UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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| DIANNE KNOX, et al., ON BEHALF OF THEMSELVES AND THE CLASSES THEY REPRESENT,<br><br>Plaintiffs,<br><br>v.<br><br>JOHN CHIANG, Controller, State of California, et al.,<br><br>Defendants. | No. 2:05-cv-02198-MCE-CKD<br><br>**MEMORANDUM AND ORDER** |

Through this action, Plaintiffs, state employees, sought redress from Defendants Controller of the State of California John Chiang ("the Controller") and Service Employees International Union, Local 1000 ("the Union" or "SEIU") (collectively "Defendants") for violations of Plaintiffs' First, Fifth and Fourteenth Amendment rights pursuant to 42 U.S.C. § 1983. Plaintiffs alleged, and the Supreme Court of the United States ultimately held, that Defendants used Plaintiffs' monies to support political causes without satisfying constitutionally required procedural safeguards.

Presently before the Court is Plaintiffs' Motion for Attorney's Fees and Expenses pursuant to 42 U.S.C. § 1988. (Pls.' Mot. Att'y Fees, Jan. 2, 2013, ECF No. 192.)

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Defendant SEIU filed a timely opposition to Plaintiffs' Motion (Def.'s Opp'n, Feb. 28, 2013, ECF No. 206) which the Controller joined (Joinder, Feb. 28, 2013, ECF No. 208). Plaintiffs filed a reply (Pls.' Reply, March 14, 2013, ECF No. 210) and subsequently filed a Notice of Partial Withdrawal of the request for expenses (Pls.' Notice, March 19, 2013, ECF No. 212).

Also before the Court is Defendant SEIU's Motion for Clarification (ECF No. 198). Plaintiffs filed a timely response to the Motion for Clarification (Pls.' Response, Jan. 25, 2013, ECF No. 202) and Defendant SEIU filed a Reply (Def.'s Reply, Jan. 31, 2013, ECF No. 203).[1]

For the reasons set forth below, Plaintiffs' Motion for Attorney's Fees and Expenses is GRANTED, and Defendant SEIU's Motion for Clarification is also GRANTED.

## LEGAL BACKGROUND[2]

Under California law, public-sector employees in a bargaining unit may decide by majority vote to create an "agency shop" arrangement under which all the employees are represented by a union selected by the majority. Cal. Gov't Code § 3502.5(a) (2010). While employees in the unit are not required to join the union, they must nevertheless pay the union an annual fee to cover the cost of union services related to collective bargaining (so-called chargeable expenses). See Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 524 (1991); Machinists v. Street, 367 U.S. 740, 760 (1961). The Supreme Court has recognized that such arrangements represent an "impingement" on the First Amendment rights of nonmembers.

[1] Because oral argument will not be of material assistance, the Court orders these matters submitted on the briefs. E.D. Cal. Local R. 230(g).

[2] The following summary of the legal background of this case is taken, sometimes verbatim, from the Supreme Court's opinion in this case. Knox v. Serv. Employees Int'l Union, Local 1000, 132 S. Ct. 2277, 2284-85 (2012).

Teachers v. Hudson, 475 U.S. 292, 307 n.20 (1986); see also Davenport v. Wash. Ed. Ass'n, 551 U.S. 177, 181 (2007) ("[A]gency-shop arrangements in the public sector raise First Amendment concerns because they force individuals to contribute money to unions as a condition of government employment"); Street, 367 U.S. at 749 (union shop presents First Amendment "questions of the utmost gravity"). Thus, in Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977), the Supreme Court held that a public-sector union, while permitted to bill nonmembers for chargeable expenses, may not require nonmembers to fund its political and ideological projects. In Hudson, the Court identified procedural requirements that a union must meet to collect fees from nonmembers without violating their rights. 475 U.S. at 302–11. There, the Court also held that the First Amendment does not permit a public-sector union to adopt procedures that have the effect of requiring objecting nonmembers to lend the union money to be used for political, ideological, and other purposes not germane to collective bargaining. Id. at 305. In the interest of administrative convenience, however, the Hudson Court concluded that a union "cannot be faulted" for calculating the fee that nonmembers must pay "on the basis of its expenses during the preceding year." Id. at 307 n.18.

## FACTUAL AND PROCEDURAL BACKGROUND[3]

In June 2005, Defendant SEIU sent out its regular Hudson notice informing employees what the agency fee would be for the year ahead. The notice set monthly dues at 1% of an employee's gross monthly salary but capped monthly dues at $45. Based on the most recently audited year, Defendant SEIU estimated that 56.35% of its total expenditures in the coming year would be dedicated to chargeable collective-bargaining activities.

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[3] The following recitation of facts is taken, sometimes verbatim, from the Supreme Court's opinion in this case. Knox, 132 S. Ct. at 2285-86 (internal citations omitted).

Thus, if a nonunion employee objected within 30 days to payment of the full amount of union dues, the objecting employee was required to pay only 56.35% of total dues. Defendant SEIU's notice also included a feature that was not present in Hudson: The notice stated that the agency fee was subject to increase at any time without further notice. During this time, the citizens of the State of California were engaged in a wide-ranging political debate regarding state budget deficits and, in particular, the budget consequences of growing compensation for public employees backed by powerful public-sector unions.

On June 13, 2005, Governor Arnold Schwarzenegger called for a special election to be held in November 2005 where voters would consider various ballot propositions aimed at state-level structural reforms. Two of the most controversial issues on the ballot were Propositions 75 and 76. Proposition 75 would have required unions to obtain employees' affirmative consent before charging them fees to be used for political purposes. Proposition 76 would have limited state spending and would have given the Governor the ability under some circumstances to reduce state appropriations for public-employee compensation. Defendant SEIU joined a coalition of public-sector unions in vigorously opposing these measures. Calling itself the “Alliance for a Better California,” the group would eventually raise “more than $10 million, with almost all of it coming from public employee unions, including $2.75 million from state worker unions, $4.7 million from the California Teachers Association, and $700,000 from school workers unions.”

On July 30, shortly after the end of the thirty-day objection period for the June Hudson notice, Defendant SEIU proposed a temporary 25% increase in employee fees, which it billed as an “Emergency Temporary Assessment to Build a Political Fight-Back Fund.” The proposal stated that the money was needed to achieve the union's political objectives, both in the special November 2005 election and in the November 2006 election.

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According to the proposal, money in the Fight-Back Fund would be used for a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education and get out the vote activities in work sites and in communities across California. The proposal specifically stated that "[t]he Fund will not be used for regular costs of the union—such as office rent, staff salaries or routine equipment replacement, etc." It noted that "all other public worker unions are in the process of raising the extraordinary funds needed to defeat the Governor." And it concluded: "Each of us must do our part to turn back these initiatives which would allow the Governor to destroy our wages and benefits and even our jobs, and threaten the well-being of all Californians." On August 27, Defendant SEIU's General Council voted to implement the proposal.

On August 31, Defendant SEIU sent out a letter addressed to "Local 1000 Members and Fair Share Fee Payers," announcing that, for a limited period, their fees would be raised to 1.25% of gross monthly salary and the $45-per-month cap on regular dues would not apply. The letter explained that the union would use the fund to "defeat Proposition 76 and Proposition 75 on November 8," and to "defeat another attack on [its] pension plan" in June 2006. The letter also informed employees that, in the following year, the money would help "to elect a governor and a legislature who support public employees and the services [they] provide."

After receiving this letter, one of the Plaintiffs in this case called Defendant SEIU's offices to complain that the union was levying the special assessment for political purposes without giving employees a fair opportunity to object. One of Defendant SEIU's area managers responded that "even if [the employee] objected to the payment of the full agency fee, there was nothing he could do about the September increase for the Assessment." (ECF No. 139.) "She also stated that 'we are in the fight of our lives,' that the Assessment was needed, and that there was nothing that could be done to stop the Union's expenditure of that Assessment for political purposes." Id.

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As a consolation, however, those employees who had filed timely objections after the regular June Hudson notice were required to pay only 56.35% of the temporary increase.

Plaintiffs filed this class-action suit on behalf of 28,000 nonunion employees who were forced to contribute money to the Political Fight-Back Fund. On March 28, 2008, this Court issued an order granting summary judgment to Plaintiffs, and granting in part Defendants' cross-motion for partial summary judgment. (Order, ECF No. 139.) Defendants appealed, and the Ninth Circuit reversed and remanded. 628 F.3d 1115 (9th Cir. 2010). In accordance with the Ninth Circuit's opinion, this Court then issued an order denying Plaintiffs' motion for Summary Judgment and reversing the denial of Defendant's partial motion for summary judgment. (ECF No. 178.) Plaintiffs then appealed, and the Supreme Court of the United States granted certiorari. 131 S. Ct. 3061 (2011). The Supreme Court reversed and remanded the Ninth Circuit's decision. 132 S. Ct. 2277, 2284 (2012). The Ninth Circuit then vacated this Court's decision in its entirety and remanded the case to this Court "for further proceedings consistent with the Supreme Court's opinion." (ECF No. 183.) On December 4, 2012, this Court entered judgment in favor of Plaintiffs and ordered that "Defendant SEIU shall refund to Plaintiffs all monies exacted for the 'Emergency Temporary Assessment to Build a Political Fight-Back Fund,' for the entirety of the period during which the assessment was exacted, plus interest." (Order 2, ECF No. 190.) Defendants now seek clarification of the Court's December 4 Order. (ECF No. 198.) Specifically, Defendants ask the Court to clarify the applicable interest rate for the prejudgment interest that Defendants must pay. (Id.) Plaintiffs ask that the Court award them their reasonable attorney's fees and expenses (ECF No. 192).

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## STANDARD

### A. Standard for Attorney's Fees

The Civil Rights Attorney's Fees Awards Act of 1976 permits the award of attorney's fees in civil rights actions. 42 U.S.C. § 1988. The statute provides, in pertinent part: "In any action or proceeding to enforce a provision of [42 U.S.C. § 1983] . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). A "prevailing party" under § 1988 is a party who "succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). "Reasonableness" is the benchmark for attorney's fees awards under 42 U.S.C. § 1988. 42 U.S.C. § 1988(b); Hensley, 461 U.S. at 433.

The "reasonableness" determination is a two-step process. First, the court should calculate a "lodestar" by "multiplying the number of hours reasonably spent on the litigation by a reasonable hourly rate." McCown v. City of Fontana Fire Dep't, 565 F.3d 1097, 1102 (9th Cir. 2009). The appropriate number of hours includes all time "reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter." Hensley, 461 U.S. at 431. However, in calculating the lodestar, "the district court should exclude hours 'that are excessive, redundant, or otherwise unnecessary.'" McCown, 565 F.3d at 1102. Although district judges "need not, and should not, become green-eyeshade accountants," Fox v. Vice, 131 S. Ct. 2205, 2216 (2011), the court should provide some indication of how it arrived at its conclusions. See Moreno v. City of Sacramento, 534 F.3d 1106, 1111 (9th Cir. 2008) ("When the district court makes its award, it must explain how it came up with the amount."), Padgett v. Loventhal, 706 F.3d 1205, 2013 WL 491024, *2 (9th Cir. Feb.11, 2013) ("We have long held that district courts must show their work when calculating attorney's fees.").

As a general rule, in determining the lodestar figure, "the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case." Moreno, 534 F.3d at 1112. However, the party seeking an award of attorney's fees bears the burden of producing documentary evidence demonstrating "the number of hours spent, and how it determined the hourly rate(s) requested." McCown, 565 F.3d at 1102. Then the burden shifts to the opposing party to submit evidence "challenging the accuracy and reasonableness of the hours charged or the facts asserted by the prevailing party in its submitted affidavits." Ruff v. County of Kings, 700 F. Supp. 2d 1225, 1228 (E.D. Cal. 2010).

The second step of the "reasonableness" determination gives the court discretion to adjust the lodestar figure upward or downward based on an evaluation of several factors articulated by the Ninth Circuit in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975). McGrath v. County of Nevada, 67 F.3d 248, 252 (9th Cir. 1995). The Kerr factors include:

> (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 (12) awards in similar cases.

Kerr, 526 F.2d at 69-70; see also E.D. Cal. Local Rule 293(c) (identifying the same factors as relevant). However, the court should exclude from its consideration factors that are irrelevant or already subsumed in the initial lodestar calculation. McGrath, 67 F.3d at 252; see also Blum v. Stenson, 465 U.S. 886, 898-900 (1984) (concluding that such factors as "novelty and complexity of the issues," "the special skill and experience of counsel," and "the quality of representation" are generally subsumed within the lodestar calculation).

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Because the lodestar figure is presumptively reasonable, "a multiplier may be used to adjust the lodestar amount upward or downward only in rare and exceptional cases, supported by both specific evidence on the record and detailed findings by the lower courts that the lodestar amount is unreasonably low or unreasonably high." Van Gerwen v. Guarantee Mut. Life Co., 214 F.3d 1041, 1045 (9th Cir. 2000) (internal citations and quotations omitted).

**B. Standard for Prejudgment Interest**

28 U.S.C. § 1961 provides that "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court." 28 U.S.C. § 1961(a). "The Ninth Circuit has not articulated the standard for awarding prejudgment interest in § 1983 cases." Davis v. Prison Health Servs., C 09-2629 SI, 2012 WL 4462520, *6 (N.D. Cal. Sept. 25, 2012) (citing Murphy v. City of Elko, 976 F. Supp. 1359, 1362 (D. Nev. 1997)); see also Ruff v. Cnty. of Kings, No. CV-F-05-631-OWW/GSA, 2009 WL 4572782 (E.D. Cal. Nov. 30, 2009). However, the Ninth Circuit has held that prejudgment interest is an element of compensation and is not a penalty. W. Pac. Fisheries, Inc. v. SS President Grant, 730 F.2d 1280, 1288 (9th Cir. 1984). "Whether interest will be awarded is a question of fairness, lying within the court's sound discretion, to be answered by balancing the equities." Wessel v. Buhler, 437 F.2d 279, 284 (9th Cir. 1971).

Section 1961 provides that "such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment." 28 U.S.C. § 1961(a). This interest rate applies to prejudgment interest, unless the court "finds, on substantial evidence, that a different rate is appropriate."

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Blanton v. Anzalone, 813 F.2d 1574, 1575 (9th Cir. 1987) (citing Blanton v. Anzalone, 760 F.2d 989 (9th Cir. 1985)); see also W. Pac. Fisheries, Inc., 730 F.2d at 1289 (requiring substantial evidence to support the district court's decision to depart from the Treasury bill rate). "'Substantial evidence' has been defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Id. at 1576 (quoting Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1014 (9th Cir. 1985)).

## ANALYSIS

### A. Attorney's Fees

#### 1. Reasonable Hourly Rate

In determining attorney's fees under § 1988, the district court "must strike a balance between granting sufficient fees to attract qualified counsel to civil rights cases and avoiding a windfall to counsel." Moreno, 534 F.3d at 1111 (internal citations omitted). Reasonable attorney's fees are calculated according to the prevailing market rate in the relevant legal community. Blum, 465 U.S. at 895. The "relevant legal community" in the lodestar calculation is generally the forum in which the district court sits. Barjon v. Dalton, 132 F.3d 496, 500 (9th Cir. 1997). However, there is a narrow exception allowing the court to rely on rates outside the local forum when the plaintiff establishes that "local counsel was unavailable, either because they are unwilling or unable to perform because they lack the degree of experience, expertise, or specialization required to handle properly the case." Id.

Here, Plaintiffs state that although this Court sits in Sacramento, "the 'relevant legal community' for the purpose of calculating [Plaintiffs'] counsel's rates could . . . be San Francisco, rather than Sacramento." (ECF No. 192 at 10.)

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Plaintiffs contend that San Francisco rates "could" apply because the claims raised in this case are unique, and there is an "apparent lack of Sacramento attorneys and firms . . . experienced and capable enough, and willing to undertake the case . . . ." (ECF No. 192 at 10.) To support this contention, Plaintiffs submit the declaration of Steven Burlingham, a Sacramento attorney. Mr. Burlingham states that it is "doubtful that any (perhaps one or two) local Sacramento attorneys would be willing to take on and pursue such a case, given the substantial resources involved, the necessary expenditures of time, and because they lack the degree of experience, expertise, or specialization required to handle properly the case." (ECF No. 192-2 at 49.)

This evidence is inadequate to support a finding that San Francisco rates, rather than Sacramento rates, apply. The only exception to the "local forum" rule applies to situations in which a plaintiff demonstrates that the unavailability of local counsel caused Plaintiff to retain an out-of-area attorney. Barjon, 132 F.3d at 500. The argument that "perhaps one or two local Sacramento attorneys" would have been willing to take on the case does not demonstrate that local counsel was unavailable. To the contrary, this statement suggests to the Court that there were Sacramento attorneys, albeit few, who would have been willing to take this case.

Furthermore, Plaintiffs bear the burden of demonstrating that San Francisco rates apply. Here, Plaintiffs make no clear connection to San Francisco as the relevant legal community—Plaintiffs' attorneys are from Virginia, and this case was litigated primarily in Sacramento. (See ECF No. 192-1, 192-2.) Accordingly, the Court finds that the relevant legal community is Sacramento.

The Court must next determine the reasonable hourly rate. The reasonable hourly rate "is not made by reference to rates actually charged by the prevailing party." Chalmers v. City of L.A., 796 F.2d 1205, 1210 (9th Cir. 1986). Instead, the court should use the prevailing market rate in the community for similar services of lawyers "of reasonably comparable skill, experience, and reputation." Id. at 1210–11.

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Accordingly, in this case, the Court will apply the the prevailing market rate for a civil rights attorney practicing in the Sacramento area. See Taylor v. Chaing, 2009 WL 453050, at *9 (E.D. Cal. Feb. 23, 2009) ("The rate to be applied is that of plaintiffs' counsel in the Sacramento area who engage in civil rights actions against governmental entities."); H.W. v. E. Sierra Unified School Dist., 2012 WL 4469262, at *2 (E.D. Cal. Sept. 27, 2012) ("The rate to be applied is that of . . . counsel in the Sacramento area who engage in civil rights actions."). The court may use either current or historical prevailing market rates. Schwarz v. Sec'y of Health & Human Servs., 73 F.3d 895, 908 (9th Cir. 1995) (internal citation omitted); see also Barjon, 132 F.3d at 502-03 ("[T]he district court may choose to apply either the attorney's current rates to all hours billed or the attorney's historic rates plus interest."); In re Wash. Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1305 (9th Cir. 1994) ("Full compensation requires charging current rates for all work done during the litigation, or by using historical rates enhanced by an interest factor.").

The fee applicant bears the burden of demonstrating 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." Camacho v. Bridgeport Fin., Inc., 523 F.3d 973, 980 (9th Cir. 2008) (citation omitted). "[A]ffidavits of the plaintiffs' attorneys and other attorneys regarding prevailing fees in the community . . . are satisfactory evidence of the prevailing market rate" but "do not conclusively establish the prevailing market rate." Id. In addition to considering affidavits and evidence submitted by the parties, the court may also "rely on its own familiarity with the legal market." Ingram v. Oroudjian, 647 F.3d 925, 928 (9th Cir. 2011).

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Plaintiffs' calculations of their attorney's fees are based on the following hourly rates: (1) W. James Young- $500; (2) Raymond J. LaJeunesse, Jr.- $500; (3) Milton L. Chappell- $500; (4) Bruce N. Cameron- $500; (5) Glenn M. Taubman- $500; (6) William L. Messenger- $350.[4]

Mr. Young

The Court's own research reveals that the prevailing hourly rate for experienced civil rights attorneys practicing in the Sacramento area does not exceed $400.[5] See, e.g., Lehr v. City of Sacramento, 2:07-CV-01565-MCE, 2013 WL 1326546 (E.D. Cal. Apr. 2, 2013) (awarding hourly rate of $400 per hour for one of Sacramento's most experienced and successful civil rights attorneys); H.W. v. E. Sierra Unified Sch. Dist., No. 2:11cv-00531 GEB GGH, 2012 WL 4469262, *1-2 (E.D. Cal. Sep. 27, 2012) (concluding that requested hourly rate of $375 per hour was reasonable rate for attorneys practicing civil rights litigation in Sacramento area); Jones v. Cnty. of Sacramento, No. 2:09-CV-01025-DAD, 2011 WL 3584332, *9 (E.D. Cal. Aug. 12, 2011) (concluding that hourly rate of $350 requested in civil rights case by attorney with over 35 years of litigation experience was "in line with those prevailing in the Sacramento market for similar services by lawyers of reasonably comparable skills, experience and reputation"); Cosby v. Autozone, Inc., No. 2:08-CV-00505-LKK-DAD, 2010 WL 5232992, *3 (E.D. Cal. Dec. 16, 2010) (finding that $375 per hour was prevailing Sacramento rate for experienced attorneys litigating cases under California's Fair Employment and Housing Act and finding requested fees of $400 and $450 per hour excessive);

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[4] These rates are the Sacramento rates requested by Plaintiffs. Plaintiffs request alternative San Francisco rates, which the Court will not consider as Sacramento is the relevant legal community. See supra.

[5] In conducting its research, the Court has paid particular attention to cases decided within two years of the time when Plaintiffs' attorneys began their work in this case. See Bell v. Clackamas Cnty., 341 F.3d 858, 869 (9th Cir. 2003) (holding that it was an abuse of discretion for the district court "to apply market rates in effect more than two years before the work was performed.").

Friedman v. Cal. State Employee Ass'n, No. 2:00-CV-00101-WBS-DAD, 2010 WL 2880148, *4 (E.D. Cal. July 21, 2010) (finding $275 per hour reasonable rate for Sacramento civil rights attorneys); Beecham v. City of W. Sacramento, No. 2:07-CV-01115-JAM-EFB, 2009 WL 3824793, *4 (E.D. Cal. Nov. 16, 2009) (finding that $375 per hour was prevailing market rate charged by Sacramento attorneys in civil right case and refusing to award requested $525–$550 per hour fee); Cal. Pro–Life Council, Inc. v. Randolph, No. 2:00-CV-01698-FCD-GGH, 2008 WL 4453627, *4-5 (E.D. Cal. Sept. 30, 2008) (finding hourly rate of $385 for lead trial counsel in civil rights case reasonable for Sacramento market).

The Court finds that several factors must be taken into consideration in determining Mr. Young's hourly rate. First, Mr. Young is an experienced and successful attorney in the areas of labor and constitutional law and successfully argued this case before the United States Supreme Court. (See Decl. W. James Young, ECF No. 192-1.) Furthermore, this case presented novel and complex issues. Thus, the Court will use the hourly rate at the top of the compensation range that exists in the Sacramento legal market for the purpose of calculating Mr. Young's fees. The Court finds that reimbursement at the rate of $450 per hour is appropriate for the work performed by Mr. Young in this case.

Mr. LaJeunesse

Mr. LaJeunesse has submitted a declaration stating that he has been practicing employment law since 1971, when he joined the National Right to Work Legal Defense Foundation (Decl. Raymond LaJeunesse, Jr. 23, ECF No. 192-2.) Like Mr. Young, Mr. LaJeunesse has extensive experience with trial and appellate litigation in the areas of labor and constitutional law, in both state and federal court. (ECF No. 192-2 at 23-24.) Because Mr. LaJeunesse's skills and experience and the quality of his work in this case are comparable to those of Mr. Young, the Court finds that the rate of $450 per hour is also a reasonable rate for Mr. LaJeunesse.

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Mr. Chappell

Mr. Chappell's declaration states that he began practicing as a staff attorney with the National Right to Work Legal Defense Foundation upon his graduation from law school and admission to the Maryland bar in 1976. (Decl. Milton Chappell 29, ECF No. 192-2.) He has therefore worked as a staff attorney for the Foundation, and practiced employment law, for nearly thirty-seven years. Mr. Chappell also has extensive experience with trial and appellate litigation in the areas of labor and constitutional law, and has been lead counsel for cases before state and federal courts, as well as state labor boards. (Id. at 30.) Because Mr. Chappell's skills and experience and the quality of his work in this case are comparable to the skills of experience of both Mr. Young and Mr. LaJeunesse, the Court finds that the rate of $450 per hour is also reasonable for Mr. Chappell.

Mr. Cameron

Mr. Cameron is the Reed Larson Professor of Labor Law and Regent University School of Law and is on staff with the National Right to Work Legal Defense Foundation. (Decl. Bruce Cameron 34, ECF No. 192-2.) Mr. Cameron has been part of the Foundation's litigation staff since 1976. (Id. at 35.) Thus, like Mr. Chappell, Mr. Cameron has practiced labor and constitutional law for nearly thirty-seven years. Like Messrs. Chappell, LaJeunesse and Young, Mr. Cameron has extensive experience with trial and appellate litigation in employment law cases in both state and federal court. (ECF No. 192-2 at 35.) Because Mr. Cameron's skills and experience and the quality of his work in this case are comparable to those of his colleagues in this case, the Court finds that the rate of $450 per hour is reasonable for Mr. Cameron.

Mr. Taubman

Mr. Taubman graduated from Emory Law School in 1980 and received an LLM in Labor Law from Georgetown University Law Center in 1985. Mr. Taubman has been employed as a staff attorney at the National Right to Work Legal Defense Foundation since 1982. (Decl. Glenn Taubman 39, ECF No. 192-2.)

Mr. Taubman has therefore practiced labor law for nearly thirty-two years. Like his colleagues in this case, Mr. Taubman has practiced as both a trial and appellate attorney in the areas of labor and constitutional law, in both state and federal courts, as well as before state labor boards and the National Labor Relations Board. (Id. at 39-40.) Thus, Mr. Taubman's skill and experience and the quality of his work in this case are comparable to the skills of his colleagues, listed above. As such, the Court finds that a rate of $450 per hour is reasonable for Mr. Taubman.

Mr. Messenger

Mr. Messenger graduated from George Washington University School of Law in 2001. (Decl. William Messenger 44, ECF No. 192-2.) Upon graduation, Mr. Messenger became employed as a staff attorney with the Foundation. (Id.) Thus, Mr. Messenger has eleven years of experience in labor litigation. As a staff attorney for the Foundation, Mr. Messenger has practiced as both a trial and appellate attorney in the areas of labor and constitutional law. Mr. Messenger has acted, or is currently acting, as lead trial and/or appellate counsel in at least ten cases. (Id. at 45.) Mr. Messenger has also been lead or co-counsel in other cases in state and federal courts, as well as before the National Labor Relations Board. (Id.) Mr. Messenger asks that he be reimbursed at a rate of $350 per hour. (Id. at 46.)

However, the Court's research reveals that a prevailing rate in the Sacramento market for the services of an attorney with skills, experience and reputation similar to those of Mr. Messenger does not exceed $260 per hour. See, e.g., Lehr v. City of Sacramento, 2013 WL 1326546, at *8 (finding $260 per hour was Sacramento market rate for civil rights attorney with 7-10 years of experience); Jones, 2011 WL 3584332, at *9-10 (finding $250 per hour was Sacramento market rate for a civil rights attorney with roughly ten years of litigation experience); Cal. Pro-Life Council, Inc., 2008 WL 4453627, at *4-7 (using $230 to $260 per hour as a reasonable rate for junior partners practicing in the Sacramento area). Accordingly, the Court calculates Mr. Messenger's attorney's fee award based on the rate of $260 per hour.

### 2. Additional Attorney's Fees Awards

Plaintiffs enlisted the services of Neal K. Katyal and his firm Hogan Lovells US, LLP, exclusively for the litigation before the Supreme Court. Plaintiffs seek compensation for Mr. Katyal and Mr. Katyal's colleagues at Hogan Lovells at a flat rate of $95,000. According to Mr. Katyal's declaration, his normal hourly rate is $1,190. His colleagues Dominic F. Perella, Catherine Stetson, and Jessica Ellsworth have normal hourly rates of $565, $750 and $630, respectively. Plaintiffs assert that the total lodestar for the hours worked by these attorneys alone is $145,669. However, because Hogan Lovells took on the case at a reduced rate due to the case's public-interest nature, Plaintiffs seek only to be reimbursed a flat rate of $95,000 for the work performed by Hogan Lovells. Defendants do not contest the flat fee of $95,000. Accordingly, the Court finds that the $95,000 flat fee sought by counsel for Hogan Lovells is a reasonable and appropriate award in this case.

Plaintiffs also enlisted the services of Steven Burlingham. Mr. Burlingham is a Sacramento attorney who has been practicing in Sacramento since 1979. (ECF No. 192-2 at 48.) Mr. Burlingham attaches the billing statements, showing the services he performed in this case in his capacity as Plaintiffs' local counsel. Mr. Burlingham seeks compensation in the amount of $303.50. These records show that Mr. Burlingham made calls, sent emails, and participated in conferences with opposing counsel. Mr. Burlingham also answered calls from the Court regarding motions and stipulations. Mr. Burlingham submits documentation showing the following invoices:

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| Numerous calls and email from right to work (Knox. v. Westly) and copies made | $55.00 |
| Call from Attorney Jeff Demain (Knox v. Westly) for information; e-filing and calls to e-filing | $55.00 |
| Knox v. Wesley [sic]: Telephone message from and conference with opposing counsel; review confirming letter | $85.50 |
| Call from Court re: wrong date for summary judgment (Knox v. Wesley [sic]); call right to work to inform | $24.00 |
| Call from Court re emailing stipulation for judge's signature and call Laverne to inform (Knox v. Westley) | $24.00 |
| Telephone conference re: appearance for Knox v. Chang [sic] | $60.00 |
| Total sought: | $303.50 |

Defendants do not dispute the $303.50 sought by Mr. Burlingham. The Court finds it somewhat problematic that Mr. Burlingham provides no evidence of the time expended in making these phone calls and emails, or how the rates charged were arrived at—whether they are flat rates or an hourly rate, and what the applicable hourly rate is (if any). However, in light of the amount sought and the amount of work performed, the Court finds Mr. Burlingham's requested attorney's fee of $303.50 reasonable. As such, Plaintiffs are entitled to reimbursement for this amount.

**3. Reduction for Unsuccessful Motion**

In addition to arguing that Defendants violated nonmembers' constitutional rights, Plaintiffs' Complaint asserted that Defendant SEIU violated the Constitution by causing deductions to be made for the temporary dues and fees increase from the salaries of members of the Union. Defendant SEIU moved for judgment on the pleadings ("MJOP") as to Plaintiffs' claim on behalf of union members.

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The Court granted Defendant SEIU's motion and held that Plaintiffs could not bring any cognizable constitutional claim on behalf of union members because there is no state action involved in the payment of union dues.

Defendants[6] now argue that the compensation requested by Plaintiffs for the 10.5 hours of Mr. Young's time spent working on Plaintiffs' Opposition to Defendant SEIU's Motion for Judgment on the Pleadings should be denied. Likewise, Defendants argue that the compensation requested by Plaintiffs for the 29.50 hours of Mr. Young's time spent working on discovery related to that motion should be denied. Finally, Defendants contend that the Court should deny Plaintiffs' request for the $1,978.11 incurred in out-of-pocket expenses with regard to that discovery.

The law is clear that "[w]here the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee." Hensley v. Exkerhart, 461 U.S. 424, 440 (1983). Thus, Plaintiffs agree that the 10.5 hours expended on the Opposition are properly excluded, but maintain that Plaintiffs are entitled to reimbursement for the fees and expenses related to the MJOP discovery.

First, Plaintiffs contend that as a matter of procedure, Defendants waived the right to dispute compensation for the fees and expenses related to the MJOP when Defendants failed to object to the bill of costs submitted by Plaintiffs, which included costs for the deposition transcript. (ECF No. 210 at 11.) The Court finds that Defendants did indeed waive their right to challenge costs associated with the MJOP. See, e.g., Konig v. Dal Cerro, No. C 04-02210 WHA, 2008 WL 4628038, *2 (N.D. Cal. Oct. 16, 2008) (citing In re Paoli R.R. Yard DPIB Litig., 221 F.3d 449, 453 (3d Cir. 2000)). But failure to object to the bill of costs does not waive Defendants' right to challenge Plaintiffs' claim for compensation for the hours and expenses related to the MJOP. Plaintiffs cite to no authority providing that a failure to file an objection to the bill

[6] Although Defendant SEIU filed the Opposition to Plaintiffs' Motion for Attorney's Fees (ECF No. 206), Defendant Controller filed a Joinder (ECF No. 208). Accordingly, the Court refers to "Defendants" throughout.

of costs is tantamount to waiver of the right to object to attorney's fees for that particular item, and the Court is aware of none. Thus, the Court cannot find that Defendants waived the right to dispute Plaintiffs' compensation for these fees as a procedural matter.

Accordingly, the Court must examine whether, as a substantive matter, Plaintiffs are entitled to these fees and expenses. The Supreme Court has made clear that "plaintiffs may receive fees under § 1988 even if they are not victorious on every claim. A civil rights plaintiff who obtains meaningful relief has corrected a violation of federal law and, in so doing, has vindicated Congress's statutory purposes. That 'result is what matters . . . .'" Fox v. Vice, 131 S. Ct. 2205, 2214 (2011) (quoting Hensley v. Eckerhart, 461 U.S. 424, 435 (1983)). Thus, "[a] court should compensate the plaintiff for the time his attorney reasonably spent in achieving the favorable outcome, even if 'the plaintiff failed to prevail on every contention.'" Id. (citing Hensley, 461 U.S. at 435). Indeed, "attorney work will [often] bear on multiple claims, only some of which are successful. Fees for work which relates only to unsuccessful claims should not be awarded." Padgett v. Loventhal, 706 F.3d 1205, 1209 (9th Cir. 2013) (citing Hensley, 461 U.S. at 436). "[T]he presence of these unsuccessful claims does not immunize a defendant against paying for the attorney's fees that the plaintiff reasonably incurred in remedying a breach of his civil rights." Fox, 131 S. Ct. at 2214. The award of attorney's fees "should not reimburse the plaintiff for work performed on claims that bore no relation to the grant of relief: Such work 'cannot be deemed to have been expended in pursuit of the ultimate result achieved.'" Fox, 131 S. Ct. at 2214 (quoting Hensley, 461 U.S. at 435)). However, "where attorney work proves beneficial to a successful claim, district courts should generally award these fees in full, even if the work is also useful to an unsuccessful claim. In other words, the district court must award fees for the work that contributed to a successful result as if the successful claims were the only ones litigated." Padgett, 706 F.3d at 1209.

The Ninth Circuit has developed a two-part analysis to determine when a plaintiff may recover attorney's fees for unsuccessful claims.

> First, the court asks whether the claims upon which the plaintiff failed to prevail were related to the plaintiff's successful claims. If unrelated, the final fee award may not include time expended on the unsuccessful claims. If the unsuccessful and successful claims are related, then the court must apply the second part of the analysis, in which the court evaluates the 'significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.' 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. Such decisions are within the district court's discretion.

Banta v. City of Merrill, CIV. 06-3003-CL, 2007 WL 3543445, *3 (D. Or. Nov. 14, 2007) (citing Thorne v. City of El Segundo, 802 F.2d 1131, 1142 (9th Cir. 1986)). Unrelated claims are "distinctly different" and based on different facts and legal theories, while related claims "involve a common core of facts or [are] based on related legal theories." Banta, 2007 WL 3543445, at *3 (quoting Hensley, 461 U.S. at 434-35, 437 n.12). In other words, "the test is whether relief sought on the unsuccessful claim is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury on which the relief granted is premised. Thus, the focus is to be on whether the unsuccessful and successful claims arose out of the same conduct." Schwarz v. Sec'y of Health & Human Servs., 73 F.3d 895, 901, 903 (9th Cir. 1995) (quoting Thorne, 802 F.2d at 1141).

Here, the Court cannot say that Plaintiffs' unsuccessful claim, brought on behalf of Plaintiff Conover—a member of Defendant SEIU at the time the special assessment was levied—was intended to remedy a course of conduct "entirely distinct and separate from the course of conduct that gave rise to the injury on which the relief granted is premised." Schwarz, 73 F.3d at 901. The non-union Plaintiffs asserted that Defendant SEIU failed to give them an adequate opportunity to object to the assessment, as constitutionally required. Plaintiff Conover, on the other hand, asserted that Defendant SEIU failed to give him an adequate opportunity to resign from the Union and, as a non-member, to object to the fee increase.

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Thus, Plaintiffs' successful and unsuccessful claims each relate to Defendant SEIU's conduct in levying the special assessment and the opportunity (of both members and nonmembers) to object to the assessment. As such, these claims arise out of the same conduct and therefore are related for the purposes of determining whether Plaintiffs may recover fees related to their unsuccessful claim.

Next, the Court must assess "the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation. If the plaintiff obtained 'excellent results,' full compensation may be appropriate." Banta, 2007 WL 3543445, at *3 (citing Thorne, 802 F.2d at 1142). Here, Plaintiffs achieved excellent results. Plaintiffs successfully litigated their claims up to the Supreme Court, and the Supreme Court found that Defendant SEIU's Hudson notice was indeed constitutionally deficient, in violation of Plaintiffs' First Amendment rights. Knox, 132 S. Ct. 2277. Furthermore, there is no showing that Plaintiffs expended an unreasonable amount of hours in obtaining this result. Accordingly, full compensation for the hours expended on litigating Plaintiffs' unsuccessful claim is appropriate. See Banta, 2007 WL 3543445, at *3 (citing Thorne, 802 F.2d at 1142).

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**4. Lodestar**

For the reasons stated above, the Court calculates Plaintiffs' lodestar as follows:

| **Attorney** | **Total Hours** | **Hours Claimed** | **Awarded Hourly Rate** | **Awarded Lodestar** |
|---|---|---|---|---|
| Mr. Young | 1771.45 | 1699.65[7] | $450 | $764,842.50 |
| Mr. LaJeunesse | 83.00 | 71.40 | $450 | $32,130.00 |
| Mr. Chappell | 145.10 | 124.40 | $450 | $55,980.00 |
| Mr. Cameron | 53.00 | 51.60 | $450 | $23,220.00 |
| Mr. Taubman | 75.00 | 70.00 | $450 | $31,500.00 |
| Mr. Messenger | 70.00 | 70.00 | $260 | $18,200.00 |
| Richard J. Clair[8] | 18.70 | 0.00 | n/a | $0.00 |
| John C. Scully | 7.50 | 0.00 | n/a | $0.00 |
| Sarah E. Hartsfield | 64.25 | 0.00 | n/a | $0.00 |
| **Additional Amounts** | | | | |
| Hogan Lovells Counsel | | | $95,000.00 | $95,000.00 |
| Mr. Burlingham | | | $303.50 | $303.50 |
| **Total Awarded Lodestar: $1,021,176.00** | | | | |

Thus, the Court finds that the appropriate lodestar in this case, based on the awarded hourly rates, is $1,021,176.00. Plaintiffs do not request a multiplier or suggest that the Kerr factors require any upward adjustment. See 526 F.2d 67.

[7] This number is calculated as the initial amount of hours claims by Mr. Young (1,625.65) minus the 10.5 hours excluded for the MJOP, plus the 34.3 hours spent in preparing Plaintiffs' Reply, plus the 50.2 hours spent preparing Plaintiffs' Opposition to Defendant SEIU's Motion for Clarification. (See ECF No. 210-4.)

[8] Plaintiffs state that they do not seek compensation for Mr. Clair, Mr. Scully, or Ms. Hartsfield, but have included the hours relating to these individuals to provide the Court with a thorough accounting. (ECF No. 192 at 14.) These attorneys assisted in preparing for, and attended, moot courts. (Id.)

Furthermore, the lodestar figure is presumptively reasonable, and thus a multiplier should be used "only in rare and exceptional cases." Van Gerwen, 214 F.3d at 1045. Thus, the Court finds that the lodestar amount is the total compensable attorney's fees in this case.

**5. Expenses**

"Under § 1988, the 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 citations and quotations omitted). "Such out-of-pocket expenses are recoverable when reasonable." Id.

Plaintiffs seek reimbursement of $15,412.93 in out-of-pocket expenses incurred in litigating this case. (ECF No. 192 at 16.) While Defendants argue that Plaintiffs are not entitled to the $1,978.11 in out-of-pocket expenses spent in relation to the MJOP, the Court finds that Plaintiffs are entitled to these expenses because the claim litigated in the MJOP is related to Plaintiffs' successful claims. See supra. Accordingly, the Court finds that the expenses and costs sought by Plaintiffs to be reasonable and awards Plaintiffs $15,412.93 in out-of-pocket expenses.

**B. Prejudgment Interest**

As set forth above, the Court issued an order on December 4, 2012, stating that "Defendant SEIU shall refund to Plaintiffs all monies exacted for the 'Emergency Temporary Assessment to Build a Political Fight-Back Fund," for the entirety of the period during which the assessment was exacted, plus interest." (ECF No. 190 at 2.) Defendants and Plaintiffs disagree about the applicable prejudgment interest rate.

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Further, the Court's prior order, dated March 28, 2008, stated: "[p]ursuant to 28 U.S.C. § 1961, the Union shall further issue to those nonmembers all interest accruing from the date(s) upon which nonchargeable deductions were taken." (ECF No. 139 at 27.)

The Court now affirms its prior application of federal law to the prejudgment interest rate in this case. See, e.g., Ruff, 2009 WL 4572782, at *5-6 (applying § 1961 interest rate to § 1983 case); see also W. Pac. Fisheries, Inc., 730 F.2d at 1289 ("We conclude that the measure of interest rates prescribed for post-judgment interest in 28 U.S.C. § 1961(a) is also appropriate for fixing the rate for pre-judgment interest in cases such as this, where pre-judgment interest may be awarded, unless the trial judge finds, on substantial evidence, that the equities of the particular case require a different rate.") As set forth above, under 28 U.S.C. § 1961(a), the applicable interest rate is "the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of judgment." 28 U.S.C. § 1961(a). This rate may be found by referring to the Federal Reserve website, located at: http://www.federalreserve.gov/RELEASES/h15/.

Under § 1961, the applicable interest rate in this case is .18%, which is the Treasury bill ("T-Bill") rate for the week ending in November 30, 2012. This interest rate is exceptionally low, from both a historical perspective (see ECF No. 202-1 at 1-18 (setting forth monthly rates from 1953 through 2012)) and in contrast to the T-Bill rates during the timespan of this case (see id.) At the commencement of this case, the monthly average rate was 3.85%. (Id.) The monthly average rate then peaked at 5.22% in July 2006, and was 1.54% in March 2008, when this Court first entered judgment for Plaintiffs. (Id.) In light of these facts, the Court finds that there is substantial evidence that use of the .18% federal interest rate would, in effect, deny Plaintiffs prejudgment interest, and the equities of this case require the application of the *monthly average* T-Bill rate in effect at the time that each deduction was made, from September 2005 to December 2006.

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See Davis, 2012 WL 4462520, at *6 (finding equities required award of higher rate when federal interest rate was .11%); Ruff, 2009 WL 4572782, at *6 (stating that under Ninth Circuit law, Court has discretion to apply the rate in effect at the time of the wrongful conduct).

**CONCLUSION**

For the reasons just stated, IT IS HEREBY ORDERED THAT:

1. Plaintiffs' Motion for Attorney's Fees (ECF No. 192) is GRANTED;
2. Plaintiffs are awarded attorney's fees in the amount of $1,021,176.00.
3. Plaintiffs are awarded expenses in the amount of $15,412.93.
4. Defendant SEIU's Motion for Clarification (ECF No. 198) is GRANTED;
5. The rate of prejudgment interest to be applied is the monthly average Treasury bill rate in effect at the time that each nonchargeable deduction was made.

IT IS SO ORDERED.

DATED: June 5, 2013

MORRISON C. ENGLAND, JR, CHIEF JUDGE
UNITED STATES DISTRICT JUDGE