Lee and Ms. Herrington together recorded nearly 155
4 hours researching and drafting the first version of the
5 complaint. Mr. Lee spent an additional 260 hours
6 researching, drafting, writing, and filing two
7 supplemental complaints and a second amended complaint.

8 (Doc. 450 at 21:3-21:5.)

9 Defendant also claims that Court should exclude in its
10 entirety: (1) the time associated with the (mis)filing of the first
11 amended complaint; and (2) the time associated with filing the third
12 supplemental complaint, which was withdrawn three weeks after it was
13 filed.

14 Plaintiff rejoins:

15 A review of Ms. Herrington's and Mr. Lee's declarations
16 reveals that Ms. Herrington spent a total of 59.8 hours
17 researching and drafting the first complaint while Mr.
18 Lee spent a total of 46.6 hours reviewing and drafting
19 the complaint. The total for both attorneys is 106.4
20 hours [...]

21 Defendant is arbitrarily categorizing all billing items
22 prior to filing of the complaint as complaint-related,
23 including items such as phone calls, correspondence, and
24 research into non-complaint related items such peer
25 review privilege in discovery. There are additional
26 discrepancies in Defendant's calculations. Exhibit G
27 includes 174 hours of research which it correctly
28 describes as "Additional research after filing
complaint". But Defendant then includes this post-
complaint research in the 260 hrs which Defendant claims
Plaintiff spent researching the supplemental and amended
complaints. This is contradictory and wrong. Defendant
also appears to have lumped all research time entries
together and deemed them complaint-related.

(Doc. 451 at 34:26-35:12.)

Plaintiff's arguments lack merit. As to Mr. Lee's briefing,
there was an easy fix to this problem: he could have provided the

1 necessary documentation during the first two rounds of briefing,
2 filed on June 1, 2010 and August 16, 2010, specifying the specific
3 hours spent research and drafting the complaint and subsequent
4 amendments/supplements. Having decided not to do so, after several
5 rounds of briefing and a lengthy instruction on the relevant legal
6 standards, Plaintiff has not satisfied the Moreno standard.

7 Even considering the merits of his third and most recent
8 supplemental filing, Mr. Lee's supporting documentation is
9 incomplete and underdeveloped. In particular, Plaintiff argues that
10 Defendant incorrectly includes non-complaint research time into the
11 "complaint" total. Plaintiff, however, does not separately
12 accumulate or relate this "uncategorized" time to the complaint,
13 instead offering an artificially reduced "original" complaint total
14 of 106.4 hours. More problematic is that Mr. Lee responds with task
15 totals for the "complaint" and "third supplemental complaint," but
16 does not follow a similar procedure for other iterations of the
17 complaints: the two supplemental complaints or the "uncategorized
18 research." There is no explanation for Mr. Lee's selective task
19 totaling, which resulted in another layer of confusion.

20 The preparation of the complaints, including research, should
21 have taken Mr. Lee no more than 80 hours. The various iterations
22 of the complaint were nearly identical and of limited complexity.
23 The gravamen of the litigation was that the County violated
24 Plaintiff's rights, as contract department chair and pathologist
25 within the Kern County Medical Center's hospital, under the FMLA,
26
27
28

1 the FEHA, the CFRA, and 42 U.S.C. § 1983.⁴⁴ (Doc. 2 at ¶¶ 137-212;
2 Doc. 15 at ¶¶ 142-221; Doc. 24 at ¶¶ 152-231; Doc. 30 at ¶¶ 153-
3 232; Doc. 242 at ¶¶ 158-224.) These statutes are customary and
4 familiar to any employment lawyer in California. Mr. Lee was not
5 breaking new ground. No attorney with thirteen years of experience
6 - with "an excellent reputation in the California employment law
7 community and demonstrated skill and success" - should need to spend
8 more than 100 hours drafting three nearly identical complaints and
9 two minor supplements. Plaintiff's counsel also erred in attaching
10 exhibits and uploading complaints to ECF. These administrative
11 errors are excluded from the fee award in their entirety. With
12 respect to all complaint-related tasks, including research,
13 correspondence and drafting, Mr. Lee is entitled to 80 hours.

14 According to Ms. Herrington's declaration, she expended 17.3
15 hours researching the complaint and 42.5 hours drafting the
16 complaint, for a total of 59.8 hours.⁴⁵ Billing nearly 60
17 additional hours as *co-counsel* is excessive given Ms. Herrington's
18 extensive experience, her specialty in employment law, and the
19 marginal legal complexity of this case and the original complaint.
20 Ms. Herrington's complaint-related task total is reduced from 59.8
21 hours to 40 hours. This totals 120 hours spent on complaint-related
22

23 ⁴⁴ Various state law claims, namely a claim for defamation,
24 were alleged but later withdrawn. (Doc. 15 at ¶¶ 204-214.) As
25 discussed on July 28, 2010, Plaintiff also advanced claims against
26 five individual defendants, but later omitted these individuals
27 from the second amended complaint.

28 ⁴⁵ According to her declaration, Ms. Herrington did not work
on either the supplemental or amended versions of the complaint.
(Doc. 452-2 at ¶ 18.)

1 tasks.

2
3 c. *Travel Time*

4 Defendant argues that Mr. Lee cannot recover a single hour of
5 his travel time. Defendant cites the "blending" together of Mr.
6 Lee's travel time and his time spent on purely legal tasks. This
7 amalgamation allegedly made it impossible to quantify Mr. Lee's
8 travel time, thus the time is not recoverable:

9 Mr. Lee charged at his full requested rate. However,
10 Mr. Lee frequently lumped his travel time in with the
11 time he spent on other tasks, thereby making it
12 impossible to identify the discrete time he actually
13 spent traveling. The Court asked Mr. Lee to revise his
14 time records to show tasks and avoid "block billing" but
15 Mr. Lee did neither. The County submits none of Mr.
16 Lee's travel time should be compensated.
17 (Doc. 450 at 9:27-10:7.)

18 Plaintiff responds by stating that Defendant *could* deconstruct
19 the different time tasks/totals, but simply chose not to do so:

20 [Calculating travel time] is not impossible. Simply
21 deduct the 4 hours round trip travel time required to
22 travel between Los Angeles and Bakersfield from any such
23 entry.

24 (Doc. 451 at 9:9-9:11.)

25 Plaintiff misses the point. Under *Hensley*, 461 U.S. 424 and
26 *Deukmejian*, 987 F.2d 1392, it is Plaintiff's burden to document his
27 hours, including travel, and submit evidence to support the hours
28 billed. It is not incumbent on the Court or opposing counsel to
isolate, itemize, break down, and attempt to categorize by legal
activity Plaintiff's counsel's billing records. See *Kearney v.*
Foley and Lardner, 553 F. Supp. 2d 1178, 1185 (S.D. Cal. 2008) ("The
Court must have 'substantial evidence' to support the fee award.").

1 Ninth Circuit law does not require a district court to work
2 backwards and sift through thousands of pages of billing records and
3 excel spreadsheets. Rather, the Ninth Circuit provides that, in
4 situations involving inadequate fee documentation, the district
5 court may request supplemental billing information from the moving
6 party. See, e.g., *Fischer*, 214 F.3d 1121. That approach was
7 initially taken in this case. Plaintiff, however, chose not to
8 comply with the Court's specific requests, communicated to counsel
9 in open court and pursuant to Minute Order, giving him the
10 opportunity to do so. It is difficult to understand Plaintiff's
11 confusion on this point.

12 Nearly all of Mr. Lee's travel time is incorporated into the
13 subtotals for depositions, summary judgments, motions in limine, and
14 depositions. The Court's independent research revealed only two
15 "miscellaneous" travel entries, on December 17, 2007 and October 8,
16 2008. This time, 13.8 hours, is reasonable and awarded. The
17 remaining travel time, if any and to the extent it can be
18 identified, is excluded on the ground the vague and imprecise
19 billing entries do not allow the Court to determine "how much time
20 ... [was] spent on particular claims, and whether the hours were
21 reasonably expended." *Ravet v. Stern*, 2010 WL 3076290, at 6
22 (citation and quotation omitted).

23 Defendant does not object to Ms. Herrington's well-documented
24 request for 39 hours of travel time.⁴⁶

25
26 ⁴⁶ Ms. Herrington's travel hours are calculated by multiplying
27 the travel rate, \$200, and the requested travel time, 39 hours, to
28 reach a total of \$7800. The reduced travel rate also applies to
calculate Mr. Lee's travel time, 13.8 hours.

1 d. *Fifth Affirmative Defense*

2 Defendant argues that the 91 hours billed by Mr. Lee and Ms.
3 Herrington in conjunction with Defendant's "Fifth Affirmative
4 Defense" was unnecessary and wasteful. The fifth affirmative
5 defense was advanced in Defendant's June 21, 2007 Answer.⁴⁷
6 Plaintiff moved to strike the defense on grounds that it was "an
7 insufficient defense" and "scandalous matter" under Rule 12(f).
8 Plaintiff supported the motion to strike with several declarations,
9 amended declarations, a Memorandum of Points and Authorities,
10 proposed orders, corrected orders and a request for judicial notice.
11 (Docs. 32-40.)

12 The motion was denied in a brief 8-page decision on October 23,
13 2007. (Doc. 64.) The Court explained:

14 Plaintiff reads the fifth affirmative defense narrowly
15 and argues that it asserts only contributory negligence.
16 The court is not persuaded by plaintiff's argument,
17 because it is based on a faulty premise. The problem
18 with plaintiff's premise is that it characterizes the
19 fifth affirmative defense as exclusively contributory
20 negligence and ignores the fact that it concerns other
21 defenses as well. The substance of the fifth
22 affirmative defense is that plaintiff's own misconduct
23 created the situation that resulted in his injuries. An
24 allegation that a party has acted inequitably or
25 asserted a claim in bad faith gives rise to an unclean
26 hands defense. An allegation that a party has sought to
27 benefit from his own wrongdoing gives rise to an
28 equitable estoppel. Both are apparent in the fifth
affirmative defense. Given that the court is obliged to

24 ⁴⁷ The fifth affirmative defense alleges: "As and for a fifth
25 affirmative defense, Defendants allege that, during Plaintiff's
26 employment at Kern Medical Center, Plaintiff was arrogant,
27 disagreeable, uncooperative, intimidating, overbearing,
28 self-righteous and unfriendly and that Plaintiff's behavior
contributed to and was the direct and proximate cause of any
stresses, disabilities or injuries that Plaintiff believes he
sustained. (Doc. 31 at 12:18-22.)

1 view the fifth affirmative defense in the light most
2 favorable to defendants and to resolve any doubt
3 regarding the sufficiency or relevancy of the defense in
4 defendants' favor, the court does not subscribe to
5 plaintiff's narrow interpretation of the defense.

6 (Doc. 64 at 5:18-6:3.)

7 Plaintiff filed a motion for reconsideration of the October 23,
8 2007 Order, (Doc. 68), which was denied without prejudice on
9 December 17, 2007, (Doc. 81). The Court stated that the "evidence
10 of Plaintiff's conduct is relevant to the totality of the
11 circumstances underlying Plaintiff's allegations, including his
12 allegation of a hostile work environment." (Id. at 3:5-3:7.)
13 Plaintiff was given the opportunity to re-file if discovery revealed
14 different facts.

15 Although those facts never developed, Plaintiff moved to
16 dismiss the fifth affirmative defense four additional times, in his
17 motion for summary judgment, (Doc. 263), twice *in limine*, pre-trial
18 and during trial, (Docs. 324 & 376), and during the Rule 51
19 conference, (Doc. 381). These requests/motions were all denied.

20 As explained to Plaintiff on a number of occasions, several
21 times in written decisions, there was no question that the evidence
22 of Plaintiff's misconduct was relevant to whether he was subjected
23 to unlawful adverse employment actions and a hostile work
24 environment. The fifth affirmative defense was one of Defendant's
25 key litigation strategies, i.e., Plaintiff's alleged mistreatment
26 of hospital employees and disagreeable nature precipitated and
27 justifies the employment actions taken against him. Although the
28 jury did not ultimately agree, Plaintiff's alleged misconduct was

1 highly relevant to determine motive, as it was supported by the
2 hospital Board chairs and some Department heads.

3 That the law recognized Defendant's ability to assert such a
4 defense should have been abundantly clear to competent employment
5 law counsel; at a minimum, after reviewing the Memorandum Decision
6 re: Cross-Motions for Summary Judgment. Any subsequent billed time
7 to prepare reconsideration motions is excluded from the fee total
8 as unnecessary. The issue was fully presented and the repeated
9 reassertion of the motions were meritless disguised motions for
10 reconsideration. In addition, the total time billed is excessive
11 for the work performed. The preparation of the preceding motions
12 should have taken no more than 40 hours. Plaintiff's counsel also
13 committed a number of administrative errors when he filed the
14 original motion to strike. This time - 1 hour - is excluded. For
15 these reasons, among others, the time spent litigating the fifth
16 affirmative defense is reduced from 91 hours to 40 hours.⁴⁸

17
18 e. *Motions for Reconsideration*

19 Defendant argues that the Court should exclude the 59 hours
20 spent preparing Plaintiff's four motions for reconsideration.
21 Plaintiff disagrees. Citing *Emery v. Hunt*, 272 F.3d 1042, 1047-48
22 (8th Cir 2001), Plaintiff argues that the entire 59 hours are
23 recoverable because "a prevailing party is entitled to recover fees
24 for all hours reasonably spent in pursuit of the litigation,
25 including hours spent on unsuccessful motions." (Doc. 451 at 12:13-

26
27 ⁴⁸ The number of hours spent on this task is broken down as
28 follows: Ms. Herrington is awarded 15 hours and Mr. Lee 25 hours.

1 12:14.)

2 Plaintiff's arguments are largely unpersuasive as they omit the
3 linchpin of the Eighth Circuit's analysis: that the hours be
4 reasonably spent in pursuit of the litigation. That is not the case
5 here. For example, on May 5, 2008, Plaintiff filed a motion for
6 reconsideration concerning the Court's denial of his request to
7 telephonically appear at a Mandatory Settlement Conference. (Doc.
8 114.) The motion was withdrawn the same day. (Doc. 115.)
9 Plaintiff spent several hours drafting this motion, which he claims
10 is reasonable. Plaintiff is wrong. The Standing Order of the Court
11 requires the presence of counsel and client at a settlement
12 conference for good reason. The motion and the time spent drafting
13 it were unreasonable and unjustified. It is excluded from the fee
14 request.

15 Plaintiff argues that the remaining motions for
16 reconsideration were necessary based on Magistrate Judge Goldner's
17 "controversial nature" and alleged bias against him:

18 Magistrate Goldner issued several controversial rulings
19 before recusing herself to become County Counsel for
20 Kern County. At one point, after Plaintiff had filed a
21 motion for reconsideration, Goldner reversed her own
22 controversial order granting Defendant's request for a
23 special master at 50% cost to Plaintiff. Plaintiff
24 objected that, among other things, Goldner was
25 appointing her "friend", Kenneth Byrum, from
26 Bakersfield, despite the fact that remaining depositions
27 were to occur in Los Angeles. The controversial nature
28 of Goldner's rulings necessitated Plaintiff's motions
for reconsideration.

(Doc. 451 at 15:7-15:13.)

26 Plaintiff's arguments are unsupported. Plaintiff's counsel has
27 shown a proclivity to personally criticize any judge who has ruled

1 against Plaintiff's counsel. There is no indication that Magistrate
2 Judge Goldner's rulings were improperly influenced, as they
3 conformed with the Supreme Court and Ninth Circuit precedent. (See,
4 e.g., Doc. 81; Doc. 174; Doc. 222.) Plaintiff's counsel's unduly
5 contentious conduct during discovery and conflicts with opposing
6 counsel made necessary the intervention of the magistrate judge on
7 a number of occasions. The arguing and conflict between the
8 attorneys at depositions justified discovery sanctions and the need
9 for a master, even if not implemented. Plaintiff conveniently
10 overlooks the fact that discovery had degenerated to the point where
11 counsel could not civilly communicate. Judicial intervention was
12 required to complete discovery based on the animosity that existed
13 between Mr. Lee and Mr. Wasser.

14 In any event, each one of the motions for reconsideration was
15 denied.⁴⁹ Plaintiff has not accused the District Judge of bias.
16 None of the unsuccessful motions for reconsideration were appealed
17 to the Ninth Circuit.

18 In addition, Plaintiff's motions for reconsideration
19 demonstrated manifest confusion of the relevant legal standards, the
20 likely explanation Plaintiff's lack of success. As discussed in the
21 Court's September 11, 2008 Order denying Plaintiff's motion for
22 reconsideration:

23 Pursuant to Rule 72-303, a District Judge upholds a
24 Magistrate Judge's ruling on a referred matter unless it
25 is "clearly erroneous or contrary to law." See Rule
26 72(a), Federal Rules of Civil Procedure; 28 U.S.C. §

26 ⁴⁹ Plaintiff also neglects to mention that he prevailed on a
27 number of motions before Magistrate Judge Goldner. (See, e.g., Doc.
28 113.)

1 636(b) (1) (A). The "clearly erroneous" standard applies
2 to a Magistrate Judge's findings of fact. *Concrete Pipe*
3 *& Prods. v. Constr. Laborers Pension Trust*, 508 U.S.
4 602, 623 (1993). "A finding is 'clearly erroneous' when
5 although there is evidence to support it, the reviewing
6 [body] on the entire evidence is left with the definite
7 and firm conviction that a mistake has been committed."
8 *Id.* at 622. The "contrary to law" standard allows
9 independent, plenary review of purely legal
10 determinations by the Magistrate Judge. *FDIC v.*
11 *Fidelity & Deposit Co. of Md.*, 196 F.R.D. 375, 378 (S.D.
12 Cal. 2000); *Haines v. Liggett Group, Inc.*, 975 F.2d 81,
13 91 (3rd Cir. 1992). "An order is contrary to law when
14 it fails to apply or misapplies relevant statutes, case
15 law, or rules of procedure." *DeFazio v. Wallis*, 459
16 F.Supp.2d 159, 163 (E.D.N.Y. 2006).

17 Plaintiff's request for reconsideration is DENIED. The
18 record establishes that the conduct of both attorneys
19 during depositions is at fault and that the protective
20 order issued by the Magistrate Judge is well within her
21 discretion and necessary to manage the process of
22 discovery in this action. The mutual protective order
23 is not clearly erroneous or contrary to law.
24 Plaintiff's requests for sanctions were denied without
25 prejudice by the Magistrate Judge because Plaintiff
26 failed to document the requested amounts. These rulings
27 also are not clearly erroneous or contrary to law.

28 (Doc. 222 at 2:4-3:5.)

Here, Plaintiff seeks to recover almost 60 hours in fees for
filing several motions for reconsideration. One of these motions
was withdrawn, several were without a legal basis, and all were
denied. This warrants a reduction in the amount of fees recovered
for these motions. See *Koon Chun Hing Kee Soy & Sauce Factory, Ltd.*
v. Star Mark Management, No. 04-CV-2293-SMG, 2009 WL 5185808, at 7
(E.D.N.Y. Dec. 23, 2009) ("plaintiff did not prevail on its motion
for reconsideration, and this warrants a reduction in the amount of
fees recovered."). To account for Plaintiff's lack of success, the
confusion over the relevant legal standards, the frivolity of the
May 5, 2008 motion and the excessive time spent preparing the

1 motions, the total number of hours are reduced by 50%, from 59 hours
2 to 29.5 hours.

3
4 *f. Depositions*

5 Defendant next contests the number of hours spent noticing,
6 conducting and defending the more than forty depositions in this
7 case, including Plaintiff's deposition. Defendant contends that
8 many of the depositions were not needed and Mr. Lee wasted countless
9 hours on "useless questioning about subjects that were not in issue
10 and arguing with witnesses." (Doc. 450 at 11:20.) Defendant
11 requests a reduction from 657 hours to 329 hours for deposition-
12 related tasks.

13 Plaintiff rejoins that Defendant is "wrong" about the number
14 of deposition hours billed by his attorneys:

15 Mr. Lee recorded 327.2 hours in deposition-related
16 tasks. Ms. Herrington's tally was 126.6 hours. The
17 total is 453.8 hours, far less than the number quoted by
18 Defendant.

19 (Doc. 451 at 16:26-27.)

20 The deposition transcripts reveal that both counsel were
21 combative and aggressive.⁵⁰ Both parties are at fault for the

22 ⁵⁰ For example, Mr. Lee accused Mr. Wasser of "tapping his
23 feet" during a deposition, with the intent to provoke a certain
24 response from the witness (Ms. Antoinette Smith). As a result, Mr.
25 Wasser directed one of Mr. Lee's two webcams to his feet. Mr. Lee
26 responded: "if you touch my camera again, you're not going to like
27 what happens." Mr. Lee made several additional statements
28 concerning what would happen to Mr. Wasser in the event he touched
his web camera. Mr. Wasser replied that he would do what was
necessary to verify the room conditions. This dispute, among
others, is chronicled in the "Order on Letter Request Regarding
Discovery Dispute," (Doc. 207).

1 breakdown of communication and uncivil decorum, which exposed a
2 number of witnesses to disputatious and offensive commentary and
3 conduct by counsel in this case. It was also unnecessarily imposed
4 on the Court. The need for judicial oversight was unfortunate and
5 a waste of resources. (See Doc. 207, "Order on Letter Request
6 Regarding Discovery Dispute," at 7:9-7:10) ("It should not be
7 necessary for any court to have to regulate the type of conduct
8 which has been exhibited in Ms. Smith's deposition.") Plaintiff's
9 figure of 453.8 hours is accepted as a starting point to determine
10 the number of hours billed for deposition-related tasks.

11 The substance of the County's arguments are that two counsel
12 were not necessary to defend depositions. Plaintiff fails to
13 acknowledge that any duplication of efforts existed in this case,
14 arguing that Defendant "failed to rebut Ms. Herrington's evidence
15 that, throughout this litigation, including at the depositions, she
16 undertook different, complementary tasks." Such a position is not
17 supported by Plaintiff's briefing. Excluding the deposition of
18 Regina Levison, it is unclear why Ms. Herrington's presence was
19 necessary. She did not separately pose questions or lodge
20 objections; she did not conduct the deposition or defend the
21 witness, Mr. Lee did. Ms. Herrington's declaration is similarly
22 vague, listing only her attendance at certain depositions, not her
23 participatory role or most notably what preparation she did. Ms.
24 Herrington did not question, lead, defend or object during
25 depositions, she does not describe her "complementary" role.

26 To account for such unjustified duplication of efforts, among
27 other reductions, the total number of deposition hours are reduced
28

1 by 30%. See *Wheeler v. Coss*, No. 3:06-CV-00717-RAM, 2010 WL
2 2628667, at 6 (D. Nev. June 22, 2010) (reducing the requested
3 deposition amount by 30.33 hours based on the Court's discretion and
4 its litigation knowledge.). The number of hours spent on all
5 deposition-related tasks are reduced from 453.8 to 317.7, broken
6 down as follows: Ms. Herrington is awarded 88.7 hours and Mr. Lee
7 is awarded 229 hours.⁵¹

8
9 g. "Manifestly Ineligible"

10 Defendant argues that three categories of time are "manifestly
11 ineligible" from inclusion in the fee award: (1) attorney-client
12 non-litigation work; (2) secretarial and clerical work; and (3)
13 researching appellate procedures. According to Defendant, Plaintiff
14 spent 57.2 hours on the first unexplained task, 169.1 hours on the
15 second and on 14.5 the third. Defendant provides a separate index
16 of the time spent by Plaintiff's counsel on these tasks. (Doc. 450-
17 1.)

18 Defendant first argues that the Plaintiff spent 57.2 hours on
19 "tasks [that] have nothing to do with prosecuting Plaintiff's
20 claims." (Doc. 450 at 9:17.) Plaintiff responds that the tasks
21 were "directly related" to the litigation and, in any event,
22 Defendant did not carry his burden to provide specific evidence to
23 challenge the reasonableness and accuracy of the hours billed.
24 Plaintiff ignores that it is the moving party who carries the
25 initial burden to support his fee motion, which was not done in this

26
27 ⁵¹ This figure includes any time spent traveling to depositions
28 and preparing the "Master Deposition Exhibit."

1 case. Plaintiff's failure to properly document and support his
2 motion directly impacted the ability to respond/evaluate the motion.

3 Defendant's primary argument is not entirely accurate. Most
4 of the alleged "non-litigation" time constitutes electronic
5 communications between Plaintiff and his counsel, as well as
6 research of employment issues, specifically, time spent researching
7 Plaintiff's FMLA eligibility and reviewing employment and buyout
8 documents. Time spent on these tasks is recoverable. However, a
9 number of the entries are excluded, including Mr. Lee's
10 conversations with a TV reporter and phone calls between Mr. Lee and
11 Ms. Herrington to discuss Mr. Lee's performance on television.
12 Other entries are inflated, i.e., billing several hours to send
13 "confirmatory emails" and "read and review" short emails. A modest
14 downward adjustment of 10% is warranted with respect to the alleged
15 non-litigation work. See *Moreno*, 534 F.3d at 1112 ("[T]he district
16 court can impose a small reduction, no greater than 10 percent-a
17 'haircut'-based on its exercise of discretion and without a more
18 specific explanation.").

19 Defendant next contends that 169.1 hours should be excluded on
20 the ground it constitutes "secretarial and clerical work."
21 Plaintiff rejoins that these activities are recoverable as "attorney
22 work product." For the most part, the time entries correspond to
23 work on the "chronology grid" and "CaseMap" software.

24 Although somewhat clerical in nature, Courts have held that
25 time spent organizing and formatting "CaseMap" software is properly
26 recoverable. See *Semmaterials, L.P. v. Alliance Asphalt, Inc.*, No.
27 CV-05-320-S-LMB2007, WL 676675, at 3 n.1 (D. Idaho Mar. 1,
28

1 2007) ("Time spent updating Casemap and adding persons, witnesses,
2 and organizations to spreadsheets have not been excluded because,
3 although somewhat clerical in nature, these tasks add to a database
4 that organizes information to save attorneys' time and to help
5 attorneys perform legal services in a more efficient manner."). On
6 the current record, however, there is considerable overlap between
7 CaseMap and Plaintiff's "chronology grid." Plaintiff's cursory
8 explanation of a "chronology grid" bears a striking resemblance to
9 the function of the CaseMap software.⁵² To account for this overlap
10 and several obvious secretarial entries, among other reasons, the
11 time spent on these tasks is reduced from 169.1 hours to 100 hours.
12 Secretarial time is not compensable. It is part of an attorney's
13 overhead. See *Yeager v. Bowlin*, No. 2:08-102-WBS-JFM, 2010 WL
14 2303273, at 8 (E.D. Cal. June 7, 2010) (secretarial tasks are
15 generally not recoverable as attorney's fees).

16 Defendant's final argument is that Plaintiff's counsel spent
17 14.5 hours researching appellate procedure, however, "no appeal
18 could have been taken and [an] extraordinary writ was never
19 available." (Doc. 450 at 9:24-9:25.) Plaintiff rejoins:

20 A trial attorney is required to look ahead to appeal as
21 he litigates a case. The process includes preserving
22 the record, making necessary objections, and exhausting
23 relief at the trial court level. That is what Plaintiff
24 did here. Also, there were numerous discovery decisions
25 issued by Magistrate Teresa Goldner for which Plaintiff
26 had considered seeking writ relief.

26 ⁵ [http://www.lexisnexis.com/trial/uslm137987.asp?ppcid=137897_p1372](http://www.lexisnexis.com/trial/uslm137987.asp?ppcid=137897_p137279483&WT.srch=1&optify_r=ppc&optify_rd=casemap+software)
27 [79483&WT.srch=1&optify_r=ppc&optify_rd=casemap+software.](http://www.lexisnexis.com/trial/uslm137987.asp?ppcid=137897_p137279483&WT.srch=1&optify_r=ppc&optify_rd=casemap+software) (Last
28 visited Dec. 18, 2010). ²

1 (Doc. 451 at 12:2-12:5.)

2 Plaintiff is awarded eight hours for these tasks. Plaintiff
3 is entitled to conduct reasonable research concerning appellate law,
4 however, the billed time and his "new" explanation for this research
5 conflict. Most of the alleged time spent researching appellate
6 procedure occurred in April 2009, after the dispositive motion
7 rulings in this case. Plaintiff's counsel incurred the rest of the
8 time in 2010, an entire year after trial. It is unclear how
9 Magistrate Judge Goldner's "numerous" rulings are relevant to these
10 entries. Magistrate Judge Goldner resigned from the bench on April
11 6, 2009 and did not rule on any dispositive motions. No other
12 explanation of the purpose of this research is provided.

13
14 g. *Spoliation*

15 Defendant argues that the Court should reduce the 25 hours
16 Plaintiff spent researching "spoliation" issues. According to
17 Defendant, Plaintiff attempted to build a spoliation claim based on
18 the conduct of Barbara Patrick, a member of the Kern County Board
19 of Supervisors. Ms. Patrick left her position on the Board on
20 January 8, 2007, two days after Plaintiff filed this action. It is
21 undisputed that she shredded all Kern-related documentation when she
22 left her Board position.

23 Plaintiff does not specifically dispute Defendant's factual
24 summary, however, he argues that the 25 hour calculation is "wrong."
25 Rather, Plaintiff asserts that the correct hourly total is 11.5
26 hours. This is a reasonable figure. Plaintiff's figure of 11.5
27 hours for purposes of calculating time spent researching spoliation

1 is adopted.

2
3 h. *Whistleblowing*

4 Defendant argues that all time spent on the whistleblowing
5 claims should be excluded:

6 Th[e] claims were legally deficient. Competent,
7 experienced counsel should have known it. Plaintiff's
8 claim was under a new version of California Health &
9 Safety Code § 1278.5, enacted after the underlying
10 events took place. The version in effect at the time
11 the events occurred did not cover an entity that owns or
12 operates a health facility (such as the County), did not
13 extend protection to members of the medical staff, and
14 did not cover "reports." It is the responsibility of
15 competent counsel to know the law before commencing
16 litigation.

17 (Doc. 450 at 17:14-17:23.)

18 Defendant advances two additional arguments to support a
19 reduction. One, Plaintiff could not establish a prima facie case
20 under California Labor Code § 1102.5 because the "time span between
21 the protected activity and the adverse employment actions was too
22 great. Two, Plaintiff wasted countless hours requesting over 10,000
23 documents to explore the unmeritorious whistleblower claims. He
24 requests a reduction of over 75 hours.

25 Plaintiff responds that he is entitled to recover all of the
26 time spent researching, preparing and arguing his whistleblower
27 claims. He does not identify the number of hours spent litigating
28 these claims. According to Plaintiff, because the Court did not
make a specific finding that the claims were "frivolous," he is
entitled to all of his fees:

Plaintiff's position was not as insinuated by Defendant.
As the Court noted: "Plaintiff argues that,

1 notwithstanding all the textual changes, the amended
2 version of California Health & Safety Code § 1278.5
3 merely clarified the original meaning of the statute
4 and, as such, it can be applied in this case. Citing
5 Mendiondo, Plaintiff suggests that the Ninth Circuit has
6 already determined that the amended version of the
7 statute applies to whistleblowing and retaliation that
8 occurred prior to its enactment into law." There was
9 never any finding that Plaintiff's contention was
10 frivolous.

11 (Doc. 450 at 22:13-22:19) (citation omitted).

12 Plaintiff advances a similar argument regarding § 1102.5, that
13 the claim was not declared "frivolous" by the Court. He also
14 asserts that the discovery was necessary and, in any event,
15 Defendant did not "indicate how it reached the arbitrary number of
16 75 hours [the reduction]." Plaintiff is correct on this point.
17 Defendant proposes a reduction, but does not provide a task
18 calculation or an analytical starting point.

19 Plaintiff is guilty of the same offense, which controls the
20 analysis. See *Falcon Waterfree Tech., LLC v. Janssen*, No.
21 1:05-cv-551, 2008 WL 4534119, at 4 (W.D. Mich. Oct. 6, 2008) ("Where,
22 as here, the fee petition makes it impossible to clearly
23 differentiate between compensable and non-compensable attorney time,
24 the onus of that lack of clarity falls on the moving party.").
25 Plaintiff again fails to understand the relevant legal standard to
26 support a fee motion. Here, Defendant's figure appears arbitrary
27 because Plaintiff's counsel did not provide adequate billing
28 documentation or task totals of the hours spent on each task in the
first instance. Even when confronted with Defendant's figure,
Plaintiff does not provide a "rebuttal" number of hours - his fourth

1 attempt to do so.⁵³

2 An accurate lodestar figure for "whistleblower" tasks cannot
3 be determined given the current state of the briefing. The
4 whistleblower claims and a number of other claims advanced by
5 Plaintiff shared common issues of fact, however, it was Plaintiff's
6 burden to: (1) produce accurate/adequate billing records to support
7 its fee motion, i.e., remove any ambiguity that impedes the
8 calculation of an accurate lodestar; and (2) to "establish that the
9 fees sought are 'associated' with a successful claim." *Signature*
10 *Flight Support Corp. v. Landow Aviation Ltd. Partnership*, --- F.
11 Supp. 2d ----, 2010 WL 3064021, at 12 (E.D. Va. July 30, 2010).
12 Plaintiff did neither in this case.⁵⁴

13 For these reasons, among others, it is impossible to deduce a
14 lodestar figure for these tasks with any accuracy.⁵⁵

15
16 i. *Motions to Compel*

17 According to Defendant, Plaintiff spent an "incredible" 319
18 hours preparing ten motions to compel or for protective orders.
19 Defendant claims that the Court should reduce this amount because:
20 three of the motions were withdrawn; several of the motions
21 concerned Plaintiff's "frivolous" whistleblowing claims; and
22

23 ⁵³ (Docs. 425, 436, 448, 451)

24 ⁵⁴ As discussed in detail in the April 3 and April 8, 2009
25 Memorandum Decisions, the claims did not survive the dispositive
26 motion stage. (Docs. 310 & 311.)

27 ⁵⁵ A number of the "whistleblower" entries are too vague to
28 permit the Court to determine whether such fees are justified. See
Ravet v. Stern, 2010 WL 3076290, at 6.

1 Plaintiff chose not to reconvene the deposition of Patricia Perez.⁵⁶

2 Plaintiff contends that all of the hours are reasonable. He
3 represents that two of the motions were withdrawn, not three, and
4 "none of the motions were focused on whistleblowing claims, as
5 Defendant contends, or any other claim, for that matter [...] they
6 focused on adverse employment actions and/or rebuttal of Defendant's
7 Fifth Affirmative Defense." (Doc. 451 at 25:17-25:19.)

8 For the most part, these topics have been addressed. Most of
9 the time spent preparing the motions to compel were required by the
10 deterioration of Mr. Lee's and Mr. Wasser's professional
11 relationship. Plaintiff's counsel, however, was unduly contentious
12 and combative during discovery, which resulted in unnecessary
13 discovery motions and court involvement. To account for this
14 conduct, the withdrawn motions, the lack of documentation (and
15 vagueness) to support the whistleblowing claims and the excessive
16 number of hours spent drafting the motions to compel, among other
17 reasons, Plaintiff is awarded 160 hours, the equivalent of four work
18 weeks, for these tasks.

19
20 j. *Background Investigations and*
21 *Administrative Filings, Undisclosed*
22 *Experts*
23

24 Defendant next asserts that none of the time spent on
25

26 ⁵⁶ With respect to Ms. Perez's deposition, Plaintiff's motion
27 was granted. However, Plaintiff's counsel chose not to further
28 depose Ms. Perez.

1 administrative filings, undisclosed experts and background filings
2 is recoverable. According to Defendant, Plaintiff spent 34 hours
3 on administrative filings, 104 hours on undisclosed experts and 121
4 hours on background investigations.

5 With respect to undisclosed experts, Plaintiff represents that
6 his counsel spent 18.6 hours. Plaintiff's figure is reasonable and
7 is accepted to calculate an accurate lodestar.

8 With respect to the other two categories, Plaintiff repeats his
9 boilerplate argument that there is no "particularized challenge" to
10 his evidence, thus Defendant's calculation fails. This argument
11 assumes that the documentation used to support the motion for
12 attorney's fees is accurate, which is not the case. Instead,
13 Plaintiff's failure to provide adequate documentation and
14 explanation necessitated Defendant's calculations/methodology. The
15 failure to document fees continues in the present motion as
16 Plaintiff does not provide a corrected figure despite Defendant's
17 specific challenge.

18 However, it is undisputed that Plaintiff was required to
19 satisfy certain administrative prerequisites to commence litigation
20 against the County. All of these hours cannot be excluded. With
21 respect to the undisclosed experts, several of the individuals were
22 on Plaintiff's expert list, (see, e.g., Doc. 320). Although
23 Plaintiff's documentation is inadequate, Defendant's inability to
24 recollect these individuals does not control the analysis. To
25 account for these deficiencies, among others, 18 hours are awarded
26 for administrative filings and 60 hours for background
27 investigations. No additional time is warranted due to the failure
28

1 to provide specific task descriptions, time increments or background
2 documentation.

3
4 k. *Motions for Summary Judgment*

5 The dispute over the motions for summary judgment encompasses
6 three discrete tasks: (1) reviewing Defendant's motion for summary
7 judgment; (2) preparing Plaintiff's motion for summary judgment; and
8 (3) attendance/preparation for oral argument.

9 Defendant claims that Mr. Lee and Ms. Herrington spent
10 approximately 863 hours on these tasks. Plaintiff disagrees,
11 stating that counsel only spent 712.4 hours, 545.5 hours (Mr. Lee)
12 and 166.9 hours (Ms. Herrington). Plaintiff's total is accepted as
13 a starting point for the lodestar analysis.

14 Plaintiff argues that the time billed on each of these tasks
15 was reasonable, in many cases directing the Court to the actual
16 motion documents. According to Plaintiff, "the complexity was
17 reflected in Plaintiff's MSJ/MSA which was over 1,000 pages,
18 Defendant's MSJ was nearly 1,200 pages, and Plaintiff's opposition
19 to Defendant's MSJ which was over 1,000 pages." (Id. at 36:24-
20 37:1.) Plaintiff also claims that this case "was extremely complex,
21 involving 13 counts, 5 years of events, tens of thousands, of
22 documents produced in discovery, more than 50 depositions, and more
23 than 20 witnesses called at trial that last nearly 4 weeks." (Doc.
24 451 at 37:24-36:24.)

25 The true complexity of this case has been appraised throughout
26 this Memorandum Decision. While the case required counsel to
27 marshal facts and establish an employment time-line, the legal
28

1 theories and arguments were neither novel nor innovative. Plaintiff
2 also incorrectly correlates motion length with legal complexity.
3 The majority of the dispositive motion briefing consisted of
4 deposition testimony and discovery responses, which were attached
5 as exhibits to Mr. Lee's and Mr. Wasser's declarations. The actual
6 "legal" briefing was less than 8% of the total pages. While
7 necessary to review this material, it takes less time to process and
8 configure factual information, mostly deposition testimony, into a
9 responsive briefing and/or trial strategy. In addition, as
10 discussed in detail in the Memorandum Decisions and Orders in this
11 case, Plaintiff's counsel's inexperience with the federal rules,
12 trial practice and procedure, and the relevant legal authority
13 inflated the total hours expended. (See, e.g., Doc. 321.)

14 After careful review of the summary judgment and post-trial
15 briefing, the hours requested by Plaintiff's counsel are
16 unreasonable. The motions were important for resolving the central
17 issues in this case and the attorneys who worked on them should be
18 compensated accordingly, however, billing the equivalent of eighteen
19 work weeks - more than four working months - is excessive.

20 To be clear, each party's motion was granted in part and denied
21 in part. Plaintiff's motion, for the most part, was not a
22 success.⁵⁷ Further, the portion granted in his favor, the County's

23
24 ⁵⁷ The Court's April 28, 2009 Order provides, in relevant part:

25 Plaintiff moved for summary judgment on the whole of his
26 action and summary adjudication on each one of his
27 claims, asserting that liability is established leaving
28 only damages for trial. Plaintiff also moved for
summary adjudication on certain affirmative defenses.

1 ability to assert a number of affirmative defenses, was not a
2 significant portion of the motion.⁵⁸ Plaintiff, however,
3 successfully defeated the FMLA and FEHA portions of Defendant's
4 motion. The dispositive motion-related tasks should have taken no
5 more than 300 hours.⁵⁹ See *Ryan M. v. Board of Educ. of City of*
6 *Chicago, Dist. 299, --- F. Supp. 2d ----, 2010 WL 3184209, at 9*
7 *(N.D. Ill. Aug. 9, 2010)* ("Using its discretion, the Court may reduce
8 an attorneys' fee award when the hours billed are excessive in light
9 of the attorneys' experience and the work produced.") (citations
10 omitted).

11 Mr. Lee claims that he spent 31.7 hours preparing for and
12 attending the oral argument on these motions and 20.5 hours
13 reviewing the April 8, 2009 Memorandum Decision, of which 35 hours
14 are reasonable. Ms. Herrington asserts she spent 1.1 hours
15 attending the hearing. All of Ms. Herrington's time is reasonable.

16 The final dispute concerning the summary judgment motions is
17 Defendant's complaint about Mr. Lee's alleged "insistence to treat
18

19
20 The court painstakingly went through each of Plaintiff's
21 claims and determined that Plaintiff was not entitled to
22 judgment as a matter of law on his claims. Some of
23 Plaintiff's claims did not survive Defendants'
24 cross-motion.

(Doc. 321 at 5:8-5:15.)

24 ⁵⁸ The brief discussion re: Plaintiff's motion to exclude
25 Defendant's affirmative defenses can be found in Doc. 311, pgs.
26 133-138.

26 ⁵⁹ The hours awarded for dispositive motion-related tasks are
27 broken down as follows (applying Plaintiff's counsel's work ratio):
28 Mr. Lee is awarded 229.5 and Ms. Herrington is awarded 70.5.

1 language in the Court's summary judgment decisions as 'undisputed
2 facts.'" (Doc. 450 at 15:21-15:22.) According to Defendant, Mr.
3 Lee unreasonably "transformed" the Court's Memorandum Decision into
4 a statement of undisputed facts, which made it impossible to draft
5 the joint pretrial statement. Defendant claims that the 89 hours
6 expended by Mr. Lee in connection with the pretrial statement should
7 be excluded.

8 For the reasons discussed in the April 29, 2009 Order,
9 Plaintiff is awarded 15 hours in connection with the preparation of
10 the pretrial statement.⁶⁰

11 The Supreme Court has stated that "at the summary
12 judgment stage the judge's function is not himself to
13 weigh the evidence and determine the truth of the matter
14 but to determine whether there is a genuine issue for
15 trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
16 249 (1986). This rule applies whether summary judgment
17 on a claim therein is at issue. See, e.g., *Washington*
18 *v. Garrett*, 10 F.3d 1421, 1424, 1428 (9th Cir. 1993).
19 In ruling on such motions, "[t]he evidence of the
20 non-movant is to be believed" by the court, "and all
21 justifiable inferences are to be drawn in his favor."
22 *Anderson*, 477 U.S. at 254 (emphasis added.) Accordingly,
23 in analyzing such motions, a court does not decide or
24 determine facts for purposes of trial. The Ninth Circuit
25 recognizes "[t]here is no such thing as findings of
26 fact, on a summary judgment motion." *Minidoka Irrigation*
Dist. v. Dep't of Interior, 406 F.3d 567, 575 (9th Cir.
2005) (internal quotation marks omitted). Although, in
the course of ruling on such motions, courts will
discuss facts or matters that are "undisputed,"
indisputable, not seriously disputed, appear
"undisputed" or established, or use words of like import
when discussing the record evidence and briefing, this
does mean that a court has thereby usurped the function
of the trier of fact and done something more than
provide the context for the motion or articulate and
explain the basis for the decision or a step in the
analytical process [...]

27 ⁶⁰ This point is also discussed in the Court's April 22, 2009
28 Order, (Doc. 317).

1 Accordingly, Plaintiff's attempt to take passages from
2 the court's order on the cross-motions and assert that
3 they represent undisputed facts that have already been
4 established for purposes of trial is misguided. No
5 factual findings for purposes of trial were made. Of
6 more concern is Plaintiff's intransigence in refusing to
7 know and follow the law.

8 More serious is Plaintiff's intentional
9 misrepresentation that the court did not rule on the
10 "cross-motions for summary adjudication." Plaintiff
11 moved for summary judgment on the whole of his action
12 and summary adjudication on each one of his claims,
13 asserting that liability is established leaving only
14 damages for trial. Plaintiff also moved for summary
15 adjudication on certain affirmative defenses. The court
16 painstakingly went through each of Plaintiff's claims
17 and determined that Plaintiff was not entitled to
18 judgment as a matter of law on his claims. Some of
19 Plaintiff's claims did not survive Defendants'
20 cross-motion. What Plaintiff appears to be arguing,
21 although he does not specifically say it, is that the
22 court should now establish facts under Rule 56(d)(1)
23 [...]

24 Given the unnecessary complexity of this case and the
25 impending trial date (which has already been rescheduled
26 three times before), it is not "practicable" to comb the
27 massive record to prepare an order under Rule 56(d)(1).
28 In light of the inflated motion practice in this case
and the apparent contentiousness between the parties, it
is decidedly contrary to the interests of justice that
yet another round of debate and further delay in these
proceedings occurs. The case will proceed to jury trial
on the present schedule. The parties are now ORDERED to
comply with the court's instruction to move all the
facts they cannot agree on to disputed. The parties
have until 10:00 a.m. on April 30, 2009, to do so.

The absence of knowledge of the law, inexperience, and
refusal to follow the directions of the court
vexatiously multiply the proceedings under 28 U.S.C. §
1927. In the event compliance with this order is not
effectuated, appropriate sanctions will be considered.

(Doc. 321 at 3:14-6:13.)

Plaintiff is awarded 21.2 hours total for all pretrial
statement activities, including Mr. Lee's attendance at the pretrial
conference.

1 1. *Motions in Limine, Jury Instructions and*
2 *Verdict Form*

3
4 Defendant argues that the time spent preparing the jury
5 instruction, motions *in limine* and the verdict form should be
6 reduced. With respect to the preparation of the jury instructions,
7 Defendant explains:

8 Mr. Lee and Ms. Herrington refused to work with the
9 Court in the preparation of jury instructions. After
10 the County filed its proposed jury instructions, Mr. Lee
11 filed 114 pages of objections. Since the County's
12 instructions were simply proposed jury instructions, Mr.
13 Lee's filings were unnecessary, Mr. Lee and Ms.
14 Herrington, together, spent 67 hours on the jury
15 instructions - far more time than was justified.

16 (Doc. 450 at 16:25-17:1.)

17 Defendant additionally states that the motions *in limine* were
18 "straightforward and simple" and the time entries are "inflated."
19 Lastly, Defendant argues no time should be awarded concerning the
20 Plaintiff's proposed verdict form because "the Court prepared the
21 verdict form."

22 Plaintiff only responds to the motions *in limine* dispute.
23 Plaintiff argues that his *in limine* fees are reasonable because "the
24 Court granted all 17 of Dr. Jadwin's motions in limine." (Doc. 425
25 at 7:14-7:15.) In addition, according to Plaintiff, the 108 hours
26 (89 hours by Mr. Lee/Ms. Herrington and 18 hours by Ms. Minger) are
27 reasonable because the motions "addressed several fact intensive and
28 controversial issues, such as admissibility of the radiologist tie-
pulling incident as character evidence and exclusion of speculative
expert opinion." (Doc. 451 at 38:26-38:28.)

1 With respect to this dispute, Plaintiff holds the weaker hand.
2 First, as explained during the July 28, 2010 hearing, the Order
3 granting Plaintiff's motions *in limine* was docketed in error. It
4 was vacated during the July 28, 2010 hearing. (See Doc. 440, Minute
5 Order, "Order Granting Plaintiff's Motions in Limine 1-17 was
6 STRICKEN for reasons as stated on the record.") It is undisputed
7 that Plaintiff was not as successful as he claims to be. Second,
8 on the most difficult and "fact-intensive" motions, Plaintiff did
9 not prevail. This includes the "tie-pulling incident" and the
10 testimony of Defendant's expert, Thomas McAfee, M.D., motions 13 and
11 16. The majority of Plaintiff's motions *in limine* were boilerplate
12 motions, i.e., to exclude non-party witnesses, to limit expert
13 testimony to stated opinions, to exclude references to Plaintiff's
14 claim for attorney's fees and to exclude evidence in support of
15 unpleaded defenses. The drafting of these motions required very
16 little time; they were undisputed, not "fact intensive" or legally
17 "complex."

18 For these reasons, and to address excessive and duplicative
19 billing, Mr. Lee and Ms. Herrington's requested time is reduced from
20 89 hours to 50 hours.⁶¹ Ms. Minger's time for drafting two motions
21 in limine is reduced from 18 hours to 10 hours.⁶²

23 ⁶¹ The hours awarded for researching/drafting the motions in
24 limine is broken down as follows (applying Plaintiff's counsel's
25 work ratio): Ms. Herrington is awarded 32.5 hours and Mr. Lee 17.5
26 hours.

27 ⁶² Plaintiff again cites *Emery v. Hunt*, 272 F.3d 1042, for the
28 proposition that "prevailing plaintiffs [are] entitled to fees on
unsuccessful motions." (Id. at 36:2.)

1 With respect to the fees requested for preparing the jury
2 instructions and verdict form, neither of which Plaintiff addresses,
3 Plaintiff's counsel are awarded 40 hours (preparing draft jury
4 instructions) and 10 hours (verdict form). As Plaintiff did not
5 address these tasks, no accurate allocation can be made between
6 counsel. As such, the 40 hours and 10 hours are added to Mr. Lee's
7 time, the counsel with the lower hourly rate.

8
9 m. *Miscellaneous Tasks*

10 Defendant argues that the time spent on three "miscellaneous"
11 tasks should be excluded. One, the time spent drafting a "reply and
12 sur-reply" to its opposition to the motion for liquidated damages
13 and prejudgment interest. Defendant claims that these responses
14 were not "authorized." Two, the ten hours spent preparing an 88-
15 page opposition to Defendant's ex parte motion, which was granted
16 on March 7, 2008. (See Doc. 122.) Three, Mr. Lee's preparing and
17 submitting a Proposed Order on Defendant's Motions in limine.

18 Defendant's first objection is without merit. The Court
19 addressed the topic in the March 31, 2010 Memorandum Decision, (Doc.
20 408). The time is not excluded in its entirety. However, it was
21 unreasonable to bill almost 22 hours to prepare unauthorized
22 response briefs,⁶³ which multiplied the proceedings. As discussed
23 in that Memorandum Decision, the reply was not entirely helpful and
24 contained very little legal analysis. Mr. Lee is permitted ten
25 hours for this task. In addition, Mr. Lee is permitted twenty hours

26 _____
27 ⁶³ To the extent it can be ascertained, Mr. Lee billed 21.7
28 hours preparing the reply brief. (Doc. 451-1 at pgs. 350-352.)

1 total for researching, drafting, and editing the "motion for
2 additional findings of fact and conclusions of law," which included
3 requests for liquidated damages and prejudgment interest. These
4 motions were denied on March 31, 2010.

5 The second objection focuses on Plaintiff's opposition to
6 Defendant's "Ex Parte Motion for an Order Shortening Time Re Motion
7 for Permission to Serve Expert Reports After May 5, 2008."
8 Defendant claims that the ten hours spent drafting an 88-page
9 opposition should be excluded. According to Defendant, its motion
10 was "immediately granted."

11 Defendant is half right. Although the motion was successful,
12 there is nothing in the record to support a complete reduction of
13 fees. Plaintiff's opposition was lengthy and largely unnecessary,
14 but it was not capricious or frivolous. Mr. Lee is permitted five
15 hours for this task.

16 The general confusion over the motions in limine was discussed
17 in § III(B)(3)(1), *supra*. As to the dispute, the Court instructed
18 each party to submit a proposed order on their own motions in limine
19 following the May 8, 2009 oral argument. The Local Rules provided
20 Plaintiff an opportunity to counter Defendant's Proposed Order,
21 however, the two Proposed Orders were identical, except for language
22 concerning motion in limine No. 10. Plaintiff's version incorrectly
23 characterized the ruling and was inaccurate. (Compare Doc. 351, MIL
24 No. 10, pg. 3 with Doc. 347, MIL No. 10, pg. 2.) Defendant's
25 Proposed Order was adopted in its entirety. The claimed 1.1 hours
26 spent preparing Plaintiff's Proposed Order (on Defendant's motions
27 in limine) are excluded.

n. *Trial Time*

Defendant also objects to the amount of time spent by Plaintiff's counsel preparing for and attending trial. Defendant requests a reduction of approximately 20%.⁶⁴

Ms. Herrington claims she spent 60.5 hours on trial-related tasks. Mr. Lee, however, does not provide a total for trial-related tasks.

A painstaking independent review of Mr. Lee's declarations, (Docs. 425-1, 448-1 and 451-1), reveals that Mr. Lee spent 321.8 hours on all trial-related tasks, including reviewing depositions transcripts, corresponding with jury consultants, the client and "trial team," selecting impeachment evidence, organizing exhibits, preparing his opening/closing statements and arguments, outlining/drafting witness examinations, attending trial and reviewing the filings in this case (jury instructions, verdict form, jury verdict). All correspondence and time spent with television/print media reporters is included in this global amount.

Defendant's proposed reduction of approximately 20% is high. Rather, a 15% downward adjustment of trial time and fees is warranted. Based on the Court's familiarity with this action and trial experience in over 500 jury trials to verdict, the duplication of effort, the sheer number of hours spent corresponding with co-counsel and on clerical/admin tasks and after reviewing all of the time entries in detail, among other reasons, a reduction of fifteen percent is appropriate.

⁶⁴ Defendant identifies a number of proposed trial reductions in Doc. 450, Exh. F.

1 Ms. Herrington is awarded 51.4 hours for trial-related tasks.
2 Mr. Lee is awarded 273.5 hours.

3
4 o. *Bill of Costs*

5 Defendant objects to the 115 hours Plaintiff's counsel spent
6 preparing the Bill of Costs, filed June 29, 2009. Defendant also
7 objects to Plaintiff's filing of a reply, arguing that a reply brief
8 is not allowed under the Local Rules.

9 Plaintiff responds that the time spent composing the Bill of
10 Costs is reasonable based on the "complexity" of the case. As to
11 the filing of a reply, Plaintiff states: "Defendant never filed an
12 objection [] [n]or did Defendant raise this issue once at the post
13 trial motions hearing [on July 28, 2010] [...] Defendant's objection
14 is waived." (Doc. 451 at 21:6-21:9.)

15 As the "Bill of Costs" is addressed by separate Memorandum
16 Decision, it is unnecessary to address the reasonableness of those
17 charges here. Any fees reasonably incurred in preparing a cost bill
18 are addressed - and awarded - separately.

19
20 p. *Graphical Representation*

21
22 1. Plaintiff's Lead Counsel, Mr. Eugene
23 Lee

	Hours Requested	D's Proposed Reduction	Hours Awarded
Task			

1	All Complaint-related tasks	Not separately delineated	"Substantial"	80
2				
3	Travel	Not separately delineated	No time should be awarded	13.8 & Task Totals
4				
5	Fifth Affirmative Defense	68.6 (D's approx was 91 hours for all counsel)	No time should be awarded	25
6				
7	Reconsideration	59 (D's approx)	No time should be awarded	29.5
8				
9	Depositions	327.2 (453.8 for all counsel)	329 for all counsel (reduced from 657 hrs)	229 (317.7 for all counsel)
10				
11	Non-Litigation	57.2 (D's approx)	"Manifestly Ineligible"	51.5
12				
13	Clerical Work	169.1 (D's approx)	"Manifestly Ineligible"	100
14				
15	Appellate Research	14.5 (D's approx)	"Manifestly Ineligible"	8
16				
17	Spoilation	11.5 (D's approx)	"Substantial"	11.5
18				
19	Whistleblowing	N/A	No time should be awarded	0
20				
21	Motions to Compel	319 (D's approx)	No time should be awarded	160
22				
23	Undisclosed Experts	18.6 (P's approx)	No time should be awarded	18.6
24				
25	Administrative Filings	34 (D's approx - P agrees)	No time should be awarded	18
26				
27	Background Investigations	121 (D's approx - P agrees)	No time should be awarded	60
28				
	Preparing/Opposing Dispositive Motions	545.5 (712.4 hours for all counsel)	"Substantial"	229.5
	Preparing for & Attending Hearing	52.2	"Substantial"	35

1	re: Dispositive Motions, Reviewing Court Order			
2				
3	Pretrial	89 (D's approx - P agrees)	No time should be awarded	21.2
4				
5	Motions in limine	89 (Mr. Lee and Ms. Herrington, 108 hours total)	50	17.5
6				
7				
8	Jury Instructions	67	"Substantial"	40
9	Verdict Form	17	"Substantial"	10
10				
11	All trial-related time	Not Provided	20% reduction	273.5
12	Liquidates Damages "Sur-Reply"	22 (D's approx - P agrees)	No time should be awarded	10
13				
14	Motion for Additional Findings of Fact and Conclusions of Law	----	----	20
15				
16				
17	Opposition to Ex Parte Application	10 (D's approx)	No time should be awarded	5
18				
19	Proposed Order re: Defendant's Motions in Limine	1.1 (P's approx)	No time should be awarded	0
20	Bill of Costs	N/A	N/A	N/A
21	Post-Trial Motions and "Fees-on-Fees" (See Below)	N/A	N/A	25
22				
23	Preparation of Supplemental Fee Motions	N/A	N/A	0
24				
25				
26	Total:	----	----	1491.6
27				
28				

2. Plaintiff's Co-Counsel, Ms.
Herrington

	Requested	D's Proposed Reduction	Hours Awarded
Task			
All Complaint-related tasks	59.8	"Substantial"	40
Motion to Strike Fifth Affirmative Defense (first draft)	22.4	No time should be awarded	15
Depositions	126.6	329 for all counsel (reduced from 657 hrs)	88.7
Retaining Experts	7.3	n/a	7.3
Preparing/Opposing Dispositive Motions	166.9	"Substantial"	70.5
Motions in Limine	57.7	50 for all counsel	32.5
Jury Instructions	34.8	"Substantial"	See Above
Verdict Form	17.7	"Substantial"	See Above
Court Attendance (MSJ and Trial)	61.6	20% Reduction	52.5
Correspondence	230.8 (all correspondence and client updates - "given to Ms. Herrington")	"Substantial"	See Above. Included in subtotals, e.g., "non-litigation" and "preparing/opposing dispositive motions"
Fee Petition	56.3	N/A	20
Travel	39	None	39

Total:	880.9	-----	365.5

3. Plaintiff's Contract Counsel, Ms.
Minger

	Requested	D's Proposed Reduction	Hours Awarded
Task			
Motions in Limine	18	"Substantial"	10
Total:	18	----	10

e. *Lodestar - Rates*

1. *Introduction*

Plaintiff's counsels' claimed theoretical rates are as follows: Eugene Lee, lead counsel, \$400 per hour; Joan Herrington, co-counsel, \$450 per hour; Marilyn Minger, contract counsel, \$385 per hour; and David Hicks, fee counsel, \$660/hr. All of the fees requested are based on out-of-district hourly rates, namely the Los Angeles and Bay Area markets, not the Fresno Division of the Eastern District of California.

Plaintiff filed his motion for attorney's fees on June 1, 2010. In support Plaintiff submitted: (1) a Memorandum of Points and Authorities; (2) the declaration of Mr. Eugene Lee; (3) the

1 declaration of Joan Herrington; (4) the declaration of Marilyn
2 Minger; (4) the declaration of David Hicks; (5) the declaration of
3 Michelle Reinglass; (6) the declaration of Paul Greenberg; (7) the
4 declaration of Chris Whelan; (8) the declaration of Jean Hyams; (9)
5 the declaration of Lee Feldman; and (10) the declaration of Dean
6 Gordon.

7 The County opposed the motion on July 8, 2010. Oral argument
8 was held on July 28, 2010, at which time supplemental briefing was
9 requested to give Plaintiff an opportunity to properly and
10 adequately support his fee motion. The parties were also requested
11 to address several post-trial issues, including whether federal or
12 state law controlled the hourly rate analysis. The parties filed
13 supplemental briefing on August 16, 2010, Doc. 448, and September
14 3, 2010, Doc. 450. On September 16, 2010, Plaintiff filed a 410-
15 page reply to Defendant's supplemental opposition.

16
17 *2. Specific Legal Standards*

18 "To inform and assist the court in the exercise of its
19 discretion, the burden is on the fee applicant to produce
20 satisfactory evidence - in addition to the attorney's own affidavits
21 - that the requested rates are in line with those prevailing in the
22 community for similar services by lawyers of reasonably comparable
23 skill, experience and reputation." *Blum v. Stenson*, 465 U.S. 886,
24 896 n. 11; *Dang v. Cross*, 422 F.3d 800, 814 (9th Cir. 2005). The
25 Ninth Circuit requires:

26 Once the number of hours is set, 'the district court must
27 determine a reasonable hourly rate considering the
28 experience, skill, and reputation of the attorney

1 requesting fees.' *Chalmers v. City of Los Angeles*, 796
2 F.2d 1205, 1210 (9th Cir. 1986). This determination 'is
3 not made by reference to rates actually charged by the
4 prevailing party.' *Id.* The court should use the
5 prevailing market rate in the community for similar
6 services of lawyers 'of reasonably comparable skill,
7 experience, and reputation.' *Id.* at 1210-11. Either
8 current or historical prevailing rates may be used.
9 *Missouri v. Jenkins*, 491 U.S. 271 (1984). The use of
10 current rates may be necessary to adjust for inflation if
11 the fee amount would otherwise be unreasonable; the
12 district court must look to the 'totality of the
13 circumstances and the relevant factors, including delay
14 in payment.' *Jordan v. Multnomah County*, 815 F.2d 1258,
15 1262 n. 7 (9th Cir. 1987).

16 *D'Emanuelle v. Montgomery Ward & Co., Inc.*, 904 F.2d 1379, 1384 (9th
17 Cir. 1990) overruled on other grounds by *Burlington v. Dague*, 505
18 U.S. 557 (1992).

19 The "relevant legal community" in the lodestar calculation is
20 generally the forum in which the district court sits. *Mendenhall*,
21 213 F.3d at 471; *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir.
22 1997); *Deukmejian*, 987 F.2d at 1405. Another forum may be the
23 proper relevant community, however, "if local counsel was
24 unavailable, either because they are unwilling or unable to perform
25 because they lack the degree of experience, expertise, or
26 specialization required to handle properly the case." *Barjon v.*
27 *Dalton*, 132 F.3d 496, 500 (9th Cir. 1997) (citation omitted). The
28 court may rely on rates outside the local forum if the plaintiff
establishes either unwillingness or inability; "[t]here is no
requirement that plaintiffs prove both." *Id.* at 502.

3. Merits

On July 28, 2010, the Court expressed its tentative view that

1 the Eastern District of California, Fresno Division, was the
2 appropriate forum to establish the lodestar hourly rate in this
3 case:

4 Now, inferentially, I've already ruled on what is
5 described as continuing misconduct and unprofessional
6 behavior. I have noted that the case was contentious,
7 the case was hotly disputed on both sides, and that
8 there was a lot of work done on this case that, in a
9 perfect world, wouldn't have been necessary.

10 To make a specific charge of either vexatiousness or fee
11 multiplication, there has to be a specific example of
12 the date, a time and a description of the conduct and
13 the hours sought to be reduced. That's what's now
14 required in the Ninth Circuit.

15 And I will tell you that in the City of Sacramento case
16 [Moreno], Judge Levy basically said as far as he was
17 concerned, the prevailing rate was \$250 an hour per the
18 Civil Rights Bar and he wasn't going to go above it.
19 And although \$300 had been requested, he reduced it
20 across the board to \$250 an hour. And that was found to
21 be an abuse of discretion because he didn't give any
22 other reasons or cite any studies for reducing the
23 hourly rate.

24 The applicable hourly rate in this case is the Eastern
25 District of California, Fresno Division. The Court does
26 pay close attention to the plaintiff's assertions that
27 no lawyers would accept this case. Except at their
28 rates. But that doesn't answer the entirety of the
question. Rather, the question is at what prevailing
rate would competent attorney accept the case. And
besides the declarations of counsel and one or two
others about their unwillingness to accept cases against
the County of Kern, the Court notes that the issue of
local bias is almost totally dissipated by the fact that
the case was tried in Fresno, over 100 miles distant
from Kern County, or Bakersfield.

That the jury pool even further diluted the potential
for local bias, because, as the parties know, the venire
was drawn from all over the Fresno division, which
extends as far north as the Northern Stanislaus County
line, Tuolumne and Calaveras Counties, to Inyo County on
the east, the Nevada border, Los Angeles County on the
south. And so there was a wide geographic diversity.
And nobody on our jury panel who sat had ever heard of
the case or any of the parties.

1 In civil rights cases and employment cases in this
2 Court, the Court has moved up from \$250 an hour and has
3 awarded, in some cases, for experienced, highly
4 competent counsel -- and by experienced, I'm talking
5 about more than 20 jury trials to verdict and at least
6 ten years experience as a lawyer. The prevailing rate
has been \$300 an hour. I know that in Judge Ishii's
court, in one or two cases, up to \$350 an hour has been
awarded, again, for attorneys with in excess of 20 years
experience and more jury trials to verdict in the
relevant field.

7
8 (RT, July 28, 2010 at 119:1-120:24.)

9 In his supplemental brief, Plaintiff argues that the tentative
10 ruling is incorrect for a number of reasons, all of which lack merit
11 and further demonstrate inexperience in trial work. Plaintiff first
12 argues that "the Court should use the rates awarded to the
13 plaintiff's employment law bar in Sacramento," i.e., employ
14 Sacramento Division hourly rates. (Doc. 448 at 6:3.) It is
15 suggested that because Defendant retained Sacramento counsel,
16 Plaintiff is therefore entitled to Sacramento hourly rates. (See
17 id. at 6:5-6:6 ("Defendant Kern County, itself, found it necessary
18 to retain counsel from Sacramento.")) This argument has no merit.
19 The only case cited in support is *Moreno v. City of Sacramento*, 534
20 F.3d 1106, which is factually distinguishable and not helpful to
21 Plaintiff's arguments on this issue. Plaintiff has been unable to
22 present any applicable or persuasive authority for the proposition
23 that opposing counsel's billing region/forum furnishes the hourly
24 billing rate for *all counsel* in a dispute overly the applicable
25 hourly rate.

26 Plaintiff next argues that the tentative ruling is infirm
27 because California law, not Federal law, controls the hourly rate
28

1 analysis in this case.⁶⁵ Plaintiff claims that under California
2 law, the "prevailing plaintiff need only show that hiring local
3 counsel was 'impracticable' in order to justify an award of out-of-
4 town hourly rates." (Doc. 448 at 3:26-3:27.) According to
5 Plaintiff, his alleged "massive search" for local counsel in
6 September 2006 satisfies California's "impracticable" standard. He
7 cites, but does not address or analyze, the federal standard in his
8 briefing.

9 Plaintiff relies on, but does not fully analyze, a number of
10 Ninth Circuit cases to support his argument that California law
11 controls the hourly rate analysis. Plaintiff correctly observes
12 that *Mangold v. California Public Utilities Commission*, 67 F.3d
13 1470, 1477 (9th Cir. 1995) held that "[w]here a plaintiff moves for
14 attorney fees on the basis of success on a state law claim, a
15 federal court is to follow state law regarding both a party's right
16 to fees and in the method of calculating fees." (Doc. 448 at 1:12-

17
18 ⁶⁵ The parties sharply disagree over whether state or federal
19 law controls the hourly rate analysis. Plaintiff contends that the
20 Court must apply California law, where the "prevailing plaintiff
21 need only show that hiring local counsel was 'impracticable' in
22 order to justify an award of out-of-town hourly rates." (Doc. 448
23 at 3:26-3:27.) Plaintiff argues that "it would be an abuse of
24 discretion to apply federal rather than state law regarding
25 attorney fees." (Id. at 1:5-1:6.) The County disagrees.
26 According to the County, Ninth Circuit law establishes that in
27 "mixed cases" involving federal and state claims, "federal law
28 applies to the award of attorney's fees on the federal claims and
state law applies to the award of attorney's fees on the pendent
[supplemental] state law claims." (Doc. 450 at 3:18-3:19.) The
County also argues that the lack of detail in the billing
documentation renders it impossible to differentiate between the
work performed on the different claims, i.e., the FMLA and
FEHA/CFRA claims.

1 1:13.) Plaintiff, however, overlooks that, in *Mangold*, the Ninth
2 Circuit did not analyze hourly rates *generally* or whether state law
3 governs that analysis in circumstances applicable here and in a dual
4 jurisdiction case. The Ninth Circuit's analysis in *Mangold* was
5 limited to whether Plaintiff was entitled to a multiplier under
6 California law.⁶⁶

8 ⁶⁶ *Mangold* addressed whether state or federal law controls the
9 method of calculating an attorney's fee awarded under state law,
10 when contingency-fee multipliers are unavailable under federal
11 fee-shifting statutes but state law permits such enhancements under
12 state fee-shifting statutes. 67 F.3d 1470 (9th Cir. 1995). There,
13 the plaintiffs had succeeded on both federal and state claims.
14 *Crommie v. State of Cal., Public Utilities Com'n*, 840 F.Supp. 719,
15 725-726 (N.D. Cal. 1994). Applying state law, the district court
16 enhanced the fee award by a multiplier of 2.0 based on the
17 contingency basis of the case, the exceptional result in light of
18 defense counsel's "excessively vexatious and often unreasonable
19 opposition to plaintiff's counsel," and difficulties in
20 preparation. *Id.* at 726. After reviewing the applicable law, the
21 Ninth Circuit found that the district court did not err in applying
22 the multiplier allowed under state law. *Mangold*, 67 F.3d at
23 1478-1479. Because Plaintiff in this case also prevailed on his
24 state law claim (the FEHA), and state law provides for a broad
25 application of a multiplier, it is proper to apply the state law
26 standard for a fee multiplier. However, for the reasons explained,
27 a deeper analysis of the "hourly rate" issue was required, but not
28 provided. Plaintiff does not mention or analyze the impact of the
jury's failure to allocate the amount of damages attributable to
the federal (FMLA) or state (FEHA or CFRA) violations. Here, it is
possible that the entire jury award is based on federal law, not
state law. If that is the case, California law would not govern
the hourly rate analysis. Second, in *Mangold*, the Ninth Circuit
delineated *why* adopting federal law on the multiplier issue
encouraged forum shopping and inequitable administration of the
law. *See Mangold*, 67 F.3d at 1473 ("if a multiplier is procedural,
a significant difference in fees would be available in state court
but not in federal court - an 'inequitable administration of the
law.'"). Plaintiff's string citation concerning this issue does
not improve his argument, it only amplifies the lack of legal
analysis. To the extent understood, Plaintiff argues that
California law governs the hourly rate analysis because, like

1 Assuming, *arguendo*, that *Mangold* applies, Plaintiff's evidence
2 does not establish justification for "out-of-town" rates.
3 Plaintiff's lead counsel, Mr. Eugene Lee, states in his declaration
4 that he "had no success" in his attempts to locate local counsel.
5 (Doc. 425-1 at ¶ 29.) Mr. Lee represents that he "emailed various
6 members of the California Employment Lawyers Association ("CELA"),
7 including lawyers from Fresno, Bakersfield, Modesto, and
8 Sacramento." (Id.) He lists several law firms, but does not
9 include the names of specific partners, of counsel, associates or
10 staff he personally contacted, or whether the email was received or
11 routed into a trash or spam folder. No details are provided as to
12 any direct communication other than an electronic communication was
13 allegedly sent by Mr. Lee's law office.⁶⁷ None of the alleged

14
15 multipliers, the "twin aims" of *Erie R. Co. v. Tompkins*, 304 U.S.
16 64 (1938) are satisfied: discouragement of forum shopping and
17 avoidance of inequitable administration of the law. Plaintiff's
18 analysis ends there. He does not explain *why* an adoption of
California law in the hourly rate context satisfies *Erie*,
especially given the unique circumstances of this case.

19 ⁶⁷ The non-specific and unsupported "reasons" cited in
20 paragraph thirty of Mr. Lee's declaration are similarly deficient.
21 Mr. Lee states that "lawyers cited the difficulty of litigating
22 against Kern County, the undesirability of the jury pool in the
23 Eastern District, the unanimous jury requirement in federal court,
24 the sheer size and complexity of the case, etc." However, Mr. Lee
25 does not attribute these non-specific criticisms to a law firm,
26 lawyer or individual. None of these alleged criticisms were
27 included in declarations to Mr. Lee's papers, which included
28 declarations of Plaintiffs' experts. The Court also addressed the
slight impact of these cited "criticisms" during oral argument on
July 29, 2010.

Mr. Lee states that he contacted a "Mr. Andrew Jones" by
telephone. (Doc. 425-1 at ¶ 29.) Mr. Jones allegedly declined to
act as local counsel. (Id.) Mr. Lee provides no further
explanation or discussion. (Id.) Mr. Jones did not provide a

1 electronic communications are attached as exhibits to Mr. Lee's
2 declaration.⁶⁸ (Compare Doc. 121 at pgs. 12, 28-29, 35-39, 41-45,
3 47-52, 54-55 and 57-59) (email communications between Mr. Lee and
4 opposing counsel attached to Plaintiff's motion). Nor do Mr. Lee's
5 time records, which span several hundred pages and three rounds of
6 briefing, contain a single entry concerning his "massive search" for
7 local counsel.

8 The inadequacy of the "massive search" is further demonstrated
9 by Mr. Lee's July 11, 2007 declaration, filed in conjunction with
10 Plaintiff's unsuccessful motion to strike Defendant's fifth
11 affirmative defense. In his declaration, which delineates his
12 search to retain local counsel, Mr. Lee states that his search
13 consisted of a mass email to CELA members, nothing more:

14 On September 18, 2006, I sent an email to over 600
15 members of the California Employment Lawyers Association
16 seeking co-counsel. No attorneys from Fresno responded.

17 (Doc. 33 at ¶ 20.)

18 Such a limited and one-sided query does not satisfy the
19 relevant "out-of-town" legal standards, federal or state. It is
20 entirely possible, even probable, that Mr. Lee's bulk email was
21 batched into a trash/junk folder or mistaken for spam and deleted

22 _____
23 declaration in this case.

24 ⁶⁸ Plaintiff frequently emailed the Court and attached emails
25 to his briefing. For example, the May 28, 2009 Order provides, in
26 relevant part: "The court received an e-mail correspondence (dated
27 April 23, 2009) from Mark Wasser, counsel for Defendant County of
28 Eugene Lee, counsel for Plaintiff David Jadwin, D.O. On both of
these e-mails, the opposing counsel was copied." (Doc. 321 at
1:12-1:16.)

1 by the recipient. Either explains the lack of response. However,
2 this issue cannot be fully addressed as Mr. Lee did not follow-up
3 with the intended recipients by any direct contact to any specific
4 attorneys.

5 That is not the end of the analysis. A close review of the
6 evidentiary support also reveals several inaccuracies and/or
7 unconfirmed assertions that undermine the evidentiary merit of the
8 fee motion. Plaintiff argues that it is not "surprising" that his
9 query for local counsel was unsuccessful because "only a small
10 handful of members of the California Employment Lawyers Association
11 practice in the Eastern District of California." (Doc. 448 at
12 5:17-5:19.) First, Plaintiff's representation that there are "very
13 few employment counsel" in the Eastern District of California is
14 contrary to the Court's experience with the number of lawyers
15 practicing employment law in the EDCA. This is especially true in
16 cases involving traditional employment law theories of recovery and
17 conventional evidentiary issues, as were presented here. This case
18 was contentious and factually detailed, but it was not legally
19 complex. Second, the CELA database is not the ultimate authority
20 or complete universe of employment counsel in the Eastern District
21 of California. A substantial number of available employment counsel
22 choose not to participate in CELA/NELA for any number of reasons,
23 including lack of synergy, high cost or attendance requirements.
24 Third, Plaintiff had local counsel in Bakersfield, however, that
25 counsel was removed/relieved after Mr. Lee became involved in the
26 case. Plaintiff makes no mention of the original local counsel and
27 it is unclear how it impacted the "massive search" for local
28

1 counsel, especially in Kern County. In Fresno County alone, there
2 are over 2,000 licensed and practicing lawyers.

3 A substantial portion of Plaintiff's "lack of local counsel"
4 argument is based on a review of CELA's database in 2010, not in
5 2006. (Doc. 448-4, Decl. of C. Krasomil, ¶¶ 4-6.) It is unclear
6 how a review of CELA members in Sacramento County in 2010 is
7 relevant to Plaintiff's "massive search" for local counsel in
8 September 2006 in the Fresno Division.

9 *Kochenderfer v. Reliance Standard Life Ins. Co.*, No.
10 06-CV-620-JLS-NLS, 2010 WL 1912867 (S.D. Cal. Apr. 21, 2010)
11 addressed a prevailing plaintiff's motion for attorney's fees.
12 There, the Court found that the plaintiff's documentary evidence -
13 including sworn declarations from numerous attorneys - was
14 insufficient to support the requested hourly rates:

15 Although Plaintiff submits numerous attorney
16 declarations, those declarations fail to carry
17 Plaintiff's burden. First, having reviewed all of the
18 declarations, the Court finds that they do not establish
19 that a paying client would pay Ms. Horner or Mr. Monson
20 their requested rate for legal work of similar
21 complexity. Neither Ms. Horner's declaration nor Mr.
22 Monson's declaration states that a paying client has
23 ever paid them their requested rate for this type of
24 work. As to the other declarations, they either do not
25 offer evidence of what a paying client would actually
26 pay or they do not indicate that a paying client had
27 paid this rate for comparable work or they do not
28 indicate that these rates are reasonable within the
Southern District of California.

23 Second, the value of these declarations is questionable
24 because they are both self-serving and
25 self-perpetuating. Each of these attorneys works on
26 ERISA matters and claiming that the rates charged by
27 Plaintiff's counsel, no matter how high, is in their own
28 interest. A high award in this case would support the
declarants' own high hourly rate requests in the future.
Ultimately, the rates Plaintiff's attorneys request
appear to have little basis in what an arms-length

1 agreement with a paying client would produce.

2 *Id.* at 3-4 (citations omitted).

3 Although *Kochenderfer* is not factually identical to this case,
4 there are similarities. It analyzed the evidentiary showing needed
5 to support a prevailing party's request for legal fees, including
6 the claimed hourly rates. For the reasons discussed in
7 *Kochenderfer*, Plaintiff's documentary evidence is insufficient to
8 support the requested hourly rates in this case.⁶⁹

9
10

⁶⁹ Because the hourly rate issue is resolved on different
11 grounds, it is unnecessary to fully analyze whether the
12 declarations attached to Plaintiff's motion are sufficient to
13 support the hourly rates in this case. However, assuming,
14 *arguendo*, that the motion is properly supported, the declarations
15 are inadequate to support a \$400 hourly rate for Mr. Lee. Mr. Lee
16 supports his hourly rate request with the declarations of Michelle
17 Reinglass, Paul Greenberg, and Lee Feldman. These boilerplate
18 declarations indicate that they are familiar with Mr. Lee through
19 his work with two employment law associations - NELA and CELA. Two
20 of these individuals are familiar with Mr. Lee's legal performance
21 in 2010, several years *after* the lion's share of litigation
22 occurred in this case (filed case in 2007, discovery in 2007 and
23 2008, Rule 56 motions in 2008, trial in 2009). For example, Mr.
24 Greenberg states that he and Mr. Lee worked together in a number of
25 "harassment and disability" cases. He also opines that this case
26 involved "substantial complexities and the need for exhaustive
27 discovery." (Doc. 425-6 at ¶ 13.) However, Mr. Greenberg's core
28 opinion is based on the following: Mr. Lee satisfactorily drafted
motions/jury instructions and attended depositions (conducting
one). No time-frame is provided for these tasks, which are
commonly performed by associates at much lower hourly rates. Mr.
Greenberg's second opinion is based on "numerous" conversations
with Mr. Lee in 2009 and 2010, nothing more. This is not a proper
basis to opine on overall case complexity and the alleged need for
"exhaustive discovery." As discussed in detail throughout this
Memorandum Decision, this case was grossly overlitigated due to
unnecessarily contentious attorney conduct with huge expenditures
of unnecessary time resulting from Mr. Lee and Mr. Wasser's
inability to extend rudimentary professional courtesy to each other
and to employ reasonable efforts to cooperate in preparing the case

1 The Eastern District of California, Fresno Division, is the
2 appropriate forum to establish the lodestar hourly rate in this
3 case. Plaintiff, who carries the burden on a fee motion, has not
4 fully analyzed why Sacramento hourly rates are appropriate or why
5 California law exclusively controls the hourly rate analysis in this
6 case, especially in light of the general verdict form. In addition,
7 Plaintiff has not provided adequate evidentiary support to
8 demonstrate that the use of an attorney from outside the relevant
9 community was necessary for purposes of charging another community's
10 higher hourly rates. See, e.g., *Welch v. Metropolitan Life Ins.*
11 *Co.*, 480 F.3d 942, 945-46 (9th Cir. 2007) (the party seeking fees
12 "bears the burden of documenting the hours expended in the
13 litigation and must submit evidence supporting those hours and the
14 rates claimed.") (emphasis added) (citation omitted). For all of
15 these reasons, as well as those discussed in open court on July 28,
16 2010, the Fresno Division is the appropriate forum to determine
17 hourly rates.

18
19 1. Attorneys

20 a. Eugene Lee

21
22 _____
23 for trial. Any added complexity was based on counsel's
24 inexperience and unfamiliarity with the Federal Rules and governing
25 legal standards. Taking Mr. Greenberg's hourly scale as
26 representative of the Los Angeles market - where "rates tend to be
27 particularly high" - there is no evidence to support his opinion
28 that Mr. Lee, who had no trial experience and associated Ms.
Herrington, is entitled to \$400/hr (or even the \$475.00/hour also
mentioned by Mr. Greenberg). Assuming Plaintiff's position is
legally and factually supported, which it is not, Mr. Lee's "out-
of-town" hourly rate would be substantially reduced.

1 Plaintiff requests an hourly rate of \$400/hr for the services
2 of attorney Eugene Lee. Mr. Lee graduated from law school in 1995
3 and was admitted to the New York State Bar in 1996. (Doc. 425-1 at
4 ¶ 3.) Mr. Lee took a two-year hiatus from the practice of law in
5 1997. In 1999, Mr. Lee worked as counsel to a technology startup
6 in Northern California. (Id.) In 2002, he took an associate
7 position with a law firm in South Korea, where he worked until 2004.
8 (Id.) In 2005, Mr. Lee was admitted to the California State Bar.
9 He has been the principal attorney in his own practice, the Law
10 Office of Eugene Lee, since he was admitted to practice law in
11 California. (Id.)

12 Mr. Lee self-describes that he is an attorney with thirteen
13 years of experience and has "an excellent reputation in the
14 California employment law community and demonstrated skill and
15 success." (Id. at ¶ 40.) He reiterates that he went to
16 undergraduate school at Harvard University and that he successfully
17 litigated a "a waiter's employment lawsuit in Los Angeles Superior
18 Court for \$350,000, even though the waiter had economic damages of
19 only \$50,000 and no significant emotional distress damages." (Id.
20 at ¶¶ 41-42.) Mr. Lee declares that his hourly rate is \$400 and "in
21 fact [I have] been paid this rate by my clients since 2006 [...] Dr.
22 Jadwin has paid me \$400 per hour in the past for my legal services."
23 (Id. at ¶ 44.)

24 Mr. Lee also represents that this "litigation proved to be
25 extraordinarily complex, difficult and onerous for me." (Id at ¶
26 7.) It is undisputed that according to Mr. Lee this was his first
27 trial in any court. (See RT, June 2, 2009 at 35:10-35:12) ("I must
28

1 emphasize this is really my first trial and a lot of stuff is going
2 on.").

3 In this Circuit, the reasonable hourly rate "is not made by
4 reference to rates actually charged by the prevailing party," an
5 attorney's undergraduate institution, or by the number of years
6 spent as a practicing lawyer. See, e.g., *Welch v. Metro. Life Ins.*
7 *Co.*, 480 F.3d 942, 946 (9th Cir. 2007); see also *Chalmers v. City*
8 *of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986). Rather, a
9 reasonable hourly rate is determined by "experience, skill, and
10 reputation." *Welch*, 480 F.3d at 946.

11 In a recent fee motion before the Court, *Schultz v. Ichimoto*,
12 No. 1:08-CV-526-OWW-SMS, 2010 WL 3504781 (E.D. Cal. Sep. 7, 2010),
13 it was determined that two very experienced employment litigation
14 counsel - with more than twenty years of litigation experience each
15 - were entitled to hourly rates of \$305.00 and \$255.00,
16 respectively. To reach the hourly rates in *Schultz*, the Court
17 catalogued the recent attorney's fee decisions in the Eastern
18 District of California, Fresno Division, including *Ruff v. County*
19 *of Kings*, 700 F. Supp. 2d 1225 (E.D. Cal. 2010), *Beauford v. E.W.H.*
20 *Group Inc.*, 2009 WL 3162249 (E.D. Cal. Sept. 29, 2009) and *Wells*
21 *Fargo Bank, Nat. Ass'n v. PACCAR Financial Corp.*, 2009 WL 211386
22 (E.D. Cal. Jan. 28, 2009). In those cases, it was determined that
23 hourly rates of \$350 (*Beauford*), \$ 315 (*PACCAR*) and \$300 (*Ruff*) were
24 reasonable for "experienced and competent counsel."

25 The most reliable factor in determining a reasonable hourly
26 rate is the ability and skill demonstrated by counsel. Mr. Lee was
27 able to secure a jury verdict in his client's favor, but recovery
28

1 was limited to approximately 12% of the *economic damages* he
2 requested from the jury. Mr. Lee also asserted a number of
3 unsuccessful claims in multiple amended complaints, which were
4 eliminated by dispositive motion or rejected by the jury/Court;
5 named numerous defendants who were later voluntarily eliminated from
6 amended pleadings without explanation; displayed a tendency to take
7 contrary legal positions (often in the same brief); and filed
8 numerous unnecessary motions/supporting material. In all stages of
9 this case, Mr. Lee exhibited inexperience with the Federal Rules of
10 Civil Procedure, the Rules of Evidence, the federal and state legal
11 frameworks and, notably, found it difficult to comply with the
12 Court's rulings.⁷⁰

13 Mr. Lee was exceedingly contentious, unduly adversarial and
14 expended inordinate time in personal conflicts and arguments with
15 opposing counsel, many of which resulted in needless discovery and
16 logistic motions which burdened scarce judicial resources. Some of
17 Mr. Lee's conduct or confusion could be attributed to a skilled
18 legal technician's attempts to preserve his case and foil opposing
19 counsel. But that is not the case here. The unnecessary court
20 proceedings and confusion were, for the most part, due to
21 inexperience.⁷¹ Mr. Lee caused countless problems for the Court's
22

23 ⁷⁰ Several, but not all, of these instances are discussed in
24 this Memorandum Decision.

25 ⁷¹ For example, the repeated failure to follow the Federal
26 Rules of Evidence during trial reveals that Plaintiff's attorney
27 was inexperienced and lacked a practical knowledge of the Federal
28 Rules of Evidence. Many times Mr. Lee reacted in an incredulous or
hostile manner to the Court's rulings on objections and motions
during trial. Plaintiff's attorney also had a practice of not

1 staff, was rude on occasion, without explanation or apology.
2 Nonetheless, Mr. Lee was afforded full opportunity to try his
3 client's case in what was a fair trial.

4 In light of the recent attorney's fee rulings in the Eastern
5 District of California, Fresno Division,⁷² the Court's comprehensive
6 familiarity with this action, its experience, prevailing attorney
7 rates in the employment law field, and after reviewing supporting
8 declarations in detail, a rate of \$275 per hour for Mr. Lee
9 constitutes a reasonable rate for this case and is based on similar
10 work performed by attorneys of comparable experience and skill to
11 Mr. Lee in the Fresno Division of the Eastern District of
12 California.

13 A further consideration is Mr. Lee's unprofessional conduct
14 throughout this case. He was unjustifiably rude, argumentative, and
15 unreasonable in his dealings with opposing counsel, some of which
16 entered into papers filed with the court and his interactions with
17 court staff and the magistrate judge. Mr. Lee was treated with
18 patience and courtesy. The Court has not based its fee award on
19 this ground, although for the purpose of providing guidance and a
20 example to counsel, it would be reasonable to do so.

21
22 _____
23 raising all ground or basis for his legal positions in oral
24 argument and then raising them in motions for reconsideration.

25 ⁷² Mr. Lee is not as experienced as any of the counsel in
26 *Beauford*, *PACCAR*, *Schultz* or *Ruff*. He is not as skilled as any of
27 the counsel in *Schultz* or *Ruff*, two cases recently litigated in
28 this Court. The Court evaluates counsel's performance and ability
based on over nineteen years on the bench and over five hundred
jury trials to verdict.

b. *Joan Herrington*

1
2 Plaintiff requests an hourly rate of \$450/hr for the services
3 of attorney Joan Herrington, co-lead counsel. Ms. Herrington is a
4 1995 law graduate of Golden Gate University and has practiced
5 employment law since she was admitted to practice in California that
6 same year. (Doc. 425-2 at ¶¶ 3-6.) Ms. Herrington has worked as
7 a workers' compensation associate and as principal in her own
8 employment law firm. (Id. at ¶¶ 5-6.) According to Ms. Herrington,
9 she "ha[s] been forced to proceed to trial in only eight cases [and]
10 participated in four appeals as attorney of record, and one as a
11 contract attorney." (Id. at ¶ 6.)

12 To support her motion, Ms. Herrington submits her own
13 declaration as well as those of Christopher Whelan, Jean Hyams and
14 Lee Feldman, all California employment law attorneys. These
15 declarations set forth the following: (1) Ms. Herrington spent 839.9
16 hours on this case at a rate of \$450/hr, including 413.6 hours
17 drafting and reviewing pleadings, 126.6 hours attending depositions,
18 and 61.6 hours attending court proceedings; (2) Ms. Herrington
19 incurred 39 hours of travel time at \$200 per hour; and (3) Ms.
20 Herrington is an experienced employment law attorney and is entitled
21 to her hourly rate of \$450/hr, which is the "market rate" for
22 similar attorneys in Sacramento and/or the Bay Area.

23 In support of her fee motion, Ms. Herrington provides the
24 declaration of Christopher Whelan. Mr. Whelan, a trial attorney and
25 Ms. Herrington's CELA colleague, provides a summary of his trial
26 history, including a number of sizeable verdicts obtained in Yolo
27 and Sacramento County Superior Courts. Mr. Whelan provides a range
28

1 for experienced counsel in the Eastern District, Sacramento
2 Division, however, he does not provide a lodestar rate/range for
3 attorneys with Ms. Herrington's experience in the Fresno Division.
4 (See Doc. 425-7 at ¶ 9 (" \$450.00 to \$595.00 per hour for employment
5 law trial counsel in Central and Northern California, including the
6 Sacramento area.") In addition, based on his declaration, Mr.
7 Whelan's experience is limited to the state court system in Northern
8 California, Alameda, Yolo, and Sacramento Counties. (Id at ¶¶'s 5-
9 8.) His declaration does not indicate litigation experience in any
10 federal forum or in Calaveras, Fresno, Inyo, Kern, Kings, Madera,
11 Mariposa, Merced, Stanislaus, Tulare or Tuolumne counties, the
12 Fresno Division.

13 As discussed above, several district courts in the Eastern
14 District of California, Fresno Division, have determined that
15 hourly rates of \$350 (*Beauford*), \$ 315 (*PACCAR*), \$305 (*Schultz*) and
16 \$300 (*Ruff*) were reasonable for "experienced and competent trial
17 counsel."⁷³ In light of these decisions and the evidence submitted
18 by Plaintiff, a reasonable hourly rate for the services of attorney
19 Joan Herrington is \$350/hr, more than the (very) experienced and
20 skilled trial counsel in *Schultz* and *Ruff*. Ms. Herrington was
21 competent but prepared no independent work product and appeared
22 before the Court only in a limited role. The \$350/hr figure is near
23 the top of the range of hourly rates charged by the other attorneys
24 and consistent with the hourly rates other courts in the Fresno

25
26 ⁷³ These decisions include *Schultz v. Ichimoto*, 2010 WL
27 3504781, *Ruff v. County of Kings*, 700 F. Supp. 2d 1225, *Beauford v.*
28 *E.W.H. Group Inc.*, 2009 WL 3162249 and *Wells Fargo Bank, Nat. Ass'n*
v. PACCAR Financial Corp., 2009 WL 211386.

1 Division have approved for similar services performed by Ms.
2 Herrington in this case.

3 Ms. Herrington's travel rate of \$200 is not reduced.
4

5 c. *Marilyn Minger*

6 Plaintiff requests an hourly rate of \$385/hr for the services
7 of contract counsel Marilyn Minger. Plaintiff contracted with Ms.
8 Minger to draft two motions in limine, to exclude the testimony of
9 two defense experts: Thomas McAfee, M.D. and Rick Sarkisian, Ph.D.
10 Ms. Minger spent 20.4 hours drafting the motions for a total of
11 \$7,854.00. (Doc. 425-3 at ¶ 7.) Ms. Minger contends that "[b]oth
12 motions were granted by court order dated July 29, 2009," however,
13 that inadvertently electronically signed Order was vacated during
14 the July 28, 2010 hearing. (Doc. 440, Minute Order, ("Order
15 Granting Plaintiff's Motions in Limine 1-17 was STRICKEN for reasons
16 as stated on the record.")) The Order granting the motions in
17 limine was docketed in error, seven weeks after the jury returned
18 their verdicts and is VACATED.

19 Ms. Minger is a 1991 law graduate of University of California
20 at Davis and has practiced in the area of litigation since 1991,
21 when she was admitted to practice in California. (Doc. 425-3 at ¶
22 3.) Ms. Minger has "conducted" a single bench trial in both federal
23 and state court, as well as a jury trial in state court. (Id. at
24 ¶ 5.) She has "second chaired" two trials. (Id.) It is unknown
25 when Ms. Minger participated in these trials.

26 In light of *Schultz v. Ichimoto*, 2010 WL 3504781 and *Ruff v.*
27 *County of Kings*, 700 F. Supp. 2d 1225, among other Fresno Division
28

1 cases, as well as the evidence submitted by Plaintiff, a reasonable
2 hourly rate for the services of contract attorney Ms. Minger,
3 performing research attorney services, is \$295/hour. This figure
4 is within the range of hourly rates charged by the other attorneys
5 as stated by Ms. Minger and consistent with the hourly rates other
6 courts have approved for the services of attorney Ms. Minger. Ms.
7 Minger's involvement was limited to drafting two motions in limine,
8 which she did under contract. She has limited trial experience and
9 does not indicate whether she has drafted motions in limine in the
10 past or, alternatively, whether she has substantial motion
11 experience. The July 29, 2009 Order granting the motions in limine
12 was erroneously entered seven weeks after the jury returned their
13 verdicts. It had no effect on the trial.

14
15 d. *David Hicks*

16 Plaintiff requests an hourly rate of \$660/hr for the services
17 of fee counsel David Hicks. Plaintiff retained Mr. Hicks to opine
18 on the range of hourly rates in the various California forums,
19 federal and state. Mr. Hicks spent 6.5 hours on this case, however,
20 he reduced this amount to five hours based on billing judgment.
21 (Doc. 425-4 at ¶ 20.)

22 Mr. Hicks is a 1972 law graduate of University of California
23 at Davis and has practiced in the area of employment litigation for
24 more than thirty years. (Id. at ¶ 3.) Mr. Hicks is an experienced
25 expert witness. (Id. at ¶ 4.) Mr. Hicks' declaration provides rate
26 and survey information for the following venues/law firms: San
27 Francisco Superior Court, Los Angeles County Superior Court, U.S.

1 District Court, Northern District of California, U.S. District
2 Court, Eastern District of California, Sacramento Division, U.S.
3 District Court, Central District of California, Bingham McCutcheon,
4 Chavez & Gertler, Cohelan, Khoury, & Singer, Goldstein, Demchak,
5 Baller, Borgen & Dardarian, Morrison Foerster, Quinn Emanuel LLP,
6 Rosen, Bien & Galvan, Schneider Wallace Cottrell Konecky & Brayton,
7 and Sturdevant Law Firm. (Id. at ¶ 18.) The ranges in Mr. Hicks'
8 declaration are delineated by his experience only; he provides no
9 knowledge of hourly ranges/rates in the Fresno Division. No Fresno
10 Division law firms or employment lawyers were surveyed.

11 In light of the authorities discussed above and the evidence
12 provided by Plaintiff, a reasonable hourly rate for the services of
13 attorney David Hicks is \$380/hour. This figure is within the range
14 of hourly rates charged by the other attorneys and consistent with
15 the hourly rates other courts have approved for the services of fee
16 counsel with similar experience to Mr. Hicks. The closest
17 comparable to Mr. Hicks is the lead counsel for the prevailing party
18 in *Schultz v. Ichimoto*, 2010 WL 3504781. Counsel in that case was
19 31-year lawyer, a preferred shareholder at a large Fresno law firm,
20 and specialized in complex civil litigation and environmental law.
21 *Id.* at 6-7. That individual was awarded a reasonable hourly rate
22 of \$305, substantially less than the rate Mr. Hicks is awarded in
23 this case.

24
25 e. *Summary of Rates*

26 A graphical representation of the reasonable hourly rates for
27 the legal services provided by Plaintiff's counsel in this case:
28

	<u>Type</u>	<u>Years Practicing (as of 2009)</u>	<u>Trial Experience</u>	<u>Rate Sought</u>	<u>Rate Awarded</u>
Eugene Lee	Lead	11	None	\$400	\$275
Joan Herrington	Co/Trial Counsel	14	Minimal - 8 trials	\$450	\$350
Marilyn Minger	Contract	18	Minor - 2 trials	\$385	\$295
David Hicks	Fee	30+	N/A	\$660	\$380

e. Multiplier

Plaintiff seeks a multiplier of 2.0 times the lodestar. Plaintiff contends that a multiplier is necessary to the determination of a reasonable fee because the case involved "arcane and intellectually challenging" claims, was undesirable and precluded other employment. Plaintiff also asserts that counsel displayed great skill and "attained an outstanding result in this action."

Defendant vehemently disagrees with Plaintiff on each ground.⁷⁴

⁷⁴ According to Defendant, the Court should further reduce the lodestar figure based on the limited success at trial and Mr. Lee's "excessive" communications with Plaintiff:

Attorney/client communication is obviously important. Mr Lee needed to keep Plaintiff informed of developments in the case, However, as with everything else, Mr. Lee went overboard. His time records disclose above 400 conferences regarding the status of the case. The time spent on conferences between Mr. Lee and Plaintiff needs to be substantially reduced.

(Doc. 450 at 19:25-19:28.)

1 In particular, Defendant argues that Plaintiff is not entitled to
2 a multiplier because counsel did not demonstrate exceptional skill,
3 the case was not exceedingly complex and "Plaintiff's counsel's
4 behavior throughout the case was far beneath what is expected of an
5 experienced lawyer."

6 After making the lodestar computation, Courts sometimes assess
7 whether it is necessary to adjust the presumptively reasonable
8 lodestar figure on the basis of several factors, including:⁷⁵ (1)

9 _____
10
11 Defendant correctly observes that 230.8 hours of claimed
12 correspondence time is "unusually high." See *Miller v. Alamo*, 983
13 F.2d 856, 859 (8th Cir. 1993) (finding that 95 hours spent on
14 "attorney conferences, telephone calls, and reviewing
15 correspondence from the government and this court" was "an
16 unusually high number of hours."). The time billed for drafting
17 correspondence to Plaintiff/co-counsel and answering Plaintiff's
18 phone calls, among others, is not reasonable in this case.
19 Moreover, because of the inadequate documentation, Plaintiff's
20 counsel has not explained why such extensive correspondence and
21 status updates were required in the first instance (or why a
22 second, or in some cases third, client contact or update was
23 required). To the extent possible, the time spent corresponding
24 between counsel and client was accounted for in the original
25 lodestar amounts, namely in the "manifestly ineligible" and
26 "dispositive motion" sections of this Memorandum Decision.
27 Contrary to Defendant's arguments, however, there is no reason to
28 further reduce the lodestar amount beyond the original reductions.
Any excessive correspondence and communication between Mr. Lee and
his client has been accounted for. Any further reduction is
duplicative and unnecessary. Defendant's other concerns are
adequately addressed in the multiplier analysis.

⁷⁵ The parties sharply disagree over whether Federal or
California law controls the multiplier analysis. (Doc. 425 at
14:15-15:15; Doc. 432 at 14:28-16:4.) Plaintiff argues that
California law governs the multiplier analysis. Defendant contends
that the discussion is controlled by U.S. Supreme Court precedent,
including *Perdue v. Kenny A.*, --- U.S. ---, 130 S.Ct. 1662 (2010).
Although the general jury verdicts and other circumstances in this
case demand a deeper analysis than provided in Plaintiff's

1 the results obtained by plaintiff's counsel; (2) the skill and
2 quality of representation; (3) the novelty and difficulty of the
3 questions involved; (4) the extent to which the litigation precluded
4 other employment by the attorneys; and (5) the contingent nature of
5 the case. See, e.g., *Serrano v. Priest*, 20 Cal.3d 25, 49 (1977);
6 *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 45
7 (2000); see also *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70
8 (9th Cir. 1975).⁷⁶

9 At the outset, the requested fee multiplier is rejected for all
10

11 briefing, *Perdue* ultimately does not control the multiplier
12 analysis in this case. See *Bancroft v. Trizechahn Corp.*, No.
13 02-CV-2373-SVW-FMO, 2006 WL 5878143, at 6 (C.D. Cal. Jan 17,
14 2006) ("Where a plaintiff prevails under both state and federal
15 claims, and where state law permits the award of a multiplier, a
16 federal court may award a multiplier even if such an upward
17 adjustment is not available for the federal claim.") (citing
18 *Mangold*, 67 F.3d at 1478). However, as discussed during oral
19 argument on July 28, 2010, the Supreme Court's reasoning in *Perdue*
20 is persuasive, including the "strong presumption" that a lodestar
21 figure provides adequate compensation, provides useful guidance in
22 considering the reasonableness of an award of attorneys' fees.

23 ⁷⁶ The lodestar "adjustment" analysis under federal law is
24 slightly different from that under state law. Specifically, since
25 first articulating twelve relevant enhancement factors in *Kerr*, the
26 Ninth Circuit subsequently stated that only those *Kerr*
27 factors—approximately seven—that are not subsumed within the
28 initial lodestar determination (which initial determination
coincides with the majority of the factors just listed) are
relevant to analyzing the propriety of any upward or downward
adjustment. See *Morales v. City of San Rafael*, 96 F.3d 359, 364
fn. 9 (9th Cir. 1996). Additionally, the viability of the
"contingent fee" factor has been called into question by the
Supreme Court's decision in *City of Burlington v. Dague*, 505 U.S.
557 (1992). Because the court must construe the applicability of
California's fee-shifting statutes under state law, however, the
foregoing listed factors nonetheless remain relevant to the
enhancement determination here.

1 the reasons cumulatively discussed in this Memorandum Decision and
2 during oral argument on July 28, 2010. See *Ketchum*, 104 Cal. Rptr.
3 2d 377 ("the trial court is not required to include a fee
4 enhancement to the basic lodestar figure for contingent risk,
5 exceptional skill, or other factors, although it retains discretion
6 to do so in the appropriate case."). Plaintiff has not come close
7 to meeting his burden to demonstrate that the issuance of a
8 multiplier - in addition to the requested lodestar amount -
9 represents a "reasonable" award of attorney's fees in consideration
10 of the claims for which an award of fee's is permitted. See
11 *Ketchum*, 24 Cal.4th at 1138 (the party seeking a fee enhancement
12 bears the burden of proof).

13 Plaintiff has not established that he is entitled to a lodestar
14 multiplier based on exceptional results.⁷⁷ Although counsel in this
15 case secured a jury verdict in Plaintiff's favor, the recovery was
16 limited to approximately 12% of the economic damages he requested
17 from the jury. (See Doc. 451 at 39:24-39:25) ("Total Past and
18 Present Value of Future Losses Net of Offsets [is] \$4,241,670.")
19 As support for the "exceptional success" factor, Plaintiff submits
20 the declaration of attorney Paul Greenberg. However, for the
21 reasons discussed *supra*, and others, Mr. Greenberg's declaration is
22

23 ⁷⁷ Relevant to the skill and results factors, Plaintiff's
24 motion mischaracterizes the record: "Counsel achieved this result
25 despite the fact that highly prejudicial evidence was admitted
26 which violated the Court's post-trial order granting all of Dr.
27 Jadwin's motions in limine." (Doc. 425 at 21:17-21:18.) As
28 explained, this evidence was admitted over Plaintiff's objection
during oral argument on the motions in limine. The erroneous order
upon which Plaintiff relies, docketed seven weeks after trial, was
vacated on July 28, 2010.

1 unpersuasive and fails to demonstrate that the verdict in this
2 matter was an exceptional result. Compare *Leuzinger v. County of*
3 *Lake*, No. C-06-00398 SBA, 2009 WL 839056, at 10 (N.D. Cal. Mar 30,
4 2009) ([Plaintiff] proffered declarations from two attorneys with
5 extensive employment law litigation experience, one of whom also
6 reviewed verdict databases, and each of which declares that the
7 \$1.67 million verdict in this matter was an exceptional result.”).
8 This factor does not support a multiplier.⁷⁸

9 The next factor is the skill in presenting the various relevant
10 legal arguments. In *Ketchum v. Moses*, 24 Cal.4th 1122, the
11 California Supreme Court stated that: “Courts should only award
12 multipliers for exceptional representation when the quality of
13 representation exceeds the quality of representation that would have
14 been provided by an attorney of comparable skill and experience.”
15 For the reasons discussed throughout this Memorandum Decision and
16 other Orders/Memorandum Decisions on file in this case, Plaintiff’s
17 counsel’s representation was far from exceptional. His inexperience
18 and unduly disputatious nature required special judicial attention
19 as evidenced by the post trial motions it engendered. The
20 qualifications and skill level of Plaintiff's counsel were fully
21 considered in determining the original lodestar figure. Based on
22

23 ⁷⁸ In *Maher v. City of Fresno*, No. 08-CV-00050-OWW-SMS, the
24 jury returned a \$2,500,000 verdict for a female firefighter
25 candidate wrongfully discharged from the fire fighter academy.
26 There, Plaintiff’s very experienced and highly competent counsel,
27 with over 30 years of trial experience, recovered approximately
28 \$900,000 in attorney’s fees after a settlement on appeal.
Plaintiff’s counsel had tried many employment and civil rights
cases to verdict, receiving a number of multimillion jury awards,
as high as \$19 million.

1 conduct, experience, and success rate on all motions and trial, Mr.
2 Lee is in the lowest quartile of trial attorneys appearing in this
3 Court. This factor weighs heavily against awarding a multiplier.

4 The same reasoning applies to Plaintiff's characterization of
5 this case as novel and "inherently challenging." A review of the
6 record indicates that the case was a garden-variety employment case
7 involving mental disability under state and federal Family Leave
8 Acts and constructive termination claims. Before the lawsuit,
9 Plaintiff was paid his full contract compensation, except as
10 department Chair and additional professional fee income he could not
11 earn because was on medical leave. The litigation and trial were
12 contentious and required fact gathering, but did not involve any
13 novel or particularly complex legal issues. The employment and
14 disability issues inherent to this litigation have been litigated
15 many times and the law on the subject is well-established. A
16 disproportionate amount of the "complexity" in this case was a
17 direct result of Plaintiff's counsel's difficulty grasping the
18 relevant legal principles (and the Court's Orders) and his total
19 inability to observe his professional responsibilities to aid the
20 court, be courteous and respectful to all, and not to unnecessarily
21 multiply the proceedings. Plaintiff's lead counsel, Mr. Eugene Lee,
22 provides the last word: "[This] litigation proved to be
23 extraordinarily complex, difficult and *onerous for me*." (Doc. 425-1
24 at ¶ 7) (emphasis added). No multiplier to the lodestar amount is
25 justified based on the alleged uniqueness or complexity of the case.

26 Plaintiff also argues that he is entitled to a multiplier
27 because of the contingent risk of the litigation. The Court in
28

1 *Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128 (1998), a case
2 involving a request for attorney's fees and a multiplier based on
3 the FEHA, reconciled the Serrano cases and discussed the
4 "contingency" factor of the multiplier analysis:

5 Looking first to the contingent nature of the award, as
6 has already been discussed, the situation here is unlike
7 that in the Serrano cases, where it was uncertain that
8 the attorneys would be entitled to an award of fees even
9 if they prevailed. Government Code section 12965,
10 subdivision (b) created a reasonable expectation that
11 attorney fees would not be limited by the extent of
12 Weeks's recovery and that Weeks's attorneys would
13 receive full compensation for their efforts. The
14 contingent nature of the litigation, therefore, was the
15 risk that Weeks would not prevail. Such a risk is
16 inherent in any contingency fee case and is managed by
17 the decision of the attorney to take the case and the
18 steps taken in pursuing it.

19 *Id.* at 1175.

20 That language applies with equal force to the facts of this
21 case. *Cf. Ketchum*, 24 Cal.4th at 1138 ("[t]he trial court is not
22 required to include a fee enhancement to the basic lodestar figure
23 for contingent risk."). Moreover, Plaintiff's lead counsel has
24 mentioned in his declarations that Dr. Jadwin, who continued to
25 receive his contract rate of compensation thru the end of the term
26 of his contract, has paid Plaintiff's counsel for legal services,
27 although the full amount paid is not described.

28 Plaintiff argues that a multiplier is justified because counsel
had to turn down other work for handling this case. But Plaintiff's
counsel have not provided any specific examples for work they turned
away. Mr. Lee has identified no cases or prospective clients. In
any event, the hours counsel spent on this case will be compensated.

Applying these factors, a multiplier is not appropriate under

1 the totality of the circumstances in this case. The litigation was
2 not exceedingly novel and counsel did not demonstrate "exceptional
3 skill." Plaintiff prevailed on nine causes of action, however, it
4 translated into a monetary award of less than 12% of the amount he
5 requested the jury award. Even if there was some contingency risk
6 involved, it in no way merits a multiplier.

7 Plaintiff's string citation to "reasonable fee" and
8 "multiplier" cases does not assist. For example, Plaintiff cites
9 *Green v. City of Los Angeles*, a Los Angeles Superior Court decision,
10 stating: "the court [in *Green*] awarded costs of \$35,000 and
11 attorney's fees of \$461,500.00, using a multiplier of 2.0." (Doc.
12 425 at 23:9-23:10.) This citation - and others - are unpersuasive.
13 Courts in California (federal and state) have awarded multipliers
14 greater than one for successful cases brought under federal and
15 state law, placing special emphasis on the exceptional results
16 obtained. See, e.g., *Leuzinger v. County of Lake*, 2009 WL 839056,
17 at 10-11 (in a disability and employment discrimination case,
18 awarding a 2.0 multiplier based on exceptional results - jury award
19 of \$1,679,001); *Donovan v. Poway Unified School Dist.*, 167
20 Cal.App.4th 567, 628 (2008) (awarding a 1.25 multiplier in light of
21 the case's difficulty and risk, but declining to grant the 1.7
22 multiplier plaintiffs had requested). However, when a case did not
23 present novel or complex issues or counsel's skill was
24 unexceptional, the courts have not awarded a multiplier. See, e.g.,
25 *James v. Cardinal Health 200 Inc.*, No. ED-CV-09-00695-JRG-SHx, 2010
26 WL 4796931, at 4 (Nov. 22, 2010) ("The plaintiff has not established
27 that she is entitled to a lodestar multiplier [] [a] review of the
28

1 record indicates that the case did not involve any novel or
2 particularly complex issues."); see also *Perez v. Safety-Kleen*
3 *Systems, Inc.*, No. C-05-5338 PJH, 2010 WL 934100, at 9 (N.D. Cal.
4 Mar. 15, 2010) ("court cannot conclude that the quality of counsel's
5 representation exceeds the quality of representation that would have
6 been provided by an attorney of comparable skill and experience,
7 such that a multiplier should be awarded"); *Schultz*, 2010 WL
8 3504781, at 11 (declining to award a multiplier because "this
9 litigation was not unusually complex or risky, nor were there
10 'exceptional circumstances.'"); *Bancroft v. Trizechahn Corp.*, No.
11 02-CV-2373-SVW-FMO, 2006 WL 5878143, at 6 (C.D. Cal. Jan 17,
12 2006) (declining a multiplier because "Plaintiffs' counsel have not
13 established that there was a novel issue involved or that the case
14 was particularly difficult [] [n]or have Plaintiffs shown that
15 counsel used skill above and beyond what is normally expected of
16 attorneys with their level of experience."). Here, counsel's trial
17 performance, skill, and decorum was deficient compared to that of
18 attorneys regularly trying cases in this court. This was
19 acknowledged during trial by a number of apologies by Mr. Lee for
20 lack of experience and not following the rules.

21 Three trial exchanges are illustrative. The first took place
22 on June 2, 2009, during Mr. Lee's cross-examination of Mr. Robert
23 Burchuk, the County's forensic psychiatrist:

24 Q: The point is: Is that you had Dr. Reading's full
25 report, which disclosed all of this Fort Hood
26 information. You had that. Okay? If Dr. Jadwin
27 wasn't forthcoming with it, wasn't it incumbent on
28 you to draw that information out for him? Knowing
you had his report.

1 A: A standard approach to psychiatric interviewing is
2 to begin with open-ended questions. To invite an
3 individual to share information based on a general
4 question and then to more specifically ask
5 questions based on what they disclose. And then on
6 other sources of information that you may have that
7 may contradict information that they've provided
8 you.

9 Q: And your success in eliciting that information from
10 Dr. Jadwin, can you automatically ascribe that to
11 being Dr. Jadwin's fault or could it have been due
12 to your lack of skill as an examiner?

13 A: I don't believe that to have been the case.

14 Q: Naturally. And --

15 THE COURT: Now, do you realize what you just did,
16 Mr. Lee?

17 MR. LEE: I apologize, Your Honor. I'll --

18 THE COURT: I'm going to ask you, please --

19 MR. LEE: Yes, Your Honor. Absolutely.

20 THE COURT: -- to follow the rules.

21 MR. LEE: Yes, Your Honor.

22 (RT, June 2, 2009, 24:15-25:13) (emphasis added).

23 A short time later, after excusing the jury, Mr. Lee was
24 instructed on the rules of courtroom decorum and tenets of
25 professionalism relevant to cross-examination, in particular, that
26 examining counsel shall not repeat, echo or comment on the witness'
27 statements:

28 Court: Now, we're outside the presence of the jury. And
Mr. Lee, I want to remind you that as part of the
[written] courtroom decorum rules, and I have
mentioned this to you before. That the examination
of witnesses includes number 13, "In examining a
witness, counsel shall not repeat, comment on or
echo the answer given by the witness." And I -- I
don't know if you're doing this intentionally,
though, because I have mentioned it to you before.

1 But candidly, bad actor lawyers, this is a tactic
2 to prejudice the witness in the eyes of the jury
3 and to, in effect, to upset the level playing
4 field. It's misconduct. So I'm not ascribing this
5 to you, but I don't understand why you're unable
6 to follow my direction.

7
8 Mr. Lee: Your Honor, I apologize. And it will stop. It's
9 just like with the "removal" versus "demotion."
10 I made a very concerted effort never to say the
11 word "demotion" again and I think I've done that.
12 I will assure you that this conduct will also
13 stop. It's completely inadvertent, Your Honor, and
14 I think it only happened today and I'll stop it.

15
16 Court: All right. And the -- there is another tendency
17 that you need to work on as well. And that is
18 making a comment like the "Naturally."

19
20 Mr. Lee: Yes.

21
22 Court: In other words, it was expressed in a sarcastic
23 tone. And what that is, we are governed in our
24 society by the rule of law. And these jurors are
25 here invested with the high purpose of following
26 the law and doing justice. We don't have any
27 chance of that happening if the attorneys who are
28 officers of the Court, and who are bound by
professional rules of conduct and ethics, if they
do not demonstrate respect for the witness,
respect for the process and respect for the law,
then we're not going to have a legal system that
anybody has any regard for. And the fact that
somebody is your adversary and we have an
adversarial system, the fact that there are two
sides to a lawsuit never means that you lose your
professionalism, that you don't extend courtesy,
and that you don't treat your adversary with the
same respect that you want your client and
yourself to be treated with by the Court and by
other officers of the Court.

And so candidly, I don't want to have to do
something about this, but I do want you to come to
your senses and basically be a lawyer. The rules
are in writing. They've been given to you. Can
you follow them?

Mr. Lee: Your Honor, I will -- I will eliminate the
behavior from this point forward. And the only
thing I'll say is that, Your Honor, it's
completely inadvertent. I must emphasize this is
really my first trial and a lot of stuff is going

1 on. But that's not an excuse and it will stop,
2 Your Honor. It will stop.

3 Court: All right. Thank you. Again, I believe that I have
4 been patient and that I have been indulgent. And
5 as I said, I'm trying to protect your client's
6 rights here as well. Because Dr. Jadwin is just
7 as entitled to a fair trial in this case as the
8 defendants are.

9 Mr. Lee: Absolutely, Your Honor. Thank you.

10 (Id. at 33:13-35:19.)

11 The final illustration is Mr. Lee's "big versus small"
12 reference during closing argument, which improperly appealed to
13 bias and emotion. Mr. Lee's comments and the Court's *sua sponte*
14 admonition were discussed in section III(A), *supra*, in the context
15 of the County's motion for a new trial.⁷⁹ Although the statements

16 ⁷⁹ During his closing argument, Mr. Lee stated:

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

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

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

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

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

1 did not ultimately control the *Settlegood* analysis, they arrived
2 after countless admonitions and warnings, an in-court review of the
3 federal rules of evidence and rules of courtroom decorum, and Mr.
4 Lee's repeated apologies and pronouncements that he would follow
5 the applicable rules of evidence/decorum. These clarifying
6 examples are a narrow sampling of the admonitions/instructions
7 concerning professionalism and courtroom decorum given to Mr. Lee
8 during the different stages of litigation in this case.

9 Plaintiff's request for application of a 2.0 multiplier is
10 DENIED. No multiplier was earned as not one of the justifying
11 factors is present.

12
13 f. *Hours Expended in Drafting Fee Motion*
14 (*"Fees-on-Fees"*)
15

16 Plaintiff requests "reasonable fees" to compensate his counsel
17 for the preparation of the motion for attorney's fees. According
18 to Ms. Herrington, she spent 56.3 preparing the "first" fee
19 petition. Mr. Hicks, Plaintiff's fee counsel, spent five hours
20 preparing his declaration. Mr. Lee, however, does not provide a
21 separate task total or an explanation why one was not included.

22 For all the reasons discussed in this Memorandum Decision and
23 during July 28, 2010's oral argument, Mr. Lee is awarded no "fees
24 on fees." He is awarded ten hours time for his travel and
25 attendance at the July 28, 2010 hearing, nothing more.

26 Mr. Lee's post-trial briefing was underdeveloped and
27 willfully, perhaps intentionally, non-responsive to the Court's
28

1 requests for supplemental billing information, which were expressly
2 made to afford Plaintiff a full opportunity to justify and prove
3 his attorney's fees request and to comply with Ninth Circuit law.
4 The relevant legal standards for fee motions were not addressed or
5 taken into consideration. This course of conduct had a
6 considerable impact on the Court's ability to resolve the fee
7 issues in a correct and timely manner. More critical to the
8 analysis, Mr. Lee did not consider the impact his actions had on
9 the County's ability to oppose the motion. His conduct placed the
10 County at a considerable disadvantage.

11 Plaintiff is only entitled to recover fees that are
12 reasonable. See *Serrano*, 32 Cal.3d at 635; *Ketchum*, 24 Cal.4th at
13 1137. With respect to "fees on fees," that number is ten hours.
14 Mr. Lee, however, is awarded an additional 15 hours for the time
15 spent preparing the other post-trial motions, for a post-trial
16 total of 25 hours.

17 To account for the general lack of detail and excessive time
18 spent preparing the original fee motion, among other concerns, Ms.
19 Herrington is awarded 20 hours for time spent on the original
20 attorney's fee motion, including travel and attendance at the July
21 28, 2010 hearing. Mr. Hicks is awarded four hours.

22 No additional "fee on fee" time is awarded, i.e., no time is
23 awarded to any counsel concerning the supplemental fee
24 motions/replies, which were necessitated by Plaintiff's counsel's
25 failure to properly support and document the motion.

g. *Graphical Summary*

NAME	HOURS	HOURLY RATE	LODESTAR AMT
Lee	1,477.8 (not including travel)	\$275	\$ 406,395.00
Lee (travel)	13.8	\$200	\$ 2,760.00
Herrington	326.5 (not including travel)	\$350	\$ 114,275.00
Herrington (travel)	39	\$200	\$ 7,800.00
Minger	10.0	\$295	\$ 2,950.00
Hicks	4.0	\$380	\$ 1,520.00
TOTAL	1,871.1		\$ 535,700.00

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1 IV. CONCLUSION.

2 Judges are experts in the matter of attorney's fees. See,
3 e.g., *Hancock Laboratories, Inc. v. Admiral Ins. Co.*, 777 F.2d 520,
4 525 (9th Cir. 1985).⁸⁰ In over 43 years in jury trials and almost
5 20 years on the bench, in cases of monumental complexity with
6 exceptionally qualified and experienced counsel, Plaintiffs' fee
7 request is the highest ever made. Contrary to the law's intent to
8 limit attorneys' fee litigation, this motion has become a case
9 within a case.

10
11 For all the reasons stated above:

- 12 1. Defendant's Motion to Amend the Judgment has been
13 resolved pursuant to separate ORDER; the judgment is
14 amended to reflect the dismissals with prejudice of Mr.
15 Bryan and Dr. Harris;⁸¹
- 16 2. Defendant's Motion for New Trial on all grounds is
17 DENIED;
- 18 3. Plaintiff's Motion for Pre-Judgment Interest is GRANTED
19 in part in the amount of \$15,022.27;
- 20 4. The judgment is AMENDED to include an award of
21 post-judgment interest at the federal treasury rate, from
22

23 ⁸⁰ A trial court has broad discretion to determine the
24 reasonable amount of an attorney fee award, including whether to
25 increase or decrease the lodestar figure. *Nichols v. City of Taft*,
155 Cal.App.4th 1233, 1240 (2007).

26 ⁸¹ On August 12, 2010, Defendant's motion to amend the judgment
27 was granted as to Defendants Peter Bryan and Irwin Harris only.
28 (Doc. 445.) Defendant's motion was, in all other respects, denied.

1 the date of the judgment to the date of satisfaction of
2 the judgment.

3 5. The Bill of Costs is decided by separate memorandum
4 decision;

5 6. Plaintiff's motion for attorneys' fees is GRANTED.

6 7. Plaintiff is awarded \$535,700.00 in attorneys' fees as
7 follows:

8 a. Eugene Lee - \$ 409,155.00

9 b. Joan Herrington - \$122,075.00.

10 c. Marilyn Minger - \$2,950.

11 d. David Hicks - \$1,520.

12
13 Plaintiff shall submit a form of order consistent with, and
14 within five (5) days following electronic service of, this
15 Memorandum Decision.

16
17 SO ORDERED.

18 Dated: January 24, 2011

19
20 /s/ Oliver W. Wanger
21 Oliver W. Wanger
22 U.S. District Judge
23
24
25
26
27
28