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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

| | |
|---|---|
| VERNELL LUNDBERG, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>COUNTY OF HUMBOLDT, et al.,<br><br>Defendants. | Case No. C-97-3989-SI<br><br>**PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR AN AMOUNT OF ATTORNEYS' FEES AND EXPENSES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**<br><br>[42 U.S.C. § 1988(b)]<br><br>Date: October 25, 2005<br>Time: 9:00 a.m.<br>Courtroom: 10<br>Judge: Hon. Susan Illston |

**NOTICE OF MOTION**

TO THE HONORABLE COURT, THE PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on **Tuesday, October 25, 2005, at 9:00 a.m.** in Courtroom 10 of the Honorable Susan Illston, United States District Judge, at the United States Courthouse, Northern District of California, 450 Golden Gate Avenue, 19th Floor, San Francisco, California 94102, Plaintiffs VERNELL "SPRING" LUNDBERG, ERIC SAMUEL NEUWIRTH, NOEL TENDICK, MICHAEL MCCURDY, JENNIFER SCHNEIDER, MAYA PORTUGAL, LISA SANDERSON-FOX, and TERRI SLANETZ will and hereby do move the Court to hold that Plaintiffs are entitled to attorneys' fees under 42 U.S.C. §1988(b) in the amount of $1,995,490.69 in attorneys' fees, plus $84,029.55 in non-taxable expenses.

This motion is based upon the attached memorandum of points and authorities, the pleadings and papers filed in this case, and such written and oral arguments as may hereinafter be made by the parties.

DATED: September 16, 2005 BY: _____

Sophia S. Cope
FIRST AMENDMENT PROJECT
Fee Counsel for Plaintiffs

## MEMORANDUM OF POINTS AND AUTHORITIES

### INTRODUCTION

This Court ruled that Plaintiffs were prevailing parties who achieved an overall success entitling them to attorneys' fees, despite the nominal damages award. [Order Re: Post-Trial Motions and Plaintiffs' Entitlement to Attorneys' Fees (August 9, 2005).] The next question is what *amount* of attorneys' fees constitutes a "reasonable" award. See 42 U.S.C. §1988(b).[1] "The amount of the fee, of course, must be determined on the facts of each case." Hensley v. Eckerhart, 461 U.S. 424, 429 (1983).

### ARGUMENT

### I. PLAINTIFFS ARE ENTITLED TO "REASONABLE" ATTORNEYS' FEES

For actions brought under §1983, the district "court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. §1988(b).

To exercise its discretion to award reasonable attorneys' fees under §1988, the district court "must first calculate a lodestar amount by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. Next, the court may increase or reduce the presumptively reasonable lodestar fee, with reference to . . . factors that have not been subsumed in the lodestar calculation." Cunningham v. County of Los Angeles, 879 F.2d 481, 484 (9th Cir. 1989) (citations omitted).

### II. THE "LODESTAR" AMOUNT MUST FIRST BE CALCULATED

To determine what constitutes a "reasonable" attorneys' fees award, the "lodestar" amount must first be calculated. Ferland v. Conrad Credit Corp., 244 F.3d 1145, 1149 n.4 (9th Cir. 2001) ("District courts must calculate awards for attorneys' fees using the 'lodestar' method"). The lodestar amount is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); see also Fischel v. Equitable Life Assurance Soc'y of U.S., 307 F.3d 997, 1006 (9th Cir. 2002). This figure "provides an objective basis on which to make an initial estimate of the value of a lawyer's services." Hensley,

[1]Case law construing what constitutes a "reasonable" attorneys' fees award "applies uniformly" to all federal fee-shifting statutes, including 42 U.S.C. §1988. City of Burlington v. Dague, 505 U.S. 557, 562 (1992); see also Traditional Cat Ass'n, Inc., v. Gilbreath, 340 F.3d 829, 834 (9th Cir. 2003) (applying Lanham Act attorneys' fees case to Copyright Act attorneys' fees case). Thus case law analyzing "reasonable" attorneys' fees under a statute other than §1988 is applicable.

461 U.S. at 433. The burden is on the fee applicant to substantiate the hours worked and the rates claimed. Id. at 433, 437; Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984); Sorenson v. Mink, 239 F.3d 1140, 1145 (9th Cir. 2001).

### A. PLAINTIFFS HAVE INCLUDED ALL HOURS REASONABLY EXPENDED

#### *1. Hours May be Deducted for Inadequate Documentation or Duplication*

In determining what is a reasonable number of hours, the Court reviews detailed time records and may reduce hours that are inadequately documented, or were unnecessary, duplicative or excessive. Chalmers v. City of Los Angeles, 796 F.2d 1205, 1210 (9th Cir. 1986); Hensley, 461 U.S. at 433-34; Sorenson, 239 F.3d at 1146; Ferland, 244 F.3d at 1149-51 (deducting hours for "inefficiency" and hours that are "excessive," but noting that "[s]ome systematic perusal of the actual billing entries will often confirm that the reason for the seemingly high fee was not inefficiency, but careful compliance with the attorneys' responsibilities"). In the present case, Plaintiffs have included all hours reasonably expended, and have exercised additional billing judgment. (*See infra* Part II.A.4.)

#### *2. Plaintiffs' Attorneys' Hours Are Not Deducted for Unsuccessful Portions of the Litigation*

Time spent on unrelated, unsuccessful claims is not reasonably expended and may be excluded before calculating the lodestar. Id. at 435; Sorenson, 239 F.3d at 1147. However, when a lawsuit can be considered on the whole as involving one "claim," time spent on unsuccessful portions of the litigation is *not* excluded from the lodestar calculation. Hensley, 461 U.S. at 434. Claims are sufficiently related when they "involve a common core of facts" or are "based on related legal theories." Id. An attorney's time is often "devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims." Id. As such, "cases involving such unrelated claims are unlikely to arise with great frequency." Id. Many civil rights cases, for example, "present only a single claim." Id.[2]

In the present case, Plaintiffs had only one claim, regardless of the causes of action invoked,

[2]But the Hensley Court noted that "there is no certain method of determining when claims are 'related' or 'unrelated.' Plaintiff's counsel, of course, is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures." 461 U.S. at 437 n.12.

the forms of relief sought, or the different motions filed: that it was illegal for Defendants to use pepper spray to arrest Plaintiffs as non-violent demonstrators who posed no threat to themselves, the officers or others. Throughout this litigation, Plaintiffs' attorneys channeled their energy into getting this practice – use of pepper spray against peaceful protestors – declared unlawful by a jury, which they achieved. Thus nearly all the attorneys' time is included in the lodestar calculation, and it makes no difference that some of that time was spent on unsuccessful portions of the litigation, such as motions for summary judgment or injunctive relief.

***3. Time Spent on Multiple Trials Is Not Deducted***

Similarly, time spent on multiple trials is included in the lodestar calculation, so long as the prevailing plaintiff's actions were not responsible for the need for more than one trial. O'Rourke v. City of Providence, 235 F.3d 713, 726, 737 (1st Cir. 2001); Shott v. Rush-Presbyterian-St. Luke's Med. Ctr., 338 F.3d 736, 742 (7th Cir. 2003). Time spent preparing for one trial that benefitted future trials is also included in the lodestar calculation. Shott, 338 F.3d at 742-43. Thus, in the present case, the time that Plaintiffs' attorneys spent preparing[3] for and participating in all three trials (and the appellate proceedings involving the Ninth Circuit three times and the U.S. Supreme Court) is included in the lodestar calculation because the need for multiple trials was not created by Plaintiffs; as this Court knows, the first two trials resulted in hung juries. See also Cabrales v. County of Los Angeles, 935 F.2d 1050, 1053 (9th Cir. 1991) (holding "that a plaintiff who is unsuccessful at a stage of litigation that was a necessary step to her ultimate victory is entitled to attorney's fees even for the unsuccessful stage").

***4. Billing Judgment***

While a district court has discretion to strike hours not reasonably expended before calculating the lodestar amount, the moving party should take the first step and exercise "billing judgment" to exclude those hours that would not properly be billed to a client. Hensley, 461 U.S. at 434, 437; Evers v. County of Custer, 745 F.2d 1196, 1205 (9th Cir.1984).

In the present case, Plaintiffs' attorneys have each exercised extensive billing judgment: they

[3] *But see infra* Part II.A.4. discussing Plaintiffs' proposed additional 10% cut (for a total of 18%) to "Pretrial 2."

were conservative in calculating their hours for the lodestar, or have expressly waived certain hours.[4] [Bloom Decl., Exh. A.] [Rosenfeld Decl. ¶12.] [Kaupp Decl. ¶6.] [Cowles Decl. ¶43.] [Harris Decl. ¶14.] Additionally, an 8% across-the-board cut has been made to the hours spent on all phases of the litigation.[5] An additional 10% cut has been made to the hours spent on "Pretrial 2" (for a total of 18% for that phase) to account for the inherent duplication of efforts during the transition from the first trial and appellate teams, to the second trial team. Therefore, Plaintiffs are claiming a total of 7,219.04 reduced hours, which includes 6,631.48 hours for the merits litigation and 587.56 hours for this fee litigation. [Wheaton Decl. Exh. C.]

***5. Reduced Hours for Current Trial Team (Trials 2 and 3) for Merits Litigation***

The current trial team is comprised of Dennis Cunningham, Robert Bloom, William Simpich, Ben Rosenfeld, Gordon Kaupp, and legal assistants Alicia Littletree and Josh Morsell. They represented Plaintiffs through the second and third trials before this Court. [Wheaton Decl. Exh. C]

| | |
|---|---|
| Dennis Cunningham: | 627.68 hours |
| Robert Bloom: | 416.68 hours |
| William Simpich: | 315.37 hours |
| Ben Rosenfeld: | 165.99 hours[6] |
| Gordon Kaupp: | 164.94 hours |
| Alicia Littletree (legal assistant): | 472.19 hours |
| Josh Morsell (legal assistant): | 453.65 hours |
| TOTAL: | 2,144.31 hours |

***6. Reduced Hours for First Trial Team for Merits Litigation***

The first trial team was comprised of Macon Cowles and his office (including attorneys Susan O'Neill, Stephanie Hult and Catherine Davis, and senior paralegal Abbott DePree), and Mark Harris. [Wheaton Decl. Exh. C]

| | |
|---|---|
| Mark Harris: | 994.15 hours |
| Macon Cowles: | 976.6 hours |

[4]Plaintiffs waive hours expended by Tony Serra, who was a lead trial counsel during trials 2 and 3, and David Greene, Executive Director of Fee Counsel First Amendment Project. [Wheaton Decl. ¶22.]

[5]The first lead counsel, Macon Cowles, has performed a line-by-line excision of the invoices for himself and Susan O'Neill. This results in reductions of 8.3% and 7.3% to each one's hours. Plaintiffs, therefore, applied an 8% reduction to all attorneys and others. This is in addition to each attorney's exercise of billing judgment in compiling his hours.

[6]Some of Mr. Rosenfeld's time is reconstructed (as opposed to contemporaneous), but this is not fatal to the fee claim. U.S. v. $12,248 U.S. Currency, 957 F.2d 1513, 1521. (9th Cir. 1991).

| | |
|---|---|
| Susan O'Neill: | 660.5 hours |
| Stephanie Hult: | 21.34 hours |
| Catherine Davis: | 15.46 hours |
| Abbot DePree (senior paralegal): | 190.07 hours |
| TOTAL: | 2,858.12 hours |

***7. Reduced Hours for Appellate Team for Merits Litigation***

The appellate team was comprised of Alan Chen, Mark Hughes and Brendan Cummings.

| | |
|---|---|
| Alan Chen: | 92.57 hours |
| Mark Hughes: | 368 hours (estimated) [Hughes Decl. ¶¶5-6.] |
| Brendan Cummings: | 702.33 hours |
| TOTAL: | 1,162.9 hours |

**B. REASONABLE HOURLY RATES**

Reasonable hourly rates under §1988 are based on the "prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." Blum v. Stenson, 465 U.S. 886, 895 (1984). Thus a district court must first decide what the "relevant community" is geographically, and then what the "prevailing market rates" are for that community.

***1. Relevant Community is the San Francisco Bay Area***

The relevant community is generally where the district court sits. Barjon v. Dalton, 132 F.3d 496, 500 (9th Cir.1997). It can also be where some of the moving party's attorneys practice. Davis v. Mason County, 927 F.2d 1473, 1488 (9th Cir. 1991). In the present case, San Francisco (or at least the Bay Area) is the relevant community on which hourly rates should be based. This Court sits in San Francisco, and Plaintiffs' trial team for the last two trials, led by Dennis Cunningham, is based in San Francisco and Oakland.

***2. Delay in Compensation Should be Considered***

To determine "prevailing market rates," the court must first decide whether to apply past or present rates. To compensate for delay in receiving payment, often "several years after the services were rendered – as it frequently is in complex civil rights litigation," Missouri v. Jenkins ex rel. Agyei, 491 U.S. 274, 283 (1989), a district court may either apply the rates in effect when the work was performed – the historical rates – plus interest, or the current rates. Bell v. Clackamas County, 341 F.3d 858, 868 (9th Cir. 2003); Barjon, 132 F.3d at 502. Applying the current rates is the preferred method to compensate for delay in payment because it is the best way "to adjust for inflation and loss of the use funds." Gates v. Deukmejian, 987 F.2d 1392, 1406-07 (9th Cir. 1993).

This method is used for the current attorneys of record.

However, for attorneys no longer in the case, their rate when they left the case has been applied, with an upward adjustment for delay using the prime interest rate. [Wheaton Decl. ¶27 & Exh. C.] [Pearl Decl. ¶15.] [Altshuler Decl. ¶9.] See also Wash. Pub. Power Supply Sys. Sec. Litig. v. City of Seattle, 19 F.3d 1291, 1305 (9th Cir. 1994) (stating that "[w]hen recalculating the hourly rates for attorneys who left the firm [prior to the fee petition], the district court is, of course, free to use *either* current rates for attorneys of comparable ability and experience or historical rates coupled with a prime rate enhancement" (emphasis in original)).

***3. Each Attorney's Background Should be Considered***

Once the temporal decision is made, the "prevailing" rates must be determined. "[T]he burden is on the fee applicant to produce satisfactory evidence – in addition to the attorney's own affidavits – that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." Blum, 465 U.S. at 895 n.11. "[T]he rates charged in private representations may afford relevant comparisons." Id. "A rate determined in this way is normally deemed to be reasonable." Id.; see also Sorenson, 239 F.3d at 1149-50 (holding that the district court should not have applied a uniform hourly rate, but instead should have determined the market rate for each lawyer, "from the most senior to the most junior").

***4. Reasonable Hourly Rates for Current Trial Team (Trials 2 and 3)[7]***

The current trial team comprises the present attorneys of record for Plaintiffs and so current market rates should apply to each of them. They represented Plaintiffs through the second and third trials before this Court. The current trial team includes Dennis Cunningham, Robert Bloom, William Simpich, Ben Rosenfeld, Gordon Kaupp, and legal assistants Alicia Littletree and Josh Morsell.

Dennis Cunningham's reasonable hourly rate is $575. Mr. Cunningham is a 1967 graduate of Loyola University in Chicago. For almost 40 years, he has made civil rights his career, litigating both civil and criminal cases dealing with protestors and law enforcement misconduct. In the present case, he was chief lead trial counsel for the second and third trials. He did most of the strategy and planning for Plaintiffs' case-in-chief, spoke most often before this Court, and coordinated the work of the rest of the trial team. [Cunningham Decl. ¶¶ 2-4.]

[7]The figures below are drawn from the expert declarations of Richard Pearl and Fred Altshuler.

Robert Bloom's reasonable hourly rate is $525. Mr. Bloom is a 1965 New York University graduate. For over 40 years, he has specialized in complex criminal trials. He also has significant civil trial experience based on his work with Dennis Cunningham and others on Judi Bari's and Darryl Cherney's case against the F.B.I. and Oakland Police Department. In the present case, he acted as a lead trial counsel, having shared in strategy, planning, trial and motion responsibilities. [Bloom Decl. ¶¶2-7.] [Cunningham Decl. ¶4.]

William Simpich's reasonable hourly rate is $450. Mr. Simpich graduated from New College of California and was admitted to practice in 1982. He has significant civil rights experience, which includes criminal cases with a civil rights focus. In the present case, his primary responsibility was to develop Plaintiffs' factual side of the story. He worked with Plaintiffs and expert witnesses, examined them in court, and did motion work as well. [Simpich Decl. ¶¶2-5.] [Cunningham Decl. ¶4.]

Ben Rosenfeld's reasonable hourly rate is $300. Mr. Rosenfeld is a 1999 graduate of Lewis and Clark Law School. For the past six years, he has worked with Dennis Cunningham and others on civil rights police misconduct cases, which comprise approximately 70% of his caseload. In the present case, he primarily worked on the Writ of Mandamus to prevent the case from being transferred to Eureka. He also drafted jury instructions and helped with trial strategy in the second trial. [Rosenfeld Decl. ¶¶3-6, 11, 13.] [Cunningham Decl. ¶4.]

Gordon Kaupp's reasonable hourly rate is $225. Mr. Kaupp is a 2002 graduate of City University of New York School of Law. Throughout law school and after his focus has been on public interest law. He has worked with Dennis Cunningham's office since May 2004. In the present case, he researched and drafted motions, assisted in expert depositions, prepared witnesses for examination, and helped with overall case strategy. [Kaupp Decl. ¶3-5.] [Cunningham Decl. ¶4.]

Through Dennis Cunningham's office, time is being submitted for two legal assistants: Alicia Littletree and Josh Morsell. [Cunningham Decl. ¶7.] Since it is the prevailing practice in this community to bill legal assistants separately at market rates, it may be done in this motion under §1988. See Missouri, 491 U.S. at 287-88; see also Barjon, 132 F.3d at 503. "Such separate billing appears to be the practice in most communities today." Missouri, 491 U.S. at 289.

Alicia Littletree's reasonable hourly rate is $100. Ms. Littletree is a legal assistant with Mr.

Cunningham's law office. She is a 1992 graduate of Whale Gulch High School. Shortly after graduation, she began working in the Law Office of Dennis Cunningham. The bulk of her work has involved Judi Bari's case against the F.B.I. and the present case. She worked as an evidence coordinator and became an indispensable resource in the myriad of transcripts, depositions, videos and other evidence and files associated with this case, and devoted a significant number of hours in the pretrial and trial phases [Littletree Decl. ¶¶2-4.] [Cunningham Decl. ¶7.]

Josh Morsell's reasonable hourly rate is $75. Mr. Morsell is a legal assistant with Dennis Cunningham's law office. He is a 1998 graduate of Brown University. He worked with Mr. Cunningham on Judi Bari's case against the F.B.I., in which he prepared video evidence and other exhibits, and drafted an informal transcript of the proceedings. Similarly, in the present case, because of his extensive video expertise, he edited video evidence for presentation at trial. He also conducted factual and legal research, and helped with the pleadings and witness preparation. [Morsell Decl. ¶¶3-8] [Cunningham Decl. ¶7.]

***5. Reasonable Hourly Rates for First Trial Team***

The first trial team was comprised of Macon Cowles and his office (including attorneys Susan O'Neill, Stephanie Hult and Catherine Davis, and senior paralegal Abbott DePree), and Mark Harris. Because the first trial team has been out of the case since the fall of 1998, their proposed hourly rates reflect reasonable market rates in 1998 adjusted upward by applying the 1998 prime interest rate. [Wheaton Decl. ¶27 & Exh. C.] [Pearl Decl. ¶14.] [Altshuler Decl. ¶10.]

Mark Harris' reasonable hourly rate is $351.89, using a base rate of $250 in 1998, and adjusting it to today's figure using the prime interest rate. Mr. Harris is a 1989 graduate of University of San Francisco Law School. He has extensive experience in civil rights, land use and environmental litigation, and criminal defense. In the present case, he worked with Macon Cowles to initiate the case and see it through the first trial. He gathered facts, helped with litigation strategy, dealt with motions and discovery requests, worked with witnesses, conducted depositions, and examined Plaintiffs during trial. [Harris Decl. ¶¶2-9, 11.]

Macon Cowles' reasonable hourly rate is $527.84, using a base rate of $375 in 1998, and adjusting it to today's figure using the prime interest rate. Mr. Cowles is a 1975 graduate of University of Colorado Law School. He has extensive jury and bench trial experience, and has

litigated in many areas of law including civil rights and environmental law. In the present case, he was lead counsel from the initiation of the case through discovery and the first trial. [Cowles Decl. ¶¶2, 7-15.]

Susan O'Neill's reasonable hourly rate is $267.44, using a base rate of $190 in 1998, and adjusting it to today's figure using the prime interest rate. Ms. O'Neill is a 1984 honors graduate of Boston College Law School. She has extensive civil litigation experience in a broad range of areas. She worked *pro bono* on a Ninth Circuit case involving employment discrimination under Title VII of the Civil Rights Act. She worked with Mr. Cowles and others to prepare for the first trial. [Cowles Decl. ¶¶ 17-20.]

Stephanie Hult's reasonable hourly rate is $457.46, using a base rate of $325 in 1998, and adjusting it to today's figure using the prime interest rate. Ms. Hult has been a lawyer since 1980 and helped Macon Cowles by summarizing depositions to form scripts that were later used in the examination of witnesses at trial. [Cowles Decl. ¶44.]

Catherine Davis' reasonable hourly rate is $246.33, using a base rate of $175 in 1998, and adjusting it to today's figure using the prime interest rate. Ms. Davis is a 1997 graduate of University of Colorado Law School. She helped Macon Cowles by conducting various types of research. [Cowles Decl. ¶44.]

Abbot DePree's reasonable hourly rate is $126.68, using a base rate of $90 in 1998, and adjusting it to today's figure using the prime interest rate. Ms. DePree is a 1968 graduate of the University of Arizona. She is a certified paralegal, having received her certificate from the Philadelphia Paralegal Institute in 1976. Since the late 1970s, she has worked with Mr. Cowles and other law firms on complex litigation and large-document cases. She worked very closely with the lawyers preparing for the first trial. [Cowles Decl. ¶16.]

***6. Reasonable Hourly Rates for Appellate Team***

The appellate team was comprised of Alan Chen, Mark Hughes and Brendan Cummings. Like the first trial team, the appellate team left the case prior to this fee petition, therefore their proposed hourly rates were calculated by taking a reasonable market rate for the year their primary responsibilities ended (2002) and then adjusting it upward by applying the prime interest rate. [Wheaton Decl. ¶27 & Exh. C.] [Pearl Decl. ¶14.] [Altshuler Decl. ¶10.]

Alan Chen's reasonable hourly rate is $402.25, using a base rate of $350 in 2002, and adjusting it to today's figure using the prime interest rate. Mr. Chen is a 1985 graduate of Stanford Law School and a former district court clerk. He has extensive federal trial and appellate experience, and formerly worked for the ACLU on police misconduct cases. He is currently a law school professor at the University of Denver. In the present case, he was responsible for the Ninth Circuit and Supreme Court appeals dealing with the directed verdict and qualified immunity. [Chen Decl. ¶¶3-16.]

Mark Hughes' reasonable hourly rate is $459.71, using a base rate of $400 in 2002, and adjusting it to today's figure using the prime interest rate. Mr. Hughes is a 1985 graduate of the University of Chicago. He is currently a staff attorney for a public interest group and a visiting professor of Constitutional Law at the University of Denver College of Law. He has extensive appellate experience, and was the lead attorney during the first Ninth Circuit appeal in this case. [Hughes Decl. ¶¶2-4.]

Brendan Cummings' reasonable hourly rate is $287.32, using a base rate of $250 in 2002, and adjusting it to today's figure using the prime interest rate. Mr. Cummings is a 1997 graduate of Boalt Hall (University of California, Berkeley) and is currently a staff attorney for the Center for Biological Diversity. He has extensive experience in civil rights, criminal defense and environmental law. In the present case, he helped with the initial complaints and other pleadings, and later he worked with the other attorneys on the various appeals. [Cummings Decl. ¶¶14-33.]

### C. PLAINTIFFS' LODESTAR IS $2,378,102.68 FOR THE MERITS LITIGATION

#### *1. Current Trial Team (Trials 2 and 3)*

| | | |
|---|---|---|
| Dennis Cunningham: | 627.68 hours x $575 = | $360,916 |
| Robert Bloom: | 416.68 hours x $525 = | $218,758.05 |
| William Simpich: | 315.37 hours x $450 = | $141,917.40 |
| Ben Rosenfeld: | 165.99 hours x $300 = | $49,797.90 |
| Gordon Kaupp: | 164.94 hours x $225 = | $37,112.40 |
| Alicia Littletree (legal assistant): | 472.19 hours x $100 = | $47,218.60 |
| Josh Morsell (legal assistant): | 453.65 hours x $75 = | $34,023.90[8] |
| SUBTOTAL: | | $889,744.25 |

[8] $1,079 of this amount has already been requested via the Bill of Costs for video equipment use.

*2. First Trial Team*

| | | |
|---|---|---|
| Mark Harris: | 994.15 hours x $351.89 = | $348,379.48 |
| Macon Cowles: | 976.6 hours x $527.84 = | $515,489.82 |
| Susan O'Neill: | 660.5 hours x $267.44 = | $176,643.85 |
| Stephanie Hult: | 21.34 hours x $457.46 = | $9,764.08 |
| Catherine Davis: | 15.46 hours x $246.33 = | $3,807.21 |
| Abbot DePree (senior paralegal): | 190.07 hours x $126.68 = | $24,078.68 |
| SUBTOTAL: | | $1,078,163.12 |

*3. Appellate Team*

| | | |
|---|---|---|
| Alan Chen: | 97.52 hours x $402.25 = | $39,227.34 |
| Mark Hughes: | 368 hours x $459.71 = | $169,174.50 |
| Brendan Cummings: | 702.33 hours x $287.32 = | $201,793.46 |
| SUBTOTAL: | | $410,195.30 |

* TOTAL LODESTAR FOR MERITS LITIGATION: $2,378,102.68
(MINUS TONY SERRA'S TIME;
PLUS 8% ACROSS-THE-BOARD CUT TO MERITS HOURS;
PLUS EXTRA 10% CUT TO "PRETRIAL 2" HOURS)

## III. PLAINTIFFS ARE ALSO ENTITLED TO COMPENSATION FOR TIME SPENT ON THIS FEE PETITION ("FEES ON FEES")

In addition to requesting compensation for their attorneys' time in the merits litigation, Plaintiffs are also asking to be reimbursed for attorney time spent on this fee petition – known as "fees on fees." Webb v. Ada County, Idaho, 195 F.3d 524, 527 (9th Cir. 1999); Hernandez V. Kalinowski, 146 F.3d 196, 200 (3d Cir. 1998).

### A. HIRING FEE COUNSEL WAS NECESSARY

In the present case, it was necessary for Plaintiffs to hire outside Fee Counsel (First Amendment Project). First, Plaintiffs' current attorneys of record do not have extensive (or for some, any) experience in seeking attorneys' fees. [Cunningham Decl. ¶6.] [Bloom Decl. ¶10.] Second, an independent third-party was critical in coordinating the three teams of present and past attorneys, comprising 13 attorneys and three legal assistants. [Wheaton Decl. ¶14.] Third, and perhaps most importantly, Plaintiffs' current attorneys of record were focused on dealing with the post-trial motions, largely initiated by Defendants and critical to the fate of the case (i.e. motions for judgment as a matter of law and for a new trial following the third jury verdict). [Cunningham Decl. ¶6.] Therefore, the hiring of Fee Counsel – who could focus solely on this atypical fee petition

and who could also manage a large team of attorneys – was essential. In addition, the merits counsel have delegated substantially all responsibility for this phase to avoid any duplication. Hence, no hours are claimed for any of the senior members of the current trial team for "fees on fees" work.

**B. REDUCED HOURS SPENT ON THIS FEE PETITION[9]**

***1. Merits Attorneys***

Only three people from Plaintiffs' current trial team are claiming time for "fees on fees," which was spent on standard tasks such as providing factual and legal assistance, and assisting in the preparation of declarations.

| | |
|---|---|
| Ben Rosenfeld: | 4 hours |
| Gordon Kaupp: | 7.36 hours |
| Josh Morsell (legal assistant): | 8.74 hours |
| TOTAL: | 20.1 hours |

***2. Fee Counsel***

Plaintiffs' Fee Counsel was the First Amendment Project, comprising attorneys James Wheaton, Sophia Cope, and intern Kim Kennedy. Fee Counsel spent the following (reduced) hours on this fee petition:

| | |
|---|---|
| James Wheaton: | 113.8 hours |
| Sophia Cope: | 352.64 hours |
| Kim Kennedy (intern): | 101.02 hours |
| TOTAL: | 567.46 hours |

**C. HOURLY RATES FOR FEE COUNSEL**

James Wheaton's reasonable hourly rate is $450. Mr. Wheaton is a 1984 graduate of Boalt Hall (University of California, Berkeley). He has over 20 years of experience litigating in the areas of civil rights, consumer rights, environmental and First Amendment Law, and teaches First Amendment Law at Stanford University and University of California, Berkeley. He also has extensive experience litigating fee petitions. In the present case, he was lead Fee Counsel and was primarily responsible for strategy, working with the experts, reviewing and organizing the data, and communicating with clients and opposing counsel. The hourly rate here is the same as that recently

[9]The same 8% "billing judgment" reduction in hours that was made for the other phases has also been applied to the fee work.

awarded by the district court in Los Angeles and is that stated in the representation agreement in this case. [Wheaton Decl. ¶¶2-10, 12-15, 18.]

Sophia Cope's reasonable hourly rate is $175. Ms. Cope is a 2004 graduate of University of California, Hastings College of the Law. Ms. Cope began working for the First Amendment Project after graduation. In the present case, Ms. Cope has been responsible for all legal and factual research, and has written all the briefs for this fee petition. She also coordinated all of the many declarations and supporting documentation. [Cope Decl. ¶¶2-4.] The hourly rate here is the same as that recently awarded by the district court in Los Angeles and is that stated in the representation agreement in this case. [Wheaton Decl. ¶18.]

Kim Kennedy's proposed hourly rate is $75. Ms. Kennedy graduated from Mills College in May 2004. She is currently a second-year law student at Boalt Hall (University of California, Berkeley). She interned with the First Amendment Project during summer 2005. She was critical to the completion of the entitlement briefs. She conducted extensive factual and legal research, and helped draft documents such as objections to evidence, the Bill of Costs and declarations. [Cope Decl. ¶¶8-9.] [Wheaton Decl. ¶19.]

**D. PLAINTIFFS' LODESTAR IS $124,011.40 FOR "FEES ON FEES"**

***1. "Fees on Fees" for Plaintiffs' Merits Attorneys***

| | | |
|---|---|---|
| Ben Rosenfeld: | 4 hours x $300 = | $1,200.60 |
| Gordon Kaupp: | 7.36 hours x $225 = | $1,656.00 |
| Josh Morsell (legal assistant): | 8.74 hours x $75 = | $655.50 |
| SUBTOTAL: | | $3,512.10 |

***2. "Fees of Fees" for Fee Counsel***

| | | |
|---|---|---|
| Jim Wheaton: | 113.8 hours x $450 = | $51,211.80 |
| Sophia Cope: | 352.64 hours x $175 = | $61,711.30 |
| Kim Kennedy (intern): | 101.02 hours x $75 = | $7,576.20 |
| SUBTOTAL: | | $120,499.30 |

* TOTAL LODESTAR FOR "FEES ON FEES": $124,011.40
(MINUS DAVID GREENE'S TIME;
PLUS 8% ACROSS-THE-BOARD CUT TO FEE HOURS)

## IV. PLAINTIFFS' LODESTAR AMOUNT OF $2,502,114.08 IS STRONGLY PRESUMED REASONABLE

Taking into account the billing judgment exercised by individual attorneys, as well as the 8% across-the-board cut to the merits and fee hours, the additional 10% cut to the "Pretrial 2" hours (for a total of 18% for that phase), and the time waived for Tony Serra and David Greene, Plaintiffs' total lodestar is $2,502,114.08. [Wheaton Decl. ¶29 & Exh. C.] To provide some perspective, Plaintiffs' total incurred fees amount – including all people's time and before the billing judgment reductions – is just under $2.9 million. [Wheaton Decl. ¶29.] Taking into account the billing judgment reductions, the fees amount is just over $2.6 million. [Id.] The summarized lodestars are:

| | |
|---|---|
| * TOTAL LODESTAR FOR MERITS LITIGATION:<br>(PLUS 8% ACROSS-THE-BOARD CUT TO MERITS HOURS;<br>PLUS EXTRA 10% CUT TO "PRETRIAL 2" HOURS) | $2,378,102.68 |
| * TOTAL LODESTAR FOR "FEES ON FEES":<br>(PLUS 8% ACROSS-THE-BOARD CUT TO FEE HOURS) | $124,011.40 |
| * TOTAL LODESTAR: | $2,502,114.08 |

There is a "strong presumption" that the total lodestar value, as the "guiding light of . . . fee-shifting jurisprudence," represents the "reasonable" amount of attorneys' fees. City of Burlington v. Dague, 505 U.S. 557, 562 (1992); see also Blum, 465 U.S. at 897; Fischel v. Equitable Life Assurance Soc'y of U.S., 307 F.3d 997, 1007 (9th Cir. 2002).

As a result, the party arguing for a departure from the lodestar figure has the burden of proving that an upward or downward adjustment is "necessary." Blum, 465 U.S. at 898; Dague, 505 U.S. at 562. Thus, adjustments that reduce or augment the lodestar amount "are the exception rather than the rule." Fischel, 307 F.3d at 1007 (citation and internal quotation marks omitted); see also Gates, 987 F.2d at 1402 ("In addition to billing judgment reductions, in rare cases, a district court may make upward or downward adjustments to the presumptively reasonable lodestar").

Thus there is a strong presumption that Plaintiffs' total lodestar amount of $2,502,114.08 is a "reasonable" attorneys' fees award under §1988.

## V. THE LODESTAR AMOUNT MAY BE ADJUSTED UPWARD OR DOWNWARD BASED ON SEVERAL FACTORS

### A. FACTORS THAT MAY ADJUST THE LODESTAR

Once the lodestar amount is calculated, and the presumptively reasonable fee obtained, a district court may adjust the lodestar upward or downward based on factors that have not already been considered in figuring the lodestar. Cunningham, 879 F.2d at 484. "The applicant must present specific evidence demonstrating that any factor relied upon is not subsumed within the basic fee." Stewart v. Gates, 987 F.2d 1450, 1453 (9th Cir. 1993), citing Pa. v. Del. Valley Citizens' Council, 478 U.S. 546, 567-68 (1986).[10]

There is considerable confusion in the case law regarding which factors are "subsumed" within the lodestar figure – meaning that the number of hours and the hourly rates should reflect these considerations – and what factors may be analyzed separately to enhance or reduce the lodestar. In reviewing the case law, it appears that half of these factors are now subsumed within the lodestar calculation.[11]

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[10]Twelve factors originally found in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir.1974) were later adopted by the Ninth Circuit, Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir.1975), and the Supreme Court, Hensley, 461 U.S. at 430. The original twelve factors are: 1) the time and labor required; 2) the novelty and difficulty of the questions; 3) the skill requisite to perform the legal service properly; 4) the preclusion of employment by the attorney due to acceptance of the case; 5) the customary fee; 6) whether the fee is fixed or contingent; 7) time limitations imposed by the client or the circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation, and ability of the attorneys; 10) the undesirability of the case; 11) the nature and length of the professional relationship with the client; and 12) awards in similar cases. Hensley, 461 U.S. at 430 n.3, 434 n9.

[11]Factor 2, the novelty and difficulty of the questions, is subsumed. Blum, 465 U.S. at 898-99 ("Neither complexity nor novelty of the issues . . . is an appropriate factor in determining whether to increase the basic fee award."); City of Burlington v. Dague, 505 U.S. 557, 562 (1992) (stating that the difficulty in establishing the legal and factual merits of a claim is "ordinarily reflected in the lodestar – either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so").

Factor 1, the time and labor required, Factor 3, the skill requisite to perform the legal service properly, and Factor 9, the experience, reputation, and ability of the attorneys, appear to all be subsumed within the lodestar calculation. Blum, 465 U.S. at 899 (stating that the "'quality of representation' . . . generally is reflected in the reasonable hourly rate. It, therefore, may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional'"); Morales, 96 F.3d at 364 n.9 (discussing "special skill and experience of counsel").

Factor 6, whether the fee is fixed or contingent, is subsumed. Dague, 505 U.S. at 567 (holding that an "enhancement for contingency is not permitted under the fee-shifting statutes"); Davis v. City and County of San Francisco, 976 F.2d 1536, 1549 (9th Cir.1992).

The remaining factors are: Factor 4, the preclusion of employment by the attorney due to acceptance of the case, Factor 7, time limitations imposed by the client or the circumstances, Factor 10, the undesirability of the case, Factor 11, the nature and length of the professional relationship with the client, and Factor 12, awards in similar cases. At least one district court found that the preclusion of other employment, time limitations and the undesirability of the case (Factors 4, 7 and 10 respectively) bumped the attorneys' fee award upward. Stewart, 987 F.2d at 1454.

Ultimately, determining which of the Johnson factors are subsumed within the lodestar calculation and which ones may be considered separately is not important. While "[a]djusting the lodestar on the basis of subsumed reasonableness factors after the lodestar has been calculated, instead of adjusting the reasonable number of hours or reasonable hourly rate at the first step, i.e. when determining the lodestar, is a disfavored procedure," "as long as the district court only makes one adjustment per factor, either before or after the lodestar calculation, we have found such an error to be harmless." Morales v. City of San Rafael, 96 F.3d 359, 364 n.9 (9th Cir. 1996)..

Furthermore, a district court is not limited by these 12 factors, but may instead consider all the facts of the case in making its attorneys' fee decision. Hensley, 461 U.S. at 429; Traditional Cat Ass'n, Inc., v. Gilbreath, 340 F.3d 829, 834 (9th Cir. 2003).

**B. "RESULTS OBTAINED" AND OTHER FACTORS**

The "results obtained" or the degree of success (Factor 8) is the "most critical factor" in determining what is a "reasonable" fee under §1988. Hensley, 461 U.S. at 436. As this Court is well aware, while "primary consideration" must be given to Plaintiffs' monetary success, specifically, "the amount of damages awarded as compared to the amount sought," Farrar v. Hobby, 506 U.S. 103, 114 (1992), non-monetary success is also factored in. And although this factor is often subsumed within the lodestar calculation, Blum, 465 U.S. at 900, Morales, 96 F.3d at 364 n.9 (*see supra* Part V.A. n.11), later reducing the lodestar to account for limited success is not an abuse of discretion, as long as the district court does not account for limited success more than once. Corder v. Gates, 947 F.2d 374, 378 (9th Cir. 1991).

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Factor 8, the amount involved and the results obtained, is subsumed within the lodestar calculation. Blum, 465 U.S. at 900; Morales, 96 F.3d at 364 n.9. (*But see infra* Part V.B.)

***1. Plaintiffs' Overall Success***

While Plaintiffs "obtained the lowest possible degree of monetary success," this Court rightly found that Plaintiffs' "overall success" was not *de minimis,* and thus Plaintiffs are entitled to attorneys' fees under §1988. [Order Re: Post-Trial Motions and Plaintiffs' Entitlement to Attorneys' Fees (August 9, 2005) at 10.]

As this Court found, Plaintiffs "did not seek a specific amount of compensatory damages, nor were monetary damages their stated objective." [Id.] Thus, while Plaintiffs were awarded nominal damages, the difference between the amount of damages awarded and the amount sought is less significant. By securing a jury verdict that Defendants' use of pepper spray against them was unconstitutional excessive force under the Fourth Amendment, Plaintiffs prevailed on the merits of this case – they achieved their primary goal.

Additionally, as this Court found [id. at 11], Plaintiffs achieved tangible results: 1) the two Ninth Circuit Headwaters decisions, which reversed the directed verdict and denied Defendants qualified immunity, are binding precedent in this circuit, and – as Plaintiffs previously argued – may be used as persuasive support for the conclusion that the use of pepper spray against peaceful protestors constitutes excessive force; 2) the California Legislature responded to this case by passing Penal Code §13514.5; 3) the Commission on Peace Officer Standards and Training (P.O.S.T.), a California agency, took administrative action by updating its guidelines and training materials regarding to the use of police force in civil disobedience situations; and 4) perhaps most importantly, there is "no doubt" that this case – the lengthy litigation and the ultimate verdict – created a deterrent effect, not only on Defendants but also on the greater law enforcement community. See Benton v. Or. Student Assistance Comm'n, 2005 WL 2036224 at 5-6 (9th Cir. 2005) (holding that in a nominal damages case, a public purpose or goal must be achieved to justify an award of attorneys' fees; and suggesting that a finding of a constitutional violation under a current statute would guide a defendant's conduct in the future, thereby supporting an award of attorneys' fees).

***2. Plaintiffs Propose a 25% Reduction in the Total Lodestar to Account for Limited Success***

While Plaintiffs are proud of the overall success of this case, Plaintiffs acknowledge that the nominal damages award justifies some reduction in the total lodestar. "There is no precise rule or

formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment." Hensley, 461 U.S. at 436-37.

With this in mind, Plaintiffs suggest that a 25% reduction in the total lodestar is a reasonable way to address Plaintiffs' mixed success in this case: that while they were awarded nominal damages by the jury, they succeeded on an significant and novel constitutional claim, and achieved several other tangible results. This 25% reduction is in addition to the billing judgment exercised by individual attorneys, the 8% across-the-board cut to the merits and fee hours, the additional 10% cut to the "Pretrial 2" hours (for a total of 18% for that phase), and the time waived for Tony Serra and David Greene. [Wheaton Decl. ¶28.] Thus, Plaintiffs are proposing an overall cut of more than 33%.

A 25% reduction to the lodestar to account for limited success appears to be a reasonable way of determining attorneys' fees in a case like this one.[12] For example, in Corder, the jury had found that the police violated the Fourth Amendment (by way of §1983) when they detained the plaintiffs and searched their residence. 947 F.2d at 377. The Ninth Circuit suggested that the 20% reduction in the lodestar imposed by the district court to account for limited success might be too much. Id. at 380.

On one hand, the plaintiffs were awarded nominal damages ($6 in compensatory damages) and prevailed against only three of the 50 initial defendants. Id. at 376-77, 79. On the other hand, the plaintiffs achieved other success ($24,000 in punitive damages), and "all of the claims arose from a 'common core of facts,' the search of plaintiffs' house [and] all of the claims are 'based on related legal theories,' the Fourth Amendment." Id.

[12]There are cases that reduce the lodestar by as much as 50% to account for limited success. However, these cases are not entirely comparable to the present case because they involve types of relief not relevant here. See, e.g., Lytle v. Carl, 382 F.3d 978, 989 (9th Cir. 2004) (upholding a 25% reduction in the lodestar to account for limited success: limited jury award and failure to prevail on all claims); Jones v. Espy, 10 F.3d 690, 691 (9th Cir.1993) (upholding a 33% reduction in the claimed hours to account for unspecified "limited success," though the case involved a challenge to the Food Stamp program and resulted in a partial settlement and summary judgment on the remaining issues); Harris v. John Marhoefer, 24 F.3d 16, 18-19 (9th Cir. 1994) (upholding a 50% reduction in the lodestar to account for limited success: plaintiff was awarded $25,000 in damages but expressly sought $5 million); but see Sorenson, 239 F.3d at 1147 (holding that the district court did not abuse its discretion by refusing to reduce the lodestar because "[a] plaintiff may obtain excellent results without receiving all the relief requested," citing Hensley, 461 U.S. at 435 n.11).

The Court of Appeals stated, "It is clear that a 20% reduction for limited success is in some cases sustainable . . . On the other hand, our cases also make clear that the district court could have awarded plaintiffs the full lodestar amount . . . [because] district courts have considerable discretion in determining attorney's fees." Id. at 378-80.[13] See also Wilcox v. City of Reno, 42 F.3d 550, 555 (9th Cir. 1994) (upholding, in another excessive force case, an *overall* reduction of 33% ($66,535 down from over $100,000 requested) in attorneys' fees in light of the fact that the plaintiff obtained nominal damages and other tangible results). [See City of Reno Appellate Brief, 1993 WL 13103229.]

Similarly, in the present case, Plaintiffs also received nominal damages ($8), but they prevailed against the most culpable and influential of the Defendants (i.e. the law enforcement entities and supervisors). Plaintiffs also achieved significant other successes, as summarized above (see *supra Part* V.B.1.), and they achieved their primary goal by ultimately prevailing on their core claim: that the use of pepper spray against these peaceful protestors constituted excessive force under the Fourth Amendment.

The proposed 25% reduction in the total lodestar is especially reasonable given that there are other factors present that may be applied to enhance the lodestar: Factor 4, the preclusion of employment by the attorney due to acceptance of the case, Factor 7, time limitations imposed by the client or the circumstances, Factor 10, the undesirability of the case.

This case was so involving for such a long time that some of Plaintiffs' attorneys were precluded from accepting other work. [Cunningham Decl. ¶8.] [Bloom Decl. ¶9.] [Simpich Decl. ¶6.] [Cowles Decl. ¶¶27-29.] [Harris Decl. ¶10.] The attorneys also faced significant time constraints and other challenges with Judge Walker. The first trial team had to deal with an inexplicably accelerated trial schedule, which caused them more stress than necessary. [Cowles Decl. ¶¶24-26.] [Harris Decl. ¶10.] Judge Walker's initial order, over Plaintiffs' objection, to move the trial to Eureka followed his directed verdict in favor of Defendants. Plaintiffs ultimately had no choice other than to fight both on appeal and then make the rarely successful attempt to remove Judge Walker

[13] After two remands for different reasons, including reconsideration in light of Farrar, the district court eventually decided upon a 30% reduction of the lodestar to account for limited success, which was not, apparently, appealed. Corder v. Gates, 104 F.3d 247, 248 (9th Cir. 1996). However, the protracted Corder litigation illustrates how confusing and, ultimately, purely discretionary the attorneys' fees process can be.

from the case. While Plaintiffs succeeded on all fronts, these motions and appeals added a new sense of undesirability to the case. [Cunningham Decl. ¶9.] [Bloom Decl. ¶7.] [Rosenfeld Decl. ¶11.] In addition, of course, as in many cases of excessive force, Plaintiffs had engaged in allegedly unlawful behavior, a factor that reportedly partially informed the verdict.

## VI. PLAINTIFFS REQUEST A TOTAL AWARD OF $1,995,490.69 IN ATTORNEYS' FEES

As mentioned above (*see supra* Part IV.), Plaintiffs' total incurred fees amount – including all people's time and before the billing judgment reductions – is just under $2.9 million. [Wheaton Decl. ¶29.] Taking into account the billing judgment reductions, the fees amount is just over $2.6 million. [Id.] The final analysis is summarized as follows:

| | |
|---|---|
| * TOTAL LODESTAR FOR MERITS LITIGATION:<br>(PLUS 8% ACROSS-THE-BOARD CUT TO MERITS HOURS;<br>PLUS EXTRA 10% CUT TO "PRETRIAL 2" HOURS) | $2,378,102.68 |
| * TOTAL LODESTAR FOR "FEES ON FEES":<br>(PLUS 8% ACROSS-THE-BOARD CUT TO FEE HOURS) | $124,011.40 |
| * TOTAL LODESTAR: | $2,502,114.08 |
| *** TOTAL LODESTAR REDUCED BY 25%:[14]<br>(I.E. FINAL AMOUNT REQUESTED)** | **$1,995,490.69** |

While not diminishing the relevance of the above analysis, "the heart of this inquiry is whether Plaintiff's accomplishments in this case justify the fee *amount* requested. There is no precise rule or formula for making these determinations." Thomas v. City of Tacoma, 410 F.3d 644, 650 (9th Cir. 2005) (citations and internal quotations omitted) (emphasis added). Thus, the attorneys' fees determination is ultimately a results-oriented exercise in discretion for the district court. In the present case, a 25% reduction in the total lodestar – on top of the billing judgment reductions and waived time – results in a total fee request of $1,995,490.69. This amount reasonably reflects Plaintiffs' overall success in this litigation.

[14]The Ninth Circuit has held that it is not an abuse of discretion for a district court to reduce the "fees on fees" award in the same way (i.e. by the same percentage) it reduces the merits or "merits" award to account for limited success. Schwarz v. Secretary of Health & Human Services, 73 F.3d 895, 909 (9th Cir.1995). However, as a matter of persuasive authority, other courts have held that adjusting the "fees on fees" lodestar in the same manner as the "merits" lodestar is not appropriate because fee counsel had nothing to do with achieving the "results obtained" in the merits litigation. See, e.g., Graham v. DaimlerChrysler Corp., 34 Cal.4th 553, 582 (2004). In the present case, however, to avoid an appearance of self-dealing by Fee Counsel and to present the Court with the most reasonable requested amount possible, the 25% reduction is being applied to the "fees on fees" lodestar as well as to the lodestar for the merits litigation.

An additional index of the reasonableness of a fee request can be the amount the opposing party spent in losing the case. Ferland, 244 F.3d at 1151. In the present case, that amount is $738,057. [Wheaton Decl. ¶31.] However there is strong evidence that defense counsel's hourly rates are a fraction of the reasonable hourly rates for Plaintiffs' attorneys. [Id. at ¶32.] If the same hourly rates were to be applied to defense counsel's time, the evidence suggests that the full value of the services rendered to Defendants exceeds $2.2 million. [Id.] It would be entirely reasonable that Plaintiffs' request for attorneys' fees is higher than the attorneys' fees incurred by Defendants because "opposing parties do not always have the same responsibilities under the applicable rules, nor are they necessarily similarly situated with respect to their access to necessary facts, the need to do original legal research to make out their case, and so on." Ferland, 244 F.3d at 1151. And it would not be unreasonable for this Court to conclude that Plaintiffs' attorneys "who, after all, did prevail – spent more time because [they] did better work." Id.

## VII. EXPENSES OTHER THAN TAXABLE COSTS

Expenses that are "not normally taxable as costs" (e.g., transportation expenses) under the Federal Rule of Civil Procedure 54 and the corresponding Civil Local Rules, but which are "out-of-pocket expenses incurred by an attorney which would normally be charged to a fee paying client are recoverable as attorney's fees under section 1988." Chalmers, 796 F.2d at 1216 n7.

In the present case, Plaintiffs's Bill of Costs (filed June 30, 2005) is currently pending before this Court. Additionally incurred non-taxable expenses total $80,539.80. These non-taxable expenses are itemized as Exhibit D, attached to the Declaration of Sophia S. Cope. However, a breakdown by attorney is as follows:

| | |
|---|---|
| Macon Cowles: | $55,199.69 |
| Dennis Cunningham: | $13,611.60 |
| Mark Harris: | $8,242.12 |
| Mark Hughes: | $3,486.39 |
| SUBTOTAL: | $80,539.80 |
| Fee Expert Richard Pearl: | $3,489.75 (7.05 hours x $495) [Pearl Decl. ¶7 & Exh. B.] |
| TOTAL: | $84,029.55 |

## VIII. POST-JUDGMENT INTEREST

Plaintiffs are entitled to post-judgment interest "from the date of the entry of judgment" pursuant to 28 U.S.C. §1961. This "statute applies to awards of attorneys' fees and costs under section 1988." Friend v. Kolodzieczak, 72 F.3d 1386, 1391 (9th Cir. 1995). When the issues of entitlement and amount are bifurcated or otherwise determined separately, "[i]nterest runs from the date that entitlement to fees is secured, rather than from the date that the exact quantity of fees is set." Id. at 1392. This rule also applies to interest on costs. Id. at n.6. Therefore, Plaintiffs are entitled to post-judgment interest from the date this Court ruled that Plaintiffs are entitled to attorneys' fees under §1988: August 9, 2005.

## CONCLUSION

Plaintiffs believe that an award of $1,995,490.69 in attorneys' fees, plus $84,029.55 for non-taxable expenses,[15] is reasonable under the circumstances of this case.

DATED: September 16, 2005 BY: _____

Sophia S. Cope
FIRST AMENDMENT PROJECT
Fee Counsel for Plaintiffs

[15]Plaintiffs have separately requested $22,272.27 in the Bill of Costs.