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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

George Rudebusch, et. al., Plaintiffs, vs. State of Arizona; Northern Arizona University; The Arizona Board of Regents, Defendants.	No. 95-CV-1313-PCT-RCB No. 96-CV-1077-PCT-RCB **ORDER**

Currently pending before the court is plaintiffs' motion for attorneys' fees in the amount of $523,309.50 and costs in the amount of $90,539.52 brought pursuant to 42 U.S.C. § 2000e-5(k). Mot. (doc. 337) at 8. For the reasons set forth below, the court grants plaintiffs' motion, but not for the requested amounts.

Background

Assuming familiarity with the factual and procedural history of this action, the court will recount only those aspects of this litigation which are relevant to the narrow fees and costs issues

which this motion presents.

On June 30, 1995, the named plaintiff, George Rudebusch, "along with a class of female and non-minority male professors" sued, among others, then-President of Northern Arizona University ("NAU") "in his individual capacity under 42 U.S.C. §§ 1981 and 1983 for equal protection violations[.]"[1] Rudebusch v. Hughes, 313 F.3d 506, 513 (9th Cir. 2002). Slightly less than a year later, on May 2, 1996, plaintiff Rudebusch and forty white male professors sued NAU and the Arizona Board of Regents under Title VII ("the Title VII action") in a related action, CIV 96-1077. On November 1, 1996, the court consolidated these two actions.

During litigation which spanned slightly more than a decade, in a mandate dated December 18, 2003, the Ninth Circuit, *inter alia*, affirmed the judgment in favor of defendants in the class action. See Doc. 344 at 2 (citing doc. 259). Clearly then, the plaintiffs in the class action were not successful. The Title VII litigation continued, however. Eventually, on June 7, 2006, the court granted plaintiffs' cross-motion for summary judgment on the issue of damages in the Title VII action. Doc. 316 at 23. Thus, unlike the class action, ultimately the plaintiffs were successful in the Title VII action. Following the submission of additional evidence as the June 7, 2006 order directed, on February 23, 2007, the court entered judgment in plaintiffs' favor in the Title VII action, awarding plaintiffs damages of approximately two million dollars.

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[1] For ease of reference, hereinafter this case, CIV 95-1313, shall be referred to as "the class action."

Discussion

Before addressing the merits, the court is compelled to comment upon plaintiffs failure to comply with LRCiv. 54.2 in making this attorneys' fee motion. This omission is particularly glaring because both the June 7, 2006, summary judgment order, as well as the judgment reflecting that order, unequivocally state that plaintiffs' request for attorneys' fees was denied because it "was not properly filed in accordance with Local Rule 54.2." See Doc. 344 at 3; and Doc. 316 at 23. Thus plaintiffs were specifically advised, not once, but twice, of the necessity of complying with that Rule, yet they did not do so.

For example, plaintiffs did not attach a "Statement of Consultation" to their motion for attorneys' fees as the Local Rules require. Under LRCiv. 54.2(d)(1), "[n]o motion for [an] award of attorneys' fees will be considered unless" such a Statement is attached to the supporting memorandum. LRCiv. 54.2(d)(1). The court will overlook that procedural irregularity this time; but counsel are forewarned that future fee motions must include this Statement, or the court will not consider them.

More significantly, plaintiffs did not submit all of the other "supporting documentation" which LRCiv. 54.2 requires. See LRCiv. 54.2(d). Plaintiffs did file supporting affidavits from several attorneys, but those affidavits are of limited use because, for the most part, they pertain only to the issue of the hourly rates sought. None of those affiants avers, as the Local Rules require, that the attorneys "reviewed and . . . approved the time and charges set forth in the task-based itemized

statement and that the time spent and expenses incurred were reasonable and necessary under the circumstances." See LRCiv. 54(d)(4)©. Nor did any of the affiants aver that they "exercised 'billing judgment[]'" in accordance with LRCiv. 54(d)(4)©. Finally, none of the affiants "identif[ied] all adjustments, if any, which may have been made, and specifically, . . . state[d] whether the[y] . . . eliminated unnecessary, duplicative and excessive time, [and/or] deleted certain categories of time[.]" See LRCiv. 54(d)(4)©. The Ninth Circuit has cautioned that district courts "may not 'uncritically' accept the number of hours claimed by the prevailing party, even if actually spent on the litigation[.]" Carson v. Billings Police Department, 470 F.3d 889, 893 (9th Cir. 2006) (internal quotations, citations and footnotes omitted). Thus plaintiffs' failure to fully comply with LRCiv. 54.2 made unnecessarily arduous the court's task of ensuring, as it must, "that the time actually spent was reasonably necessary." See id. ***I. Attorneys' Fees***

In accordance with 42 U.S.C. § 2000e-5(k), a district court, "in its discretion, may allow the prevailing party" to recover its "reasonable attorney's fee (including expert fees) as part of the costs" in a Title VII action. See also Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412, 418-19 (1978). The first inquiry is whether a plaintiff is a "prevailing party" within the meaning of that statute. See Gerling Global Reinsurance v. Garamendi, 400 F.3d 803, 806 (9th Cir. 2005) (in reviewing an

attorneys' fee award under 42 U.S.C. § 1988,[2] "[t]he first issue is whether plaintiffs constitute 'prevailing parties[]'). The second inquiry pertains to the reasonableness of the fee award.

A. "Prevailing Party"

Defendants start from the premise that despite consolidation, the class action and the Title VII action retain their separate identities. See, e.g., Boardman Petroleum, Inc. v. Federated Mut. Ins. Co., 135 F.3d 750, 752 (11th Cir. 1998) ("[C]onsolidation of cases . . . does not strip the cases of their individual identities."); Harrah's Club v. Van Blitter, 902 F.2d 774, 775 (9th Cir. 1990) ("The two actions remained separate in identify despite their consolidation for purposes of trial.") Therefore, defendants do not believe that it is "appropriate" to combine those actions for purposes of determining the fees award herein. See Resp. (doc. 342) at 11. Based upon that premise, defendants readily concede that "[t]he Title VII plaintiffs are prevailing parties[,]" and thus entitled to recover reasonable attorney's fees under section 2000e-5(k). Id. at 3.

In contrast, because plaintiffs were "unsuccessful" in the class action, defendants contend that plaintiffs were not prevailing parties there. Consequently, defendants assert that

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[2] "[T]he attorney's fees provision in 42 U.S.C. § 1988 and . . . .the attorney's fees provision in Title VII, § 2000e-5(k), . . . are interpreted to be the same." Marbled Murrelet v. Babbitt, 182 F.3d 1091, 1095 n.2 (9th Cir. 1999) (citing Hensley v. Eckerhart, 461 U.S. 424, 433 n. 7 (1983)). Thus, case law construing section 1988 applies with equal force to this fee motion brought pursuant to section 2000e-5(k). Indeed, the Supreme Court has "declared that the standard announced in *Hensley* [construing § 1988] [is] to be 'generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" Aguirre v. Los Angeles Unified School District, 461 F.3d 1114, 1118 (9th Cir. 2006) (quoting Hensley, 461 U.S. at 433 n.7).

plaintiffs are not entitled to a statutory fee award in the class action. Thus, deducting time plaintiffs expended "solely on th[at] unsuccessful" class action, *i.e.* $156,943.75, defendants assert that plaintiffs are entitled to a fee award of "not greater than $243,555.25," or "47% of Plaintiff's total request." Id. at 1 and 11. "Alternatively," even treating the class action and Title VII actions as one, defendants maintain that "[p]laintiff's limited success in both cases justifies this [same 50%] reduction[.]" Id. at 1.

Recognizing that they were not prevailing parties in the class action, plaintiffs expressly "concede" that the $156.943.75 reduction for fees clearly incurred therein is appropriate. See Reply (doc. 343) at 1. Despite that concession, there remains a sizeable discrepancy between the amount of fees which plaintiffs are seeking and those to which defendants believe plaintiffs are entitled.

The bulk of that difference arises from what the parties have termed "commingled" fees. These commingled fees are a result of the fact that when billing, plaintiffs did not distinguish between fees incurred with respect to the Title VII action and those incurred with respect to the class action.[3] Due

[3] Consolidation does not excuse plaintiffs' commingling of time because, as mentioned above, despite consolidation, the Title VII and class actions retained their separate identities. Furthermore, in Hensley the Supreme Court directed that attorneys "should maintain billing records in a manner that will enable a reviewing court to identify distinct claims[.]" Hensley, 461 U.S. at 437. Obviously, plaintiffs' billing records in the present case were not kept in such a manner.

As an aside, the court observes that like the Supreme Court, " the Ninth Circuit does not "'view with sympathy any claim that a district court abused its discretion in awarding unreasonably low attorney's fees in a suit in which plaintiffs were only partially successful if counsel's records do not provide a

to this "commingling," defendants argue that the "remaining . . . time should be discounted based on the overall success of the two cases." Resp. (doc. 342) at 9.

Examining the remaining commingled time "as if it were expended in the same case[,]" defendants point out that there were a total of 261 plaintiffs. Id. Defendants reason, however, that of those 261 plaintiffs, only 40 "obtained relief under one of the claims[]" – the Title VII claim. Id. Defendants further reason, because "[o]nly 40" of the plaintiffs, "or 15%, obtained any relief[,] . . . a 50% reduction in the remaining fees sought "is eminently fair[.]" Id. at 10. From defendants' viewpoint, plaintiffs' limited relief "could support a much larger reduction[,]" but "the 50% figure more accurately reflects the time and effort spent on Title VII-related issues and common factual issues versus [the class action] issues." Id. Employing a 50% reduction, defendants calculate that plaintiffs should recover $110,524.75 for the remaining "commingled time[.]" Id.

Disregarding the issue of whether the court should view this as one or two actions, plaintiffs counter that a 50% reduction is improper because "the facts and legal theories in the class action . . . were interrelated with the facts and legal theories in the Title VII case." Reply (doc. 343) at 3. More specifically, plaintiffs explain that the successful Title VII

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proper basis for determining how much time was spent on particular claims[.]'" Schwarz v. Secretary of Health & Human Services, 73 F.3d 895, 906 (9th Cir. 1995) (quoting Hensley, 461 U.S. at 437 n. 12) (other quotation marks and citation omitted).

claims and the unsuccessful class action claims "both arose out of the same course of conduct: the exclusion of non-minority males from any raises." Id. at 4. Therefore, plaintiffs contend that a 50% reduction is improper.

By the same token though, plaintiffs are willing to concede that a slight reduction of 5% or $11,052.47 is proper. This minimal reduction represents time which plaintiffs attribute to the "unrelated" part of the class action, *i.e.* the females' claim that their raise was less than that of the minority males. Id. This reduction also takes into account "minor expenditures of time to argue, and prepare separate jury instructions for the slightly . . . different legal theories pertaining to the class action[.]" Id. At the end of the day then, plaintiffs believe that they are entitled to $209,997.03 in attorneys' fees for the "commingled" time, and not the lesser amount of $110,524.75, which defendants are so strongly urging.

In addition to the commingled time, the parties disagree with respect to the amount of fees to which plaintiffs should be allowed to recover for time expended by attorney Rosemary Cook. Defendants are seeking a $14,500.00 reduction in her time due to inadequate documentation in 1996. Plaintiffs did not directly respond to this argument. Instead, based upon a supplemental affidavit from Ms. Cook, wherein she avers that she worked only on the Title VII action, plaintiffs simply state "that the Court should not exclude the $14,500.00 claim for 1996[.]" Reply (doc. 343) at 4.

The court will separately address these disputed issues in

the context of determining the reasonableness of the fees sought. It will also address plaintiffs' request, made for the first time in their Reply, that they are entitled to additional fees for time expended since the filing of this motion. Lastly, the court will address plaintiffs' request for costs.

B. Reasonableness of Fees

"To determine reasonable attorney's fees . . . , the district court should first determine the lodestar amount by calculating the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Dang v. Cross, 422 F.3d 800, 812 (9th Cir. 2005) (internal quotation marks, citations and footnote omitted). "'Th[is] lodestar determination has emerged as the predominate element of the analysis' in determining a reasonable attorney's fee award.'" Doe v. Keala, 361 F.Supp.2d 1171, 1182 (D. Hawai'i 2005) (quoting Morales v. City of San Rafael, 96 F.3d 359, 363 (9th Cir. 1996)). "In determining the appropriate lodestar amount, the district court may exclude from the fee request any hours that are 'excessive, redundant, or otherwise unnecessary.'" Welch v. Metropolitan Life Ins. Co., 480 F.3d 942, 946 (9th Cir. 2007) (quoting Hensley, 461 U.S. at 434).

Once the court determines the lodestar amount, it "'then assesses whether it is necessary to adjust th[at] presumptively reasonable . . . figure on the basis of the Kerr factors that are not already subsumed in the initial lodestar calculation.'" Aloha Airlines v. Mesa Air Group, Inc., 2007 WL 2320672, at *4 (D.Hawai'i Aug. 10, 2007) (quoting Morales, 96 F.3d at 363-64)

(footnotes omitted). The original Kerr factors, based upon the case of the same name, are: "(1) the time and labor required; (2) the novelty and difficulty of the questions involved: (3) the skill requisite to perform the legal service properly; (4) the preclusion of other 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 912) awards in similar cases." Id., at *4, n.2 (citing Kerr v. Screen Guild Extras, Inc., 526 F.2d 67, 70 (9th Cir. 1975)).

In the present case, plaintiffs suggest that the court consider Kerr factors four, five, six and ten. See Mot. (doc. 337) at 7. However, factor six – the fixed or contingent nature of the fee – is "irrelevant in the fee calculation[.]" EEOC v. Harris Farms, 97 FEP Cases 1447, 1450 (E.D.Cal. 2006) (citing City of Burlington v. Dague, 505 U.S. 557 (1992)). Thus, the court declines to consider that factor. Moreover, because plaintiffs did not analyze how the Kerr factors, which they mention only in passing, should impact the "presumptively reasonable lodestar figure," those factors also will not be part of the court's calculations herein. Cf. id. (quoting Cairns v. Franklin Mint Co., 292 F.3d 1139, 1158 (9th Cir. 2002)) ("[T]he court 'need not consider all . . . Kerr factors, but only those called into question by the case at hand and necessary to support

the reasonableness of the fee award.'"); Jankey v. Beach Hut, 2006 WL 4569361, at *3 (C.D.Cal. 2006) (citing Hensley, 461 U.S. at 363-64) (Kerr "factors irrelevant to the case need not be considered[]").

The court's decision not to consider the Kerr factors which plaintiffs identified is justified on the additional basis that only in "exceptional cases" may a "district court . . . adjust the 'presumptively reasonable' lodestar figure based upon th[os]e . . . factors that have not been subsumed in the lodestar calculation." Harris Farms, 97 FEP Cases at 1450 (citing, *inter alia*, Dang, 422 F.3d at 812). The present case is not such a "rare" or "exceptional" case. See id. (citing, *inter alia*, Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986)). Thus, there is no need in the present case to "adjust the lodestar upward or downward using a 'multiplier' based on factors not subsumed in the initial calculation of the lodestar." Id. (citing, *inter alia*, Blum v. Stenson, 465 U.S. 886, 898-901 (1984)).

Certain Kerr factors are "subsumed" in making the initial lodestar calculation. Those factors are: "'(1) the novelty and complexity of the issues; (2) the special skill and experience of counsel; (3) the quality of representation . . . (4) the results obtained[.]'" Id. (citing, *inter alia*, Blum, 465 U.S. at 898-00). The final "subsumed" factor, the "results obtained," is the focus of the parties' respective arguments herein. Thus, following the Ninth Circuit's "favored procedure[,]" this court will "consider the extent of the plaintiff[s'] success in making

its initial determination of hours reasonably expended at a reasonable rate, and not in subsequent adjustments to the lodestar figure." Id. (citing, *inter alia*, Corder v. Gates, 947 F.2d 374, 378 (9th Cir. 1991)).

1. Results Obtained

As just noted, calculation of the lodestar "requires the [c]ourt to consider the 'results obtained'[.]" Keala, 361 F.Supp.2d at 1185 (citing Morales, 96 F.3d at 364). In fact, the Supreme Court deems "the degree of success obtained[]" to be "*the most critical factor* in determining the reasonableness of a fee award[.]" Hensley, 461 U.S. at 436 (emphasis added). The "results obtained" factor "is particularly crucial where[,]" as here, "a plaintiff is deemed 'prevailing' even though he succeeded on only some of his claims for relief." Id. at 434; see also Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 790 (1989) (emphasis in original) ("[T]he *degree* of the plaintiff's success in relation to the other goals of the lawsuit is a factor critical to the determination of the size of a reasonable fee[.]" Succinctly put, "[t]he result is what matters." Id. at 435 (footnote omitted).

a. Related v. Unrelated Claims

Based upon Hensley and its progeny, the Ninth Circuit has adopted "a two-step process for determining the appropriate reduction for 'limited success'[.]" Webb v. Sloan, 330 F.3d 1158, 1169 (9th Cir. 2003). The first step looks at "whether the plaintiff fail[ed] to prevail on claims that were unrelated to the claims on which he succeeded[.]" Dang, 422 F.3d at 812

(internal quotation marks and citations omitted). Under the first step a district court must "determine whether the successful and unsuccessful claims were unrelated." Id. at 813 (citation omitted). "Claims are *unrelated* if the successful and unsuccessful claims are distinctly different *both* legally *and* factually, . . . ; claims are related, however, if they involve a common core of facts *or* are based on related legal theories." Id. (internal quotation marks and citations omitted) (emphasis in original). Therefore, as the Ninth Circuit has stressed, there is no "*require*[*ment*] [of] commonality of both facts *and* law before concluding that unsuccessful and successful claims are related." Webb, 330 F.3d at 1168 (emphasis in original). "At bottom, the focus is on whether the unsuccessful and successful claims arose out of the same course of conduct." Dang, 422 F.3d at 813 (internal quotation marks and citation omitted). "If they did not," then the Ninth Circuit has held that "the hours expended on the unsuccessful claims should not be included in the fee award." Id. (citations omitted).

In the present case, defendants readily admit that this "relatedness test is met[]" in that both the Title VII and the class actions "arose from a common core of facts – the 1993 equity increases[.]" Resp. (doc. 342) at 11. In light of that concession, with which the court concurs, it will not reduce plaintiffs' fee award under the first step of the Ninth Circuit's analysis for deciding the "appropriate reduction for limited success." See Webb, 330 F.3d at 1169.

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b. "Significance of Overall Relief"

Having found that the Title VII and class action claims are related, the court proceeds to step two of the analysis wherein it "'evaluates the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.'" Dang, 422 F.3d at 813 (internal quotation marks and citation omitted). "If the plaintiff obtained excellent results, full compensation may be appropriate, but if only partial or limited success was obtained, full compensation may be excessive[.]" Schwarz, 73 F.3d at 902 (internal quotation marks and citations omitted). "There is no precise rule or formula for making these determinations." Hensley, 461 U.S. at 436. At the same time though, the Ninth Circuit recognizes that "[a] discretionary reduction to reflect limited success against some of the defendants is appropriate at this step[;]" Keala, 361 F.Supp.2d at 1185 (citing Webb, 330 F.3d at 1169); but the Ninth Circuit "does not sanction a proportionate reduction of the lodestar amount based on the number of defendants dismissed." Id. at 1185 n. 17. "At the heart of this inquiry is whether Plaintiff's accomplishments . . . justify the fee amount requested." Thomas v. City of Tacoma, 410 F.3d 644, 649 (9th Cir. 2005) (internal quotation marks and citation omitted).

Defendants did not directly address this second step. Instead, they harken back to the general argument that plaintiffs were only "partially successful" in that 221 of the 261 plaintiffs "obtained no relief[,]" and so there should be a 50% fee reduction.

Similarly, plaintiffs did not mention, let alone analyze, the "significance of the overall relief" obtained. Rather, plaintiffs devoted their Reply primarily to the "relatedness" issue, which is puzzling given defendants' concession on that point. Plaintiffs' failure to address the second step also is troubling because "[t]he bulk of discretion retained by the district court lies in th[is] second, . . . , inquiry." Thomas, 410 F.3d at 649-50 (citation omitted); see also Hensley, 461 U.S. at 437 ("[T]he district court should make clear that it has considered the relationship between the amount of the fees awarded and the results obtained.") For this same reason, defendants' failure to directly address this second step is equally troubling.

Even with only minimal input from the parties, given its intimate familiarity with this consolidated action (having presided over it for more than a decade), the court can assess the "significance of the overall relief" which plaintiffs achieved. Looking at the relief obtained *vis-a-vis* the hours of commingled time, a one-third reduction (rather than the 50% reduction which defendants urge or the 5% reduction plaintiffs urge) in the fees sought for that time is appropriate. A one-third reduction results in a fee award of $ 147,366.34 for the commingled time. This reduction is not, in any way, to be construed as diminishing the favorable outcome which plaintiffs' obtained in the Title VII action. In fact, plaintiffs' success in that action is resulting in an award for *all* of the fees which they are seeking for time spent on that action from February 18,

2003,[4] to the present.

The court cannot ignore the fact, however, that plaintiffs proceeded at their peril by not heeding the Supreme Court's directive that billing records be kept "in a manner that will enable a reviewing court to identify distinct claims." See Hensley, 461 U.S. at 437. Had plaintiffs maintained their billing records in accordance with Hensley, it would have been possible to parse the Title VII time from the class action time. Because that was not done, however, even though the Title VII and class action claims are related, the court finds an across-the-board percentage cut is necessary to reflect plaintiffs' partial success on the claims overall.

This approach comports with Schwarz, wherein the Ninth Circuit affirmed a district court's award of only 25% of the fees which plaintiff sought because she "made no effort to identify for the . . . court which of the hundreds of hours were spent on the unsuccessful claims," and where she "always maintained that she was entitled to all hours expended by [her] attorneys." Schwarz, 73 F.3d at 905, n.3. Here, a reduction of one-third is mandated because the initial lodestar figure for the commingled time yields "an excessive amount[]" given plaintiffs' partial success. See Hensley, 461 U.S. at 436. More particularly, plaintiffs are seeking $221,049.50 in fees for the commingled

[4] On this date, the Ninth Circuit "affirmed the defense judgment in the class action[,]" and reversed the defense judgment in the Title VII action. Resp. (doc. 342) at 5 (citation omitted). Clearly then, because the Title VII action is the only one which survived, all fees incurred after this date are attributable solely to that action.

time.

That is an excessive amount, in this court's opinion, given that some of that time necessarily was expended on the class action where plaintiffs did not prevail against any of the defendants. Although not dispositive, as defendants repeatedly note, the fact that in the end only a limited number of plaintiffs prevailed in this consolidated action, also supports this one-third fee reduction. A one-third reduction, in contrast to the 50% reduction which defendants so strongly urge, also takes into account the fact that some of the fees incurred would have been incurred even if plaintiffs had only brought their successful Title VII action.

The court is fully cognizant that it has "resort[ed] to a mathematical formula," which, in the words of the Ninth Circuit, might be deemed "crude[.]" See Schwarz, 73 F.3d at 905. Such an approach was expressly endorsed by the Ninth Circuit in Schwarz, however, when it held that the district court did not abuse its discretion in proceeding in precisely this way. See id. Moreover, "[l]itigants who make no effort to apportion fees among compensable and non-compensable claims," such as the plaintiffs herein, "run the risk" that in reducing the fees sought "a court will adopt such an approach." See Cambridge Electronics Corp. v. MGA Electronics, Inc., 2005 WL 927179, at *8 (C.D. Cal. 2005). For all of these reasons, the court finds that at the end of the day a one-third reduction corresponds with plaintiffs' success in this litigation.

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2. Attorney Cook

Part of the court's task in calculating the fee award is to ensure that the party seeking the fees meets its "burden of documenting the hours expended in the litigation and" that that party has "submit[ted] evidence supporting those hours and the rates claimed." See Welch, 480 F.3d at 946(citing Hensley, 461 U.S. at 433). Consequently, "[w]here the documentation is inadequate," the Supreme Court authorizes district courts "to reduce the award accordingly." Hensley, 461 U.S. at 433. The Local Rules echo this requirement, providing that "[i]f the time descriptions are incomplete, or if such descriptions fail to adequately describe the service rendered, the court may reduce the award accordingly." LRCiv. 54.2(e)(2).

In terms of supporting documentation, although the Ninth Circuit has "a preference for contemporaneous [time] records, [it] ha[s] never held that they are absolutely necessary[]" as a prerequisite to a statutory fee award. Fischer v. SJB-P.D. Inc., 214 F.3d 1115, 1121 (9th Cir. 2000) (internal quotation marks and citation omitted). Thus, counsel need not "record in great detail how each minute of his [or her] time was expended." See Hensley, 461 U.S. at 437, n.12. Instead, the Ninth Circuit has held that "plaintiff's counsel can meet his burden - although just barely - by simply listing his hours and identify[ing] the general subject matter of his time expenditures." Fischer, 214 F.3d at 1121 (internal quotation marks and citations omitted); see also Keala, 361 F.Supp.2d at 1184 (internal quotation marks and citation omitted) ("[T]he cases . . . require that there be

[an] adequate description of how the time was spent, whether it be on research or some other aspect of the litigation[.]") Basically, the records supporting an attorneys' fee motion "should be comparable to those that a private attorney would present to a client to substantiate a fee." Merrifield v. Miner's Inn Restaurant & Lounge, 2006 WL 4285241, at *10 (E.D.Cal. 2006)(citing, *inter alia*, Evers v. Custer County, 745 F.2d 1196, 1205 (9th Cir. 1984)), adopted in full, 2007 WL 841791, at *1 (E.D.Cal. March 26, 2007).

On the other hand, "'the party opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and the reasonableness of the hours charged or the facts asserted by the prevailing party in its submitted affidavits.'" Aloha Airlines, 2007 WL 2320672, at *6 (quoting Gates v. Deukmejian, 987 F.2d 1392, 1397-98 (9th Cir. 1992)) (other citations omitted).

Without distinguishing between the Title VII action and the class action, attorney Cook submitted an affidavit averring that she spent 15.90 hours on this litigation in 1995, and 120.80 hours in 1997. Mot. (doc. 335), exh. 2 thereto (Aff. of Rosemary Cook (July 27, 2004)) at 2, ¶ 6. Ms. Cook has "hand-written notes for [her] time spent" in those two years. Id. Apparently it is those notes which form the basis for the statement of "Services Provided" attached to Ms. Cook's affidavit. That statement lists the dates on which Ms. Cook provided legal services, the nature of those services, and the amount of time expended in 1995 and 1997. Based upon her hourly rate at that

time of $145.00, plaintiffs are seeking a total of $19,821.50 in fees for Ms. Cook's time in 1995 and 1997.

In contrast to 1995 and 1997, Ms. Cook "no longer ha[s] [her] hand-written notes for 1996." Id. Consequently, Ms. Cook is only able to aver that she "*believe[s]* that [she] spent at least 100 hours on the case in 1996." Id. at ¶ 7 (emphasis added). Evidently Ms. Cook bases her belief upon the fact that she "was responsible for all correspondence and pleadings in 1995, 1996, and 1997." Id. Ms. Cook further avers that she could verify those hours if she "review[ed] the correspondence, pleadings, and the discovery files[,]" but she did not do that. Id. Thus, based solely upon her "belief" that she spent 100 hours on "the case" in 1996, plaintiffs are seeking an additional $14,500.00 in fees for Ms. Cook's time for that year. See id.

Defendants challenge attorney Cook's 100 hour "'estimate[,]'" pointing out that because she did not retain any records for 1996, it is impossible "to verify" these hours, "let alone evaluate what time was expended in the Title VII case versus the class action case." See Resp. (Doc. 342) at 9. Due to this lack of supporting documentation, defendants assert that the "the Court should exclude the $14,500" which plaintiffs are seeking for the 100 hours of time Ms. Cook purportedly expended during 1996. See id.

Plaintiffs counter with an extremely cursory affidavit from Ms. Cook. In addition to "reaffirm[ing] [her] bill for services" initially filed in support of this motion, Ms. Cook avers that "[a]ll services" which she "performed were solely on the [Title

VII] claim[.]" Reply (doc. 343), exh. A thereto (Aff. of Rosemary Cook (Feb. 1, 2007) at 2, ¶¶ 1 and 2. Ms. Cook stresses that she "performed no work on any other issue." Id. at 2, ¶ 2. In any event, despite the complete lack of billing records for 1996, plaintiffs continue to assert that they are entitled to recover $14,500.00 for the time attorney Cook purportedly spent on this litigation in 1996.

Because, as previously noted, contemporaneous time records are not essential for a fee award, the fact that attorney Cook does not have such records is not a proper basis for denying fees for the legal services she rendered in 1996. See id. But plaintiffs did not "even [provide] 'minimal descriptions that establish that [Ms. Cook's] time [in 1996] was spent on matters on which th[is] . . . court may award fees[.]" See Harris Farms, 97 FEP Cases at 1451 (citation omitted). Nor did plaintiffs satisfy this Circuit's lenient standard of "simply listing [Ms. Cook's] hours and identifying the general subject matter of [her] time expenditures[]" for her 1996 legal services. See Fischer, 214 F.3d at 1121 (internal quotation marks and citations omitted). Attorney Cook's mere "belief" that she expended 100 hours on this litigation in 1996, without making any attempt to identify the general subject matter of that time does not, by any stretch of the imagination, constitute "evidence in support of those hours worked." See Welch, 480 F.3d at 948.

Plaintiffs' failure to provide adequate documentation of Ms. Cook's 1996 time is perplexing given that it is permissible for fee requests to "be based on reconstructed records developed by

reference to litigation files[,]" Fischer, 214 F.3d at 1121 (internal quotation marks and citations omitted); and, in her original supporting affidavit Ms. Cook indicated that she could, "review the correspondence, pleadings, and the discovery files." See Mot. (doc. 335). exh. 2 thereto at 2, ¶ 7. So presumably Ms. Cook could have reconstructed her billing records for 1996. For whatever reason, however, she chose not to do that.

Further, because plaintiffs did not provide any time records whatsoever for Ms. Cook's hours in 1996, they did not comply with the Local Rule mandating "adequate[] descri[ptions] [of] the services rendered so that the reasonableness of the charges c[ould] be evaluated." LRCiv. 54.2(e)(2). Nor did plaintiffs submit a "task-based itemized statement of time expended[]" by Ms. Cook in 1996 – another requirement of the Local Rules. See LRCiv. 54.2(d)(3). Thus, because plaintiffs did not even come close to meeting their burden of submitting evidence to support the hours worked by attorney Cook in 1996, the court declines to award plaintiffs $14,500.00 for the time she supposedly expended on this action during that year. However, because plaintiffs have provided adequate documentation to support a fee award for 15.90 hours expended by attorney Cook in 1995 and for 120.80 hours expended by her in 1997, plaintiffs are entitled to her fees for those two years, but not for 1996. The fees for attorney Cook's 1995 and 1997 time are subject to the one-third reduction previously discussed for commingled time. That is so because despite Ms. Cook's assertion to the contrary, a number of billing records, as well as the class action complaint which she

signed, show that she worked on both the Title VII and the class actions.

3. Hourly Rate

Defendants do not contest the hourly rates which plaintiffs are requesting. Resp. (doc. 342) at 4. After carefully reviewing the supporting affidavits, and based upon the court's own experience in this and similar litigation, it finds that the hourly rates sought for attorneys and paralegals, which range from $300[5] per hour to $70 hour, are reasonable. Further, the court finds that these rates are in accord with the "prevailing market rates" in this community for the relevant time period for lawyers and paralegals with "reasonably comparable skill, experience and reputation." See Carson, 470 F.3d at 891 and 892 (internal quotation marks and citations omitted).

4. Additional Fees

Plaintiffs also are seeking fees incurred since the filing of this motion, which includes time spent in preparing their Reply. The updated billing statement upon which plaintiffs are relying to support this additional fee award greatly varies from

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[5] The court is aware that plaintiffs agreed on a "contingency fee of . . . 1/3 or 40% after the discovery portion of the case had begun or . . . $300.00 . . . an hour, whichever is greater." Aff. of Jess A. Lorona (Dec. 14, 2006) (doc. 336), at 2, ¶ 6; see also id., exh. A thereto (Aff. of George Rudebusch (Dec. 14, 2006)) at 4, ¶ 3. The court is equally aware, however, that [w]hether or not [the client] agreed to pay a fee and in what amount is *not* decisive. . . . The criterion for the court is not what the parties agreed but what is reasonable." Jankey, 2006 WL 4569361, at *5 (internal quotation marks and citations omitted) (emphasis added). Thus, in the present case, even though plaintiffs did agree, under certain circumstances, to an hourly rate of $300.00, the court is not bound to make an across-the-board fee award at that rate. In fact, evidently due to variations in background and experience, while plaintiffs are seeking $300 per hour for most of the billing attorneys, they are not seeking that rate for every attorney who worked on this action.

their Reply. Plaintiffs declare in their Reply that they are seeking "$7,497.00[]" in fees, doc. 343 at 5, whereas the updated statement indicates that plaintiffs are seeking "$67043.00 [sic]" in additional fees. Id., exh. C thereto at 5. A careful review of the hourly rates and services enumerated in that statement, however, supports a finding that plaintiffs are seeking fees of $7,239.50 for December 14, 2006 through February 7, 2007 - not $7,497.00 and certainly not $67,043.00.

As mentioned earlier, on February 18, 2003,"the Ninth Circuit reversed the judgment in favor of Defendants in the Title VII action and affirmed the defense judgment in the class action." Resp. (doc. 342) at 5 (citing doc. 259). Thus, after that date only the Title VII action continued to be litigated. Defendants readily "agree[] that Plaintiffs are entitled to reasonable fees from that point forward." Id. Likewise, defendants do "not contest the number of hours or the hourly rate claimed" for that time. Id.

Given those concessions, and recognizing that "[t]ime billed for litigating a fees motion is recoverable," Jankey, 2006 WL 4569361, at *5 n. 7 (citing Kinney v. Int'l Bros. Of Elec. Workers, 939 F.2d 690, 695 (9th Cir. 1991)), after carefully examining the updated billing statement, the court finds that the hours expended by plaintiffs' counsel on this action between December 14, 2006, and February 7, 2007 were reasonable. Further, the court finds that the hourly rates billed during that time period are also reasonable. Accordingly, the record supports an attorneys' fee award in the amount of $7,239.50 for

services rendered between December 14, 2006, and February 7, 2007.

To summarize, the court finds that plaintiffs are entitled to $133,030.50 in attorneys' fees for legal services rendered from February 18, 2003 through February 7, 2007. Plaintiffs are also entitled to recover $147,366.34 in attorneys' fees for the "commingled" time, which includes attorney Cook's time in 1995 and 1997. Additionally, plaintiffs are entitled to recover $7,239.50 in attorneys' fees for legal services rendered between December 14, 2006, and February 7, 2007. The foregoing represents a total award to plaintiffs' counsel of attorneys fee in the amount of $287,636.34.

II. Costs

A "prevailing party may recover as part of the award of attorney's fees those out-of-pocket expenses that would normally be charged to a fee paying client." Dang, 422 F.3d at 814 (internal quotation marks and citations omitted). As with the attorneys' fee award, "[s]uch out-of-pocket expenses are recoverable when reasonable." Id. (citations omitted).

Initially plaintiffs sought costs totaling $90,539.52. For reasons which they do not explain, in their Reply plaintiffs reduced that amount to $47,256.18. Reply (doc. 343) at 7. That total includes $21,679.77 in costs which plaintiffs incurred since February 18, 2003, the date the Ninth Circuit issued its mandate in this action. Defendants do not object to those costs, reasoning that as of that date "the class action was over," and thus all subsequent costs necessarily pertained to the Title VII

action. Reply (doc. 342) at 4.

Even with that concession, and the fact that plaintiffs have reduced the amount of costs which they originally sought, a nearly $18,000.00 difference remains between the amount which plaintiffs are seeking in costs and the amount which defendants believe is proper. More specifically, plaintiffs claim that they are entitled to $47,256.18 in costs, whereas defendants claim the amount is "not greater than $29,331.17." Resp. (doc. 342) at 1. Obviously then there are still disputed cost issues.

The first such issue need not detain the court for long. Initially plaintiffs sought costs totaling $90,539.52, although as defendants note plaintiffs' supporting affidavits and exhibits only establish costs in the amount of $85,539.52. Id. at 13. That discrepancy is because plaintiffs "mistakenly omitted[]" a $5,000.00 billing statement from a certified public accountant ("CPA") whom they retained to handle the taxes and judgment. Reply (doc. 343) at 6. The record has since been supplemented with that statement. See id., exh. D thereto. Thus, to the extent defendants are seeking to reduce any award of costs by $5,000.00 due to lack of supporting documentation, that objection is rendered moot because plaintiffs have supplemented the record. Primarily because defendants agree that plaintiffs are entitled to costs from February 18, 2003, forward, and because the CPA's costs were incurred during that time frame (on October 11, 2006), plaintiffs are entitled to recover the $5,000.00 in costs which they are seeking for his services. See Reply (doc. 343), exh. D thereto at 2.

A. Plaintiff Rudebusch

There is validity though to defendants' next challenge to the costs which plaintiffs are seeking. Plaintiffs claim that they are entitled to recover $36,960.00 for "consulting services" provided by the named plaintiff, George Rudebusch. See Doc. 336, exh. 12 thereto (Aff. of George Rudebusch (Dec. 14, 2006) at 1, ¶ 4), and attachment. Defendants make a compelling argument as to why this cost is not recoverable. See Doc. 342 at 13-14. There is no need to detail that argument herein because evidently plaintiffs agree, given that conspicuously absent from their Reply and supplemental exhibits is any mention of recovering costs for plaintiff Rudebusch's "consulting services." Thus, the court deems this aspect of plaintiffs' motion withdrawn. Hence it declines to award plaintiffs any costs for plaintiff's Rudebusch's "consulting services."

B. Expert Witness Michael Wagner

It appears that originally plaintiffs were seeking $19,708.71 for services provided by "Mike Wagner Consulting[,]" but nowhere did they explain the nature of those services. Doc. 336, exh. 9 thereto. The invoices provide no insight as they simply reference prior "unpaid invoices," and then include demands for "past due interest." See id.

Defendants' main objection to Wagner's invoices is that it is "impossible" to discern "how much of the bill is interest, and how much is principle [sic][,]" *i.e.* fees for his services. Resp. (doc. 342) at 14. Defendants go on to argue that "[i]nterest charges . . . are not reasonable litigation

expenses." Id. at 15. Further, given that "[p]laintiffs have not provided information regarding the actual fees Mr. Wagner charged," defendants assert that "the Court should decline to award Plaintiffs expert fees" for Mr. Wagner. Id.

Plaintiffs responded to this argument by submitting another invoice from Mr. Wagner. It is dated January 30, 2007, and indicates a "total due" of $6,100.00, which represents four hours for "[p]reparation of [an] affidavit[,]" at $100 per hour; and 57 hours of "[s]tatistical consulting," also at $100 per hour. Reply (doc. 343), exh. E thereto. As plaintiffs acknowledge, however, Mr. Wagner "does not set forth the dates that he provided th[os]e services or any further detail. Id. at 6. Under "[d]ate of [s]ervice" that invoice simply states "various." Id. Perhaps for that reason, in their final calculation of costs, plaintiffs reduced by five percent the amount requested for Mr. Wagner's services, so that they are seeking $5,795.00 for his time. See id. at 7.

Mr. Wagner's prior invoices specifically indicate December 21, 2000 and August 15, 2003, as "[d]ate[s] of [s]ervice[.]" Mot. (doc. 335), exh. 9 thereto. Thus, it is evident that Mr. Wagner rendered services in connection with both the Title VII and class actions. As with many of plaintiffs' attorneys' billings, however, it is impossible to distinguish the amount of time which is attributable to the successful Title VII action, and that which is attributable to the unsuccessful class action. Accordingly, as it did for the commingled attorneys' fee time, the court will reduce Mr. Wagner's fee of $6,100.00 by one-third

(or $2,033.33). This means that plaintiffs are entitled to costs for Mr. Wagner's time in the amount of $4,066.67.

C. "Commingled" Costs

As to the commingled costs, defendants are once again seeking a 50% reduction. This means that of the $15,302.80 in costs which defendants admit are "reasonably attribut[able] to both cases," plaintiffs should only recover $7,651.40. Resp. (doc. 342) at 15.

Plaintiffs retort that they should recover the full $5,275.00 which they are seeking for the costs of trial transcripts. As to the other commingled costs, however plaintiffs suggest a five percent reduction like they did for the commingled attorneys' fee time. Plaintiffs figure a total of $9,506.41 for these commingled costs. See Reply (doc. 343) at 1.

For consistency, the court will continue to apply a one-third reduction for these commingled costs, including for the cost of the transcript. The end result is that of the $15,302.80 which plaintiffs are seeking in commingled costs, they are entitled to recover $10,201.87. Even though plaintiffs did not mention it in their Reply, the court will add to the recoverable costs the $415.88 which plaintiffs' billing statement indicates they incurred from December 16, 2006, through January 30, 2007. See Reply (doc. 343), exh. C thereto at 9.

In summary, plaintiffs are entitled to $21,679.77 for costs incurred from February 18, 2003, through the filing of this motion. Likewise, plaintiffs are entitled to $5,000.00 in costs for the CPA which they retained in October 2006 to review the

settlement in the Title VII action. Plaintiffs are entitled to an additional $415.88 for costs incurred from December 14, 2006 through January 30, 2007. They are also entitled to costs of $4,066.67 for services rendered by Mr. Wagner. Finally, plaintiffs are entitled to $10,201.87 for commingled costs. The sum total of the cost award to plaintiffs is $41,364.19.

Conclusion

For the reasons set forth above, IT IS ORDERED that plaintiffs' motion for attorneys' fees and costs (doc. 335) is GRANTED in the amount of $287,636.34 in attorneys' fees; and $41,364.19 in costs; and

IT IS FURTHER ORDERED that defendants shall pay those amounts to plaintiffs within thirty (30) days of the date of this Order.

DATED this 20th day of September, 2007.

Robert C. Broomfield
Senior United States District Judge

Copies to all counsel of record