UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY

AT LOUISVILLE

IN RE: SKECHERS TONING SHOES PRODUCTS LIABILITY LITIGATION	MASTER FILE No. 3:11-MD-2308-TBR MDL No. 2308 Honorable Thomas B. Russell
This Document Relates To: *Grabowski v. Skechers U.S.A., Inc.* S.D. California, Case No. 3:10-01300 – and – *Stalker v. Skechers USA, Inc.*, C.D. California, Case No. 2:10-cv-05460	Case No. 3:12-cv-00263-TBR Final Fairness Hearing: March 19, 2013 1:00 p.m.

DECLARATION OF GREG HAFIF IN SUPPORT OF APPLICATION FOR AWARD OF ATTORNEYS' FEES AND COSTS BY PLAINTIFF SONIA STALKER'S COUNSEL

I, Greg Hafif, declare as follows:

1. I am an attorney at law duly licensed to practice law before all Courts in the State of California, the Ninth Circuit, and the Northern, Eastern, Central and Southern District of California and the United States Supreme Court. I am attorney of record for Plaintiffs in these actions. I submit this Declaration in support of the Motion for Attorney's Fees and Costs. I have personal knowledge of the facts stated herein. If called upon to testify, I could and would competently testify thereto.

Education and Experience

2. I believe the ability and reputation of LOHH was essential to the success of this litigation. The undersigned has substantial experience in complex, class and collective action litigation. The undersigned's skills in developing theories of recovery, obtaining discovery, interviewing witnesses and Class and Collective Action Members and developing evidence, were essential motivating the defendant's to settle. We were the only firm along with my co-counsel to file a class certification motion demonstrating to the defendants that this case would be certified and that we were moving forward in a rapid pace to that end.

3. I graduated from the University of La Verne in 1987 with two B.S. degrees, one in Political Science and the other in Business Administration. I graduated from Pepperdine School of Law in 1990 and was admitted to practice in California in December 1990. In my first year of practice as counsel with Herbert Hafif, the firm received a record-breaking $45 million wrongful termination verdict against Lockheed for three individuals. I have been consistently trying two to four civil cases per year.

4. I am the managing attorney for the Law Offices of Herbert Hafif in Claremont, California, one of the most successful and nationally recognized trial law firms in the country. I

am one of California's leading civil trial lawyers producing numerous million-dollar verdicts, including the 10th largest verdict in the State of California in 1995, in an antitrust matter in Victorville, California, the same year my father, Herbert Hafif, produced the fourth largest verdict in the State of California.

5. My accomplishments have been featured in numerous publications throughout the state including "California Lawyer Magazine," the "Los Angeles Times" and the "Los Angeles Daily Journal." I have been on CNN, the Today Show and all local television stations. I am a member of the Consumer Attorneys of California and Consumer Attorneys Association of Los Angeles. I have also been a frequent lecturer to various legal associations on trial strategy and techniques and am recorded in the "Marquis Who's Who in American Law."

6. I currently serve as Vice Chairman of the Board for Balboa Thrift and Loan and am a member of the Board of Visitors for the University of La Verne Law School. Our Firm is known throughout the Country as a leader in class action litigation. The Law Offices of Herbert Hafif, APC zealously prosecuted this action on behalf of the Plaintiff and the proposed collective action members, and has devoted sufficient resources to fully and competently prosecute this matter.

LIST OF CLASS ACTION CASES

7. A list of just some of the class and collective action cases I have worked on or was certified as class counsel include, but are not limited to, the following;

a. *Barnicle v. American General*, San Diego County Superior Court Case No. EC011865;

b. *Byrd v. Sprint Corporation*, Jackson County, Missouri Circuit Court Case No. CV92-18979;

c. *Rodriguez v. Metropolitan Life*, Kern County Superior Court Case No. 235846 SPC;

d. *Killackey, et al v. General Dynamics Corp.*, Los Angeles Superior Court Case No. KC011573.

e. *Lukens v. The Ohio State Life Ins.*, Los Angeles County Superior Court, Central District Case No. BC 263545;

f. *Sueoka v. United States*, United States District Court, Central District of California Case No. 98-6313 MM (RCx);

g. *Simmons v. DHL Worldwide Express, Inc.*, San Bernardino County Superior Court, Rancho Cucamonga District Case No. RCVRS 080128;

h. *Coordination Proceeding Special Title (Rule 1550(b))*, The Great Escape Promotion Cases, JCCP Case No. 4343.

i. *Massey, et al v. Shelter Life Insurance Co.*, Jackson County, Missouri Case No. 01CV229955;

j. *Solis v. Abercrombie & Fitch Stores, Inc.*, Los Angeles Superior Court Case No. BC 289932.

k. *Byrd v Spring Corporation*, Jackson County, Missouri Circuit Court, Case Number CV 92-18979;

l. *Killacky, et al v. General Dynamics Corp*, Los Angeles Superior Court, Case Number KC011573;

m. *Richard S. v Dept of Development Services of the State of California*, United States District Court, Central District, Southern Division, Case Number SACV97-219(GLT);

n. *Saeger, et al v. Pacific Life Insurance Company, et al*, United States District Court, Central District, Southern Division, Case Number SA02-314AHS (MLGx);

o. *Boyce, et al v. Sport and Fitness Clubs of America*, United States District Court Southern District of California, County of Orange, Case Number 03CV2140-BEN(BLM);

p. *Simon v. Walt Disney World Co.*, Superior Court, California, County of Fresno, Case Number 594786-6;

q. *Reed v. County of Orange*, Case Number SACV05-1103 CJC (ANx) United States District Court, Central District of California;

r. *Edwards v. Long Beach*, Case Number CV05-8990 GW (PLAx) United States District Court, Central District of California.

s. *Faris v. Long Beach*, Case Number SACV07-954 GW (PLAx) United States District Court, Central District of California.

t. *Alaniz v. City of Los Angeles*, Case Number CV04-08592 GAF (AJWx) United States District Court, Central District of California.

u. *Mata v. City of Los Angeles*, Case Number CV 07-06782 GAF (AJWx) United States District Court, Central District of California.

8. My hourly rate charged by the Law Offices of Herbert Hafif is more than reasonable at $550.00 an hour. I have had $550 an hour approved by Federal Courts throughout the country as fair and reasonable in class action cases. In fact, my rate has never been challenged or reduced. In 2006, my hourly rate was one of the subjects addressed by the United Stated District Court, Central District of California in a Motion for Award of Attorneys' Fees and Expenses in the case of *Smith, et al. v. Bally Total Fitness Corp., et al.*, Case No. CV 05-4791-SVW (JTLx). That case resulted in an award of $500 per hour for me. A true and correct copy

of the "Order Granting in Part Plaintiffs' request for Reasonable Attorneys' Fees Pursuant to This Court's August 16, 2006 Order" is attached hereto as Exhibit "A", p. 5, ln. 9 and p. 7, lns. 7-8.). Once again in 2009, my hourly rate was evaluated and addressed by the United Stated District Court, Central District of California in a Motion for Award of Attorneys' Fees and Expenses in the case of *George, et al. v. The Timberland Company, Inc.*, Case No. CV 07-01327-MMM (JWJx). That case again resulted in an award of $ 500 per hour for me back in 2006. A true and correct copy of the "Order Re: Plaintiff's Motion for Attorneys' Fees" is attached hereto as Exhibit "B", p. 14, ln. 2-3.). On March 22, 2012, the Honorable George Wu in the consolidated lawsuits of *Edwards v. City of Long Beach*, USDC-Central, Case No. CV 05-8990 GW (PLAx) and *Faris v. City of Long Beach*, USDC-Central, Case No. SACV 07-00954 GW (PLAx) granted the Law Offices of Herbert Hafif's motion for allocation of attorney's fees and costs, indicating that my hourly rate of $550 was reasonable. (See *Edwards* Docket No. 1694 at p. 4. A true and correct copy of the March 22, 2012 Minute Order is attached hereto as Exhibit "C", p. 4). On June 4, 2012, the Honorable Cormac J. Carney in *Reed v. County of Orange*, Case Number SACV05-1103 CJC (ANx) United States District Court, Central District of California granted the Law Offices of Herbert Hafif's motion for allocation of attorney's fees and costs. My hourly rate in this matter is $550.

ATTORNEYS FEES AND EXPENSE COMPUTATION TOTALS

9. A summary of the my billing records reflecting the itemization of services rendered in this case is attached hereto as Exhibit "D". This billing was reviewed by me for accuracy, exercising my billing judgment by excising all time that could arguably be construed as duplicative, excessive, or unnecessary.

10. The time and expense computation totals in the above captioned matter through December 2012 for the Law Offices of Herbert Hafif, are as follows

***Sketchers* Action**

Description	**Amount**
109.30 Hours in the prosecution of this action	$60,115.00

11. Furthermore, I believe that there may be approximately an additional 50 hours that have not been billed, including but not limited to telecoms, emails and conferences with co-counsel, telecoms and emails with opposing counsel, telecoms and emails with plaintiffs, and the Court's ECF system and investigation of the matter. My firm has also expended over $1,161.00 in hard costs on this matter.

Work Performed and Involvement in Case

12. During the course of my involvement in this matter, I performed extensive legal work. From June 2010 to the time of settlement, I completed research regarding Business & Professions Code Section 17200 and requirements for class certification. I participated in meetings with co-counsel regarding obtaining their claims and damages. I prepared for and participated in all FRCP Rule 26 requirements. I participated in the drafting of plaintiffs' complaint, motion for class certification and opposition to defendant's motion to dismiss as well as extensive investigation into the produce as claims, including consultation with medical professionals, which time is not even accounted for in my time sheets submitted hereto.

13. I also believe a significant multiplier should be applied in this matter as it was taken on contingency and other cases had to be turned down in order to have the staffing available for this case. I believe if our hours in this matter were compared to any other lawyer, including the Blood firm, the hours we expended would be comparable and the division of fees

should reflect that comparison and be divided accordingly, otherwise one firm would be getting the lions share and a windfall simply because the defendant decided to secretly pick one firm over us to negotiate with, when it was my firm, along with co-counsel Ray Mandlekar and Christopher Morosoff who were supplying the pressure on defendants to litigate the matter, including the only pending class certification motion on file.

14. I also attempted in good faith on numerous occasions to negotiate directly with Tim Blood a reasonable attorney fee in the matter to eliminate the necessity for this motion, but was unsuccessful.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 27th day of December 2012, at Claremont, California.

Greg Hafif

EXHIBIT "A"

Priority ✓
Send ✓
Enter ✓
Closed
JS-5/JS-6
JS-2/JS-3
Scan Only

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHRRISTOPHER M. SMITH, JONATHAN B. ARAUJO, TIMI D'ANGELO, and PETER J. GUTIERREZ, individuals for themselves, on behalf of all others similarly situated, and behalf of the general public,

Plaintiffs,

v.

BALLY TOTAL FITNESS CORPORATION, a Delaware corporation; BALLY TOTAL FITNESS HOLDING CORPORATION, a Delaware corporation; and DOES 1 through 10, inclusive,

Defendants.

CV 05-4791-SVW (JTLx)

ORDER GRANTING IN PART PLAINTIFFS'S REQUEST FOR REASONABLE ATTORNEYS' FEES PURSUANT TO THIS COURT'S AUGUST 16, 2006 ORDER [113]

I. INTRODUCTION

Plaintiffs alleged various wage and hour claims against Defendants, seeking back wages, compensatory damages, punitive damages, and attorney fees. On November 8, 2005 - before Defendants

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filed their answer - Plaintiffs voluntarily dismissed the action without prejudice. Defendants filed a Rule 11 Motion for Sanctions on November 23, 2005, claiming that the entire suit was factually and legally baseless. Plaintiffs' Opposition contended that Defendants' motion was frivolous, and requested sanctions in the amount of the attorneys' fees and costs they incurred responding to Defendants' Motion. In an Order filed August 16, 2006, the Court granted Plaintiffs' request for sanctions, finding that Mr. Paul Coady violated Rule 11. The Court ordered Plaintiffs to file "a detailed billing statement specifying the hours they spent responding to arguments that the Court has found to be sanctionable." Plaintiffs filed a detailed billing statement on September 18, 2006, and Defendants filed a response on September 25, 2006.[1]

As detailed below, this Court GRANTS IN PART Plaintiff's requested for reasonable attorneys' fees in the amount of $1,000.

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[1] Plaintiffs filed a supplemental billing statement in response to Defendants' opposition on September 27, 2006. The supplemental statement suggests two methods for analyzing the billing statements to account for the fact that not all of Defendants' Rule 11 arguments were found sanctionable. On October 3, 2006, Defendants filed objections to the supplemental statement, contending that it was untimely. Because the statement does not present new evidence, but only a response to Defendants' objections, it seems appropriate for the Court to consider the statement. It also does not provide any new "evidence," but merely offers supplemental arguments

II. DISCUSSION

A. Applicable Legal Standard

Rule 11 sanctions may be imposed "when a filing is frivolous, legally unreasonable, or without factual foundation, or is brought for an improper purpose." Estate of Blue v. County of Los Angeles, 120 F.3d 982, 985 (9th Cir. 1997). Once a court determines that Rule 11 has been violated, it has broad discretion in fashioning a sanction award. Divane v. Krull Elec. Co., 319 F.3d 307, 314 (7th Cir. 2003); see also Retail Flooring Dealers of Am., Inc. v. Beaulieu of Am., LLC, 339 F.3d 1146, 1150 (9th Cir. 2003) (holding Rule 11 determinations are reviewed for abuse of discretion). For example, the court "may impose a flat sanction," "strike offensive pleadings," or "direct the offending party to pay the other party's reasonable attorney's fees." Divane, 319 F.3d at 314; see also Fed. R. Civ. P. 11(c)(1)(A) ("[I]f warranted, the court may award to the party prevailing on the motion the reasonable expenses and fees incurred in presenting or opposing the claim."). A sanctions award is limited to "attorneys' fees and other expenses incurred as a direct result of the violation." Fed. R. Civ. P. 11(C)(2) (emphasis added); see also Barber v. Miller, 146 F.3d 707, 711 (9th Cir. 1998).

Rule 11's "paramount aim" is deterrence. Matter of Yagman, 796 F.2d 1165, 1184 (9th Cir. 1986); see also Fed. R. Civ. P. 11(C)(2) (sanction "shall be limited to what is sufficient to deter repetition of [the sanctioned] conduct or comparable conduct by others similarly situated"); Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure, Civil, § 1336.3 (3d ed. 2004) ("The 1993 revision [to Rule

11] makes it clear that the main purpose of Rule 11 is to deter improper behavior, not to compensate the victims of it or punish the offender."). However, a secondary purpose is to compensate the moving party. See, e.g., Kahre v. United States, 2003 WL 21001012, at *5 (D. Nev. Mar. 10, 2003); Divane, 319 F.3d at 314.

The moving party - on whom the burden rests - must provide documentation supporting its claims. Id.; see also Hensley v. Eckerhart, 461 U.S. 424, 433, 437 (1983). While a court need not "become enmeshed in a meticulous analysis of every detailed facet of the professional representation," Lindy Bros. Builders v. Am. Radiator & Standard Sanitary Corp., 540 F.2d 102, 116 (3d Cir. 1976), "a court must make a reasonable effort to examine the requested award to determine its reasonableness," Sussman v. Salem, Saxon & Nielsen, P.A., 150 F.R.D. 209, 217 (M.D. Fla. 1993); see also Fed. R. Civ. P. 11(C)(3) ("When imposing sanctions, the court shall describe the conduct determined to constitute a violation . . . and explain the basis for the sanction imposed."); Intel Corp v. Terabyte Int'l, Inc., 6 F.3d 614, 623 (9th Cir. 1993) (holding a district court may not merely award fees "without elaboration").

Courts calculate sanctions awards on the basis of a "lodestar" calculation, an initial fee determination constituting a reasonable number of hours expended on the case multiplied by a reasonable hourly rate. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); see also Willis v. City of Oakland, 231 F.R.D. 597, 600 (N.D. Cal. 2005). Courts proceed to adjust the lodestar calculation on the basis of various factors, including the sanctioned attorney's experience. Willis, 231 F.R.D. at 601. However, because this method "proves to be an inexact

science," Divane, 319 F.3d at 315, the district court's broad discretion to fashion an appropriate sanctions award is particularly important.

B. Lodestar Calculation

Plaintiffs have incurred the following legal fees in responding to Defendant's Rule 11 motion:

Attorney	Hourly Rate ($)	Hours Billed	Total Billed ($)
James Trush	500	116.3	58,150
Greg Hafif	500	39.9	19,950
Charles Hill	250	20.5	5,125
Total		176.7	83,225

1. Reasonable Hourly Rate

Courts closely scrutinize the hourly rate sought; "whether 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." Sealy, Inc. v. Easy Living, Inc., 743 F.2d 1378, 1385 (9th Cir. 1984) (quoting Johnson v. Ga. Highway Express, Inc., 488 F.2d 714, 718 (5th Cir. 1974)). A reasonable hourly rate is determined by the "prevailing market rates in the relevant community." Blum v. Stenson, 465 U.S. 886, 895 (1984). Some courts view the agreement between lawyer and client as presumptively indicative of a reasonable market rate. See, e.g., Gusman v. Unisys Corp., 986 F.2d 1146, 1150 (7th Cir. 1993) ("[The client's] willingness to pay establishes the market's valuation of the attorney's services."); Hartmarx Corp. v. Abboud, 176 F. Supp. 2d 831, 837 (N.D. Ill. 2001) ("[I]n the absence of any indication that [lawyer-client fee] agreements represented an unreasonable decision on the part of the clients, the agreed-upon rate was by definition the proper measure of

a reasonable fee."), overruled on other grounds, 326 F.3d 862 (7th Cir. 2003).

Common knowledge of the legal profession suggests that Plaintiffs' counsel's hourly rates are reasonable. For example, this Court faced rates exceeding $500 per hour in another case. See Termine v. William S. Hart Union High Sch. Dist., CV 02-1114-SVW (MANx) (C.D. Cal. Jan. 13, 2006). Similar cases also suggest that the hourly rates are reasonable. See Mardirossian v. Guardian Life Ins. Co., 2006 WL 3059930, at *7 (C.D. Cal. Oct. 18, 2006) (upholding $400 hourly rate); Thivierge v. Hartford Life & Accident Ins. Co., 2006 WL 2917926, at *3 (N.D. Cal. Oct. 11, 2006) (upholding $375 hourly rate); Gurary v. Winehouse, 270 F. Supp. 2d 425, 431 (S.D.N.Y. 2003) (upholding hourly rates of $525 and $550 for experienced trial and appellate advocate); Hartmarx, 176 F. Supp. 2d at 837 (upholding hourly rates of $510 and $440). Additionally, the fact that Defendant's counsel's hourly rate is $505 suggests that the hourly rates Plaintiffs' counsel seek are also reasonable. Finally, public records recounting Plaintiffs' counsel's experience support their hourly rates. See Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001) (holding judicial notice may be taken of public records). For example, the State Bar of California's website indicates that Greg Hafif has been practicing law in California for nearly sixteen years, and graduated from Pepperdine University School of Law. Trush has been practicing law in California for over seventeen years and also graduated from Loyola Law School. Finally, Hill has been practicing law since 1995 - though his bar membership has been inactive at times - and graduated from University of San Diego Law School. Thus, counsel's extensive legal experience supports their hourly rates.

Courts tend to defer to an attorney's hourly rate when the opposing party has not objected to the rate sought. See, e.g., S.A. Auto Lube, Inc. v. Jiffy Lube Int'l, Inc., 131 F.R.D. 547, 550 n.1 (N.D. Ill. 1990). Thus, the fact that Defendants' counsel has not objected to the hourly rates sought suggests that this Court should regard them as proper.

Accordingly, the Court accepts the hourly rates Plaintiffs seek in their fee application.

2. Reasonable Number of Hours Expended

While courts generally accept what is stated in the request for fees, courts at times reduce the hours when they are clearly excessive or only vaguely described. See, e.g., In re Wash. Public Power Supply Sys. Securities Litigation, 19 F.3d 1291, 1298 (9th Cir. 1994).

a. Requisite Specificity

The parties disagree about the extent to which the hours need to be specified. Defendant contends that Plaintiffs must disaggregate the hours spent responding to the sanctionable arguments from those spent responding to other arguments. Plaintiffs disagree and assert that it is impossible and impracticable to accurately differentiate between these two categories.

Defendants cite to Dodd Insurance Services, Inc. v. Royal Insurance Co., 935 F.2d 1152 (10th Cir. 1991), in support of their argument. In Dodd, the district court found that three out of ten claims were frivolous, and therefore awarded 30% of defendant's counsel's fees as sanctions. Id. at 1159. The Tenth Circuit reversed, holding that "such an approach to the calculation of Rule 11 sanctions is inappropriate." Id. The court emphasized that this mathematical percentage approach "fail[e]d even to consider whether the penalty

imposed is the least severe sanction adequate to deter future abuses." Id. Thus, the court rejected the district court's determination because it did not factor in deterrence. A mathematical percentage approach could therefore be appropriate if the court utilizing it also considered deterrence at some point in its analysis.

Additionally, Defendants seek support from the Ninth Circuit's statement that "[i]t is crucial . . . that a sanctions award be quantifiable with some precision and properly itemized in terms of the perceived misconduct and the sanctioning authority." Yagman, 796 F.2d at 1184. However, viewed in its proper context, this statement does not require that a bill be itemized in the manner Defendants demand. Immediately following the statement, the Ninth Circuit noted:

> Different rules, regulations and statutes provide sanctions for different forms of misconduct. For example, section 1927 provides for the recovery of the excess attorney's fees incurred as a result of misconduct which multiplies the proceedings. Obviously, a blanket award of all fees cannot square with the section's requirement that only excess amounts be allowed. Thus, only if the award is sufficiently itemized can the court be assured that it is reasonable.

Id. Thus, the quote Defendants cite does not suggest that a bill must specify the particular arguments involved in every single time entry. Rather, the quote merely supports the assertion that a bill must be itemized to some extent - so that a court can reasonably attempt to distinguish between time expended on the sanctioned arguments and other billed time.

Indeed, courts have held that a sanction award need not be based on highly specific bills. See, e.g., Divane, 319 F.3d at 317 (holding

when claims are interrelated, and only some are sanctionable, the failure to engage in a line-by-line analysis of the bills would not constitute an abuse of discretion); Hendrix v. Naphtal, 971 F.2d 398, 400-01 (9th Cir. 1992) (upholding district court's method of calculating sanctions, which was to award all fees prior to a cut-off date, based on the estimation that most fees incurred in that time would be related to the sanctioned argument).

In fact, the Ninth Circuit has implicitly supported a mathematical approach to fee awards. Hudson v. Moore Business Forms, Inc., 898 F.2d 684, 686-87 (9th Cir. 1990). In Hudson, the court found that although the substantive counterclaims at issue were not frivolous, the damages sought were so high as to merit Rule 11 sanctions. Id. at 686. In addition to awarding fees directly related to the damages claim, the district court awarded 25% of the fees plaintiff incurred in connection with defendant's substantive counterclaims. Id. The Ninth Circuit upheld this determination, noting that in light of the complexity of the legal claims, "[i]t is reasonable to conclude that much of the time spent investigating the legal claims were [sic] interrelated with the frivolous prayers for relief." Id. at 687. Thus, it is unnecessary for Plaintiffs' counsel to provide even more detailed billing statements. A mathematical analysis can be employed if necessary.

b. Calculation

Plaintiffs' counsel have billed the following hours in connection with Defendants' Rule 11 motion:

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	Hafif	Hill	Trush	Total
Introductory Research	12.5[2]	14[3]	0	26.5
Drafting	16.7[4]	6.5[5]	37.7[6]	60.9
Revising	.8[7]	0	27.5[8]	28.3
Other[9]	9.9[10]	0	46.2[11]	56.1
Total	39.9	20.5	111.4	171.8

The Court notes that because Defendants were seeking a $300,000 award, counsel reasonably spent a substantial amount of time responding to Defendants' Rule 11 motion. Additionally, the fact that Defendants have not objected to the number of hours charged - other than on specificity grounds - suggests that the hours expended are reasonable. Nonetheless, counsel spent an excessive amount of time on

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[2] This is comprised of the billing entries from 11/28 and 11/29.

[3] This is comprised of the billing entries from 11/21, 11/28, and 11/29.

[4] This is comprised of the billing entries from 11/30, 12/1, and 12/2.

[5] This is comprised of the billing entries from 11/29 and 11/30.

[6] This is comprised of the billing entries from 11/28, 11/29, 11/30, and 12/1.

[7] This is comprised of the billing entry from 12/5.

[8] This is comprised of the billing entries from 12/2, 12/3, 12/4, and 12/5.

[9] This category constitutes billing entries relating to preparation for the hearing and the reply to the Court's order to show cause, as well as the request for decision.

[10] This is comprised of the billing entries from 12/13, 12/18, and 12/19.

[11] This is comprised of the billing entries from 12/13, 12/19, 12/20, 1/13, 1/16, and 1/24.

the Plaintiffs' opposition. For example, the time entries from 1/30 through 8/18 appear unnecessary to responding to the Rule 11 motion. Instead, the entries include a mere convenience, such as obtaining an earlier decision from the Court. Additionally, reviewing this Court's August 16 Order is not necessarily connected to responding to Defendants' frivolous arguments. Finally, the entries concerning the evidentiary hearing do not involve the sanctioned arguments, as the Court did not reach the issues discussed at that hearing. As a result, these 18.6 hours billed by Trush are removed from the "Other" category.[12]

In addition, counsel spent an undue amount of time on their opposition. For example, counsel seeks recovery for essentially three full days of research completed before drafting even began. This is an unusually long time period to devote to research alone; most lawyers begin drafting papers after considerably less time. Second, counsel devoted a great deal of time to revising the opposition - nearly half of the time spent crafting a first draft. Plaintiffs' counsel have presented no reasonable justification for expending this amount of time on revisions.

This amount of time spent revising was also unreasonable in light of the opposition's flaws. Generally, the opposition suffers from serious structural flaws: it contains seven substantive sections, and begins discussing the flaws in Defendants' motion (sections II-IV), proceeds to argue for sanctions (section V), and then returns to addressing the original motion's shortcomings (sections VI-VIII).

[12] The Court ha reviewed the other time entries within this "Other" category and deems them to be reasonable (such as for drafting the reply brief in January 2006).

Perhaps this is a product of too many individuals being involved in the writing process - or counsel having devoted too much time to the opposition. Nonetheless, the opposition's flaws suggest that Plaintiffs' counsel should not recover for all requested time.

Therefore, the Court finds that the following time expenditures are reasonable:

	Hafif	Hill	Trush	Total
Introductory Research	7	7	0	14
Drafting	10	3	20	33
Revising	.5	0	10	10.5
Other	9.9	0	27.6	37.5
Total	27.4	10	57.6	95

Accordingly, the initial time calculation is 95 hours.[13]

c. Adjustment

This calculation must be adjusted to account for the fact that only a few of Defendants' arguments in their Rule 11 motion were found to be frivolous.[14] Thus, some of the time Plaintiffs' counsel spent responding to Defendants' Rule 11 motion was not a "direct result" of the offending arguments. Fed. R. Civ. P. 11(C)(2).

[13] While counsel expended an inordinate amount of effort on Plaintiffs' opposition, the Court does not believe it should further reduce the fees sought because work performed was duplicative or redundant. Some overlap will necessarily occur in a case involving multiple attorneys, but the attorneys in this case appeared to attempt to minimize this overlap. For example, one of the time entries for 11/28 states that Hafif and Hill assigned portions of the opposition to each other. To the extent that duplication of effort did occur, the Court finds that its reduction of Plaintiff's hours has effectively eliminated any such difficulty.

[14] It is important to note, however, that the Court did not find that the Defendants' remaining seven arguments were not frivolous, but instead declined to evaluate them under Rule 11.

Plaintiffs propose two methods of reducing the hours charged. The first is to reduce the hourly figure based on the proportion of Plaintiffs' opposition concerning the sanctioned arguments (38.73%). Alternatively, Plaintiffs propose that the hourly figure be multiplied by the percentage of the arguments the Court found sanctionable, which was 46.15%. While no cases directly address a similar situation, both approaches seem quite sensible. The Court will adopt the second approach, as it adds a realistic element to the time calculation: for example, Plaintiffs' counsel may have misjudged the import of various arguments.

3. Conclusion

Based on the foregoing estimates, the lodestar calculation is as follows:

Attorney	Hourly Rate ($)	Hours Billed	Total Billed ($)
James Trush	500	57.6 x .4615 =26.58	13,290
Greg Hafif	500	27.4 x .4615 =12.65	6,325
Charles Hill	250	10 x .4615 = 4.62	1,155
Total		43.85	20,770

C. Adjustments

A court must next consider the propriety of adjusting the lodestar calculation on the basis of various factors. It is only necessary to consider factors relevant to the case at hand. See, e.g., Cairns v. Franklin Mint Co., 292 F.3d 1139, 1158-59 (9th Cir. 2002); Drucker v. O'Brien's Moving & Storage Inc., 963 F.2d 1171, 1174 (9th Cir. 1992); Harris v. McCarthy, 790 F.2d 753, 758 (9th Cir. 1986). Factors already subsumed into the lodestar calculation cannot be the basis of an adjustment. D'Emanuele v. Montgomery Ward & Co, Inc., 904 F.2d 1379, 1383 (9th Cir. 1990).

1. Deterrence

In fashioning a sanctions award, considerations of deterrence are of the utmost importance. Yagman, 796 F.2d at 1184. However, courts' adjustments based on deterrence appear to be conclusory. For example, in Zimmerman v. United States, 198 F.R.D. 535 (E.D. Cal. 2000), the court merely stated that "the requested sanction seems somewhat excessive to accomplish [Rule 11] goals," and accordingly reduced the award by roughly 35%. Id. at 539.

The fact that Defendants sought such a high award ($300,000) could suggest that a high sanction is necessary to deter future violations. However, unlike Terrebonne, Ltd. v. Murray, 1 F. Supp. 2d 1050, 1075-76 (E.D. Cal. 1998), the Defendants' Counsel did not appear to make deceptive arguments, but instead simply presented several legally meritless arguments.

Thus, the Court believes a substantial downward adjustment is necessary. In light of the Court's broad discretion in this arena, it concludes that a sanction in the amount of $1,000 is the least necessary to deter future Rule 11 violations.

2. Sanctioned Party's Ability to Pay

A court may adjust the lodestar calculation based on the sanctioned party's ability to pay. Yagman, 796 F.2d at 1185. The burden rests on the sanctioned party to demonstrate his inability to pay. Gaskell v. Weir, 10 F.3d 626, 629 (9th Cir. 1993); White v. Gen. Motors Corp., Inc., 908 F.2d 675, 685 (10th Cir. 1990). However, "a monetary sanction imposed without any consideration of ability to pay would constitute an abuse of discretion." In re Kunstler, 914 F.2d 505, 524 (4th Cir. 1990).

Defendants' counsel, Mr. Paul Coady, has not alleged that he is unable to pay the requested fees. Accordingly, he has failed to meet his burden. Additionally, Defendant's counsel is a seasoned partner at Winston & Strawn's Los Angeles office, and likely receives very high compensation. Thus, he should be able to pay the sanctions award.

3. Opposing Party's Misconduct

The initial calculation may be reduced if the sanctioned conduct partially resulted from misconduct by the opposing attorney. Mossman v. Roadway Express, Inc., 789 F.2d 804, 806 (9th Cir. 1986); Yagman, 796 F.2d at 1185. Defendants contend that the sanctions award should be reduced because Plaintiffs filed a nearly identical action in the California Superior Court after voluntarily dismissing the claims before this Court, in violation of Local Rule 83-1.2.1 ("It is not permissible to dismiss and thereafter refile an action for the purpose of obtaining a different judge.") However, as Plaintiffs note, this Court may only consider sanctions awards for conduct involving the action before this Court. It is not this Court's responsibility to reprimand Plaintiffs for their improper actions in state court; that is instead the obligation of the state court judge. See Woodard v. STP Corp., 170 F.3d 1043, 1045 (11th Cir. 1999).

Additionally, Defendants contend that Plaintiffs have "padded" their bills because they requested roughly $54,000 in fees in their opposition to Defendants' Rule 11 motion, but now request approximately $83,000. However, because Defendants have not presented any evidence suggesting bad faith, this difference alone cannot support an adjustment. Additionally, the Plaintiffs now seek recovery for 52.5 hours of work (and $26,250 in fees) incurred after the opposition was filed on December 5, 2005. Thus, the request in the

opposition and in the bills presented after this Court's August 16 Order do not appear to be in significant conflict.

Therefore, this factor does not support a downward adjustment of the lodestar calculation.

SCANNED

III. CONCLUSION

For the foregoing reasons, this Court SANCTIONS Defendants' counsel, Mr. Paul Coady, in the amount of $1,000.[15] Coady is ORDERED to pay this amount in the manner directed by Plaintiffs' counsel not later than December 22, 2006.

IT IS SO ORDERED.

DATED: 11/28/06

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

[15] The fact that the award has been reduced to such an extent from what Plaintiffs sought should instill confidence that the award does not incorporate time spent on nonsanctionable arguments. This is also only $50 more than Defendants' suggested amount.

EXHIBIT "B"

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL GEORGE, for himself and other members of the general public similarly situated, Plaintiff, vs. THE TIMBERLAND COMPANY, INC; and DOES 1 through 10, inclusive, Defendants.	CASE NO. CV 07-01327 MMM (JWJx) ORDER RE: PLAINTIFF'S MOTION FOR ATTORNEYS' FEES

On September 15, 2008, plaintiff's counsel filed a motion for attorneys' fees,[1] which defendant Timberland Company ("Timberland") opposed on September 29, 2008.[2] After reviewing the filings, the court concluded that plaintiff's counsel had submitted inadequate evidence regarding the reasonableness of the hourly rates requested, and no evidence regarding

[1]See Plaintiff's Motion for Final Approval of Attorneys' Fees Award ("Plaintiff's Mot."), Docket No. 31 (Sept. 15, 2008); see also Plaintiff's Reply to Defendant Timberland's Opposition to Plaintiff's Motion for Final Approval of Attorneys' Fees Award ("Plaintiff's Reply"), Docket No. 36 (Oct. 6, 2008).

[2]See Defendant Timberland's Opposition to Plaintiff's Motion for Final Approval of Attorneys' Fees Award ("Defendant's Opp."), Docket No. 33 (Sept. 29, 2008).

the number of hours expended.[3] Accordingly, the court directed counsel to file a supplemental brief containing this information, and permitted defendant to file a responsive pleading.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Statutory Background

The complaint in this action alleged claims under the Fair and Accurate Credit Transaction Act ("FACTA"). FACTA is part of a broader statutory scheme known as the Fair Credit Reporting Act ("FCRA"). FCRA creates a private right of action for FACTA violations. See 15 U.S.C. § 1681 et seq; see also, e.g., *Nelson v. Chase Manhattan Mortgage Corp.*, 282 F.3d 1057, 1059 (9th Cir. 2002) ("That with these words Congress created a private right of action for consumers cannot be doubted"). FACTA provides that "no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." 15 U.S.C. § 1681c(g)(1).[4] Section 1681o provides for the recovery of actual damages for negligent violations.[5] Section 1681n provides for recovery of actual or statutory damages, as well as punitive damages, for "willful" violations.[6]

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[3]See Order Directing Plaintiff's Counsel to Submit Additional Evidence in Support of Request for Award of Attorneys' Fees ("First Fees Order"), Docket No. 38 (Oct. 16, 2008).

[4]When it enacted this provision, Congress directed that it take effect in two phases. Cash registers installed on or after January 1, 2005 had to comply with the display requirement immediately. Companies that had registers in use before that date, however, were required to comply by December 4, 2006. See 15 U.S.C. § 1681c(g)(3).

[5]See *id.*, § 1681o ("Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of . . . any actual damages sustained by the consumer as a result of the failure; and . . . the costs of the action together with reasonable attorney's fees as determined by the court").

[6]See *id.*, § 1681n ("Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of . . . any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; . . . such amount of punitive

Although § 1681c(g)(1) originally prohibited printing more than the last five digits of the card numbers *and* the card's expiration date on any receipt provided to the cardholder at the point of sale or transaction, Congress amended the statute in the spring of 2008. It did so in response to the fact that "hundreds of lawsuits" had been filed that did not "contain[ ] any allegation of harm to any consumer's identity." 154 Cong. Rec. H00000-29 § 2 (a)(4)-(5) (May 13, 2008). The House of Representatives noted that "[e]xperts in the field [of consumer protection] agree[d that] that proper truncation of the card number . . . *regardless of the inclusion of the expiration date*, prevents a potential fraudster from perpetrating identity theft or credit card fraud." *Id.*, § 2(a)(6) (emphasis added). It also observed that "the continued appealing and filing of [expiration date] lawsuits represents a significant burden on the hundreds of companies that have been sued and could well raise prices to consumers without corresponding consumer protection benefit." *Id.*, § 2(a)(7). Based on these findings, Congress amended FACTA by adding the following provision to 15 U.S.C. § 1681n:

> "(d) Clarification of willful noncompliance – For the purposes of this section, any person who printed an expiration date on any receipt provided to a consumer cardholder at a point of sale or transaction between December 4, 2004 and June 3, 2008, but otherwise complied with the requirements of section 1681c(g) of this title for such receipt shall not be in willful noncompliance with section 1681c(g) of this title by reason of printing such expiration date on the receipt." *Id.*

The amendment took effect on June 3, 2008.

B. Factual Background

In his complaint, plaintiff Michael George alleged that, beginning on January 1, 2005, Timberland violated FACTA either by printing more than the last five digits of the consumer's

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damages as the court may allow; and in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court"). In *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 127 S.Ct. 2201 (2007), the Supreme Court held that "willful" violations can be either knowing or reckless. *Id.* at 2208. It defined reckless violations objectively as "action entailing 'an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" *Id.* at 2215.

credit card number or printing the card's expiration date on the receipt at point of sale.[7] He did not allege that any class member had suffered actual damage as a result of Timberland's conduct.[8] Rather, George asserted that Timberland "willfully" violated FACTA such that it was liable for statutory damages.[9]

George filed the action on February 27, 2007. On July 2, 2007, the court held a scheduling conference.[10] No motions were filed, nor were any other proceedings held between the scheduling conference and November 26, 2007, the date on which the parties submitted a stipulation seeking preliminary approval of their settlement.[11] For an unspecified period of time prior to November 26, 2007, the parties engaged in arms length settlement negotiations "with the extensive assistance of retired Justice Richard Neal, acting as a mediator at JAMS."[12]

The parties ultimately agreed that "in light of the costs, risks, and delay of litigation," it was appropriate to resolve the action. They also agreed that the terms of the settlement were fair, reasonable and adequate, particularly given their stipulation that George would have had difficulty proving "willfulness" as required to recover statutory damages under FACTA.[13]

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[7]See Settlement Agreement and Release of All Claims ("Settlement Agreement"), Nov. 27, 2007, at 5-6, attached as Exhibit 1 to Final Order and Judgment Approving Settlement and Setting Hearing for Approval of Attorney's Fees, Docket No. 28 (Apr. 28, 2008).

[8]See *id.* at 6 ("[t]he Settlement Class shall not include . . . any person who suffered actual damages as a result of the FACTA violation alleged in the Action").

[9]*Id.* at 2.

[10]See Minutes of Scheduling Conference, Docket No. 13 (July 2, 2007).

[11]See Stipulation for Order for Approval of Proposed Class Action Settlement, Docket No. 19 (Nov. 26, 2007).

[12]Settlement Agreement at 2.

[13]*Id.* at 2-3. The parties noted that Timberland promptly stopped printing expiration dates on customer receipts after learning of the alleged violation. Moreover, Timberland repeatedly retained respected outside experts to audit compliance with best practices for protecting customer data. (*Id.* at 3.)

C. Settlement Terms

The settlement agreement provided two forms of consideration for class members. First, Timberland agreed to "make available to any Settlement Class member a 30% discount redemption certificate redeemable upon making a purchase at one of Timberland Retail's stores in the United States or online at Timberland.com."[14] To obtain a certificate, class members were required to mail to Timberland a receipt containing information that violated FACTA, or a copy of a credit or debit card statement evidencing a transaction within the qualifying period.[15] Timberland agreed to issue and accept discount certificates for six months following approval of the settlement; each certificate, moreover, expired six months after the effective date of the settlement.[16] Class members were entitled to only one certificate per qualifying (i.e., FACTA-violating) transaction.[17] In addition to certificates issued to class members, Timberland agreed to make a charitable donation of $100,000 to the Identity Theft Resource Center ("ITRC") within 30 days of final settlement approval.[18]

The settlement agreement also provided for an award of attorneys' fees to class counsel. It stated: "Timberland agrees to pay Class Counsel a total of $137,500.00 in attorneys' fees, costs, and expenses. If the Court awards in excess of $137,500.00, Timberland will pay no more than $137,500.00 in fees and costs. Within fifteen (15) days after the redemption certificates issued to Settlement Class members expire, Timberland shall make this payment of the fees, costs

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[14] *Id.* at 7.

[15] *Id.*

[16] *Id.* Effectively, this meant that a class member had six months after the final approval of the settlement to receive and redeem a discount coupon on a purchase at Timberland.

[17] *Id.*

[18] *Id.* ITRC is a non-profit organization "dedicated exclusively to the understanding and prevention of identity theft. . . [and] provi[sion of] consumer and victim support as well as public education." Identity Theft Resource Center, Working to Resolve Identity Theft, (http://www.idtheftcenter.org/index.html) (last visited May 26, 2009).

and expenses to the account of Class Counsel."[19]

As noted, the parties filed a stipulation seeking preliminary approval of the settlement on November 26, 2007.[20] On January 25, 2008, the court issued an order preliminarily approving the proposed settlement and preliminarily certifying a class for the purpose of giving notice.[21]

D. Certification of a Settlement Class, Approval of the Parties' Settlement, and Scheduling a Hearing on Class Counsel's Anticipated Attorneys' Fees Motion

On March 31, 2008, George moved for certification of a settlement class and final approval of the proposed settlement under Rule 23 of the Federal Rules of Civil Procedure.[22]

The parties agreed to seek certification of a settlement class comprised of subgroups A, B, C, and D.[23] After reviewing the parties' proposal, the court found Subclasses A and B relevant to administration of the settlement, in that they distinguished between receipts printed on machines

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[19] *Id.* at 13.

[20] See Stipulation for Preliminary Approval of Proposed Class Action Settlement ("Stipulation"), Nov. 26, 2007, attached as Exhibit A to Final Order and Judgment Approving Settlement and Setting Hearing for Approval of Attorney's Fees, Docket No. 28 (Apr. 28, 2008).

[21] See Order Granting Preliminary Approval of Class Settlement, Conditionally Certifying Settlement Class and Approving Form and Manner of Notice, Docket No. 20 (Jan. 25, 2008).

[22] See Plaintiff's Motion for Final Fairness Review and Approval of Class Settlement Agreement; Setting of Hearing for Attorneys' Fees Award ("Plaintiff's Final Settlement Mot."), Docket No. 21 (Mar. 31, 2008).

[23] Subclass A consisted of "all persons in the United States who, between January 1, 2005 and the Effective Date, were provided with a receipt at the point of sale or transaction on which Timberland printed, through the use of a machine or device that was first put into use on or after January 1, 2005, more than the last five digits of the person's credit or debit card number and/or printed the expiration date of the person's credit or debit card." (Settlement Agreement at 5.) Subclass B was identical except that it was limited to "[a]ll persons in the United States who, between December 4, 2006 and the Effective Date, were provided with a receipt . . ." that violated FACTA and that was printed on a machine that was in use *before* January 1, 2005. (*Id.*) Subclass C was identical to Subclass A except that it was limited to persons who received a receipt at point of sale or transaction in Cabazon, California. (*Id.* at 5-6.) Subclass D was identical to Subclass B except that it was limited to those who received a receipt in Cabazon, California. (*Id.* at 6.)

purchased after January 1, 2005 and those printed on machines already in use on January 1, 2005;[24] it concluded, however, that Subclasses C and D were subsumed within Subclasses A and B, and narrowed the proposed settlement class to the first two subclasses only.[25]

So defined, the court concluded that the proposed settlement class met the numerosity, commonality, typicality, and adequacy requirements of Rule 23(a),[26] as well as the requirements of Rule 23(b)(3).[27] After evaluating the notice provisions and overall fairness of the settlement agreement, the court held that the proposed settlement was fair and adequate.[28]

As respects the attorneys' fees provisions of the agreement, the court observed:

> "[Class counsel] Hafif seeks attorneys' fees, costs, and expenses in the amount of $137,500. Under the settlement agreement, Timberland has agreed to pay only $137,500 and will pay no more than that even if the court's award exceeds that

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[24]Final Settlement Order at 8.

[25]Final Settlement Order at 8-9. The settlement class was thus composed of:

> (A) All persons in the United States who, between January 1, 2005 and the Effective Date, were provided with a receipt at the point of sale or transaction on which Timberland printed, through the use of a machine or device that was first put into use on or after January 1, 2005, more than the last five digits of the person's credit or debit card number and/or printed the expiration date of the person's credit or debit card; and
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> (B) All persons in the United States who, between December 4, 2006 and the Effective Date, were provided with a receipt at the point of sale or transaction on which Timberland printed, through the use of a machine or device that was in use before January 1, 2005, more than the last five digits of the person's credit or debit card number and/or printed the expiration date of the person's credit or debit card.

(*Id.* at n. 25.)

The settlement agreement provided that the settlement class would "not include (1) Timberland employees, (2) anyone who purchased at Timberland's headquarters company store (which is not generally open to the public), and (3) any person who suffered actual damages as a result of the FACTA violation alleged in the Action." (Settlement Agreement at 6.)

[26]Final Settlement Order at 9-13.

[27]*Id.* at 14-18.

[28]*Id.* at 18-28.

sum. Although Hafif has limited its request to $137,500, it has not yet moved for fees. Instead, Hafif requests that this court set a date for a hearing on its motion for attorneys' fees at least 240 days after the final approval of the agreement 'to allow for the redemption period to end [so that the court may] determine the actual value the Class received.'"[29]

Observing that counsel's request was at odds with the terms of the settlement agreement – which required that Timberland pay fees within fifteen days after the redemption certificates issued to class members expired, i.e., within 195 days after the effective date of the settlement – the court granted plaintiff's request for a delayed hearing on attorneys' fees, but directed Hafif to file a fee motion no later than September 15, 2008. Timberland was directed to file any opposition to plaintiffs' request for fees on or before September 29, 2008.[30] The court set a hearing on the anticipated attorneys' fees motion for October 20, 2008.

E. The Court's First Fees Order

After reviewing the parties' submissions, the court vacated the hearing on the attorneys' fees motion and issued an order directing counsel to submit additional evidence in support of the requested fees. Although it concluded that class counsel were entitled to attorneys' fees and that it had authority to evaluate the reasonableness of the fees sought,[31] the court observed that counsel's supporting evidence was deficient. First, with respect to its hourly rates, class counsel submitted a single declaration from a lawyer involved in the action; counsel provided no additional evidence supporting the reasonableness of the requested rates.[32] Additionally, counsel failed to

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[29] *Id.* at 28 (quoting Settlement Agreement at 13 and Plaintiff's Final Settlement Mot. at 8).

[30] *Id.* at 28-29.

[31] As the court noted, the settlement agreement contained a "clear sailing provision" that required careful scrutiny irrespective of the terms of the settlement contract itself. (First Fees Order at 15.)

[32] *Id.* at 18 (observing that declaration of Greg K. Hafif seeking hourly rates ranging from $375 to $650 was not supported by extrinsic evidence, such as survey data, declarations from lawyers outside the firm, and/or copies of the state or federal court fee decisions Hafif

identify the lawyers in the firm who had worked on the case, or to explain how tasks had been apportioned between them. Likewise, no documentation of the hours that were expended on this litigation was provided. Given these deficiencies, the court concluded that it could not determine the amount of a reasonable fee award on the basis of the record before it, and directed class counsel to file supplemental evidence documenting the reasonableness of the rates charged and the nature of time charges incurred. Class counsel filed a supplemental brief on November 3,[33] to which Timberland responded on November 10.[34]

II. DISCUSSION

A. Legal Standard Governing Awards of Attorneys' Fees

The procedure for requesting attorneys' fees is set forth in Rule 54(d)(2) of the Federal Rules of Civil Procedure. While the rule specifies that requests shall be made by motion "unless the substantive law governing the action provides for the recovery of . . . fees as an element of damages to be proved at trial," it does not itself provide authority for awarding fees. "Rather, [Rule 54(d)(2)] and the accompanying advisory committee comment recognize that there must be another source of authority for such an award . . . [in order to] give[ ] effect to the 'American Rule' that each party must bear its own attorneys' fees in the absence of a rule, statute or contract authorizing such an award." *MRO Communications, Inc. v. AT&T*, 197 F.3d 1276, 1281 (9th Cir. 1999).

In class actions, two common sources of authority for awarding attorneys' fees are specific

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referenced).

[33]Supplemental Declaration of Greg K. Hafif in Support of Plaintiff's Motion for Final Approval of Attorneys' Fees Award ("Suppl. Hafif Decl."), Docket No. 39 (Nov. 3, 2008).

[34]Defendant Timberland's Response to Plaintiff's Supplemental Declaration of Greg K. Hafif in Support of Plaintiff's Motion for Final Approval of Attorneys' Fees Award ("Timberland Suppl. Resp."), Docket No. 40 (Nov. 10, 2008).

statutory provisions and the common fund exception to the "American Rule."[35] See Alba Conte and Herbert B. Newberg, NEWBERG ON CLASS ACTIONS, § 14.1 (4th ed. 2005) ("Two significant exceptions [to the "American Rule"] are statutory fee-shifting provisions and the equitable common-fund doctrine"). Valid contractual provisions providing for the payment of attorneys' fees, however, also provide a sufficient source of authority supporting a fee award. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 257 (1975) ("[A]bsent statute or enforceable contract, litigants pay their own attorneys' fees"); *Kyocera Corp v. Prudential-Bache Trade Serv., Inc.*, 299 F.3d 769, 793 (9th Cir. 2002) ("Absent statute or enforceable contract, litigants pay their own attorneys' fees"); *MRO*, 197 F.3d at 1281 ("[E]ach party must bear its own attorneys' fees in the absence of a rule, statute or contract authorizing such an award").

Although FACTA and other statutes provide a basis for awarding attorneys' fees in this case, see 15 U.S.C. § 1681n(a)(3)[36] and 28 U.S.C. § 1712(b),[37] the parties negotiated a settlement agreement that specifically provided for an award of fees. A settlement agreement is a binding contract. See, e.g., *Janneh v. GAP Corp.*, 887 F.2d 432, 436 (2d Cir. 1989), abrogated on other grounds by *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994); *D.R. by M.R. v. East Brunswick Bd. of Educ.*, 838 F.Supp. 184, 189 (D.N.J. 1993) ("It is well settled that settlement agreements . . . form a contract between parties. Plaintiff asserts that because the

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[35]The common fund exception recognizes that attorneys' fees may be collected from a fund preserved, protected, collected or realized by attorneys' efforts on behalf of a class of persons benefitted by or entitled to the fund. See 38 A.L.R.3d 1384, §4(a) & (b).

[36]Section 1681n(a)(3) provides: "[I]n the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court" may be recovered.

[37]Section 1712(b) states: "(1) If a proposed settlement in a class action provides for a recovery of coupons to class members, and a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel, any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action. (2) Any attorney's fee under this subsection shall be subject to approval by the court and shall include an appropriate attorney's fee, if any, for obtaining equitable relief, including an injunction, if applicable. Nothing in this subsection shall be construed to prohibit application of a lodestar with a multiplier method of determining attorney's fees."

Agreement was reached during mediation it is not a binding resolution of a lawsuit. The Court concurs with the Administrative Law Judge that such an assertion is not backed by either case law or logic," citing *Nolan v. Lee Ho*, 120 N.J. 465, 472 (1990)); see also *Thomas v. Louisiana*, 534 F.2d 613, 615 (5th Cir. 1976) ("Settlement agreements have always been a favorable means of resolving disputes. When fairly arrived at and properly entered into, they are generally viewed as binding, final, and as conclusive of rights as a judgment"). The court previously concluded that the parties' settlement agreement, which specifically contemplates an attorneys' fees award to plaintiff's counsel for their efforts on behalf of the class, entitles counsel to fees.[38] The sole remaining question, therefore, is whether the requested fees are reasonable.

B. Whether the Requested Fees Are Reasonable

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). This figure, which is known as the "lodestar," presumptively provides an accurate measure of reasonable fees. See *Harris v. Marhoefer*, 24 F.3d 16, 18 (9th Cir. 1994) (discussing the calculation of attorneys' fees in the context of civil rights suits under 42 U.S.C. § 1988); *Clark v. City of Los Angeles*, 803 F.2d 987, 990 (9th Cir. 1986) (same). Although a "district court should exclude from the lodestar amount hours that are not reasonably expended because they are 'excessive, redundant, or otherwise unnecessary,'" *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000) (quoting *Hensley*, 461 U.S. 424), a court may increase or decrease the lodestar only in rare or exceptional cases. See *Harris*, 24 F.3d at 18 ("[o]nly in rare instances should the lodestar figure be adjusted on the basis of other considerations"); *Clark*, 803 F.2d at 990-91 ("upward and downward [adjustments] . . . to the lodestar amount are sometimes appropriate, albeit in 'rare' and 'exceptional' cases").

A court employing the lodestar method to determine the amount of an attorneys' fees award does not directly consider the multi-factor test developed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), and *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67,

[38]First Fees Order at 10-11.

69-70 (9th Cir. 1975).[39] Rather, as a first step, it determines the lodestar amount, which subsumes certain of the *Kerr/Johnson* factors, i.e., the novelty and complexity of the issues, the special skill and experience of counsel, the quality of the representation, and the results obtained. See *Cunningham v. County of Los Angeles*, 879 F.2d 481, 484 (9th Cir. 1988); *Clark*, 803 F.2d at 990-91 and n. 3; *Blum v. Stenson*, 465 U.S. 886, 898-900 (1984). Next, the court looks to the *Johnson/Kerr* factors that have not been subsumed in the lodestar calculation to determine whether to increase or reduce the presumptively reasonable lodestar fee. See *Clark*, 803 F.2d at 991 (determining that upward adjustments to the lodestar figure are justified by factors such as the undesirability of a case, preclusion from other work, and the uncertainty of receiving any fee).

1. Reasonableness of the Hourly Rate

So that the court can calculate the lodestar, a plaintiff must submit "satisfactory evidence . . . that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum*, 465 U.S. at 895-96 n. 11. The relevant community is that in which the district court sits. See *Schwartz v. Sec'y of Health and Human Serv.*, 73 F.3d 895, 906 (9th Cir. 1995). Declarations regarding the prevailing market rate in the relevant community suffice to establish a reasonable hourly rate. See *Widrig v. Apfel*, 140 F.3d 1207, 1209 (9th Cir. 1998); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691, 696 (9th Cir. 1996) (noting that declarations from attorneys in the community can provide adequate proof of the reasonableness of counsel's rates); see also *Earthquake Sound Corp. v. Bumper Industries*, 352 F.3d 1210, 1215 (9th Cir. 2003) (discussing the affidavit of "an attorney practicing in the same region as Earthquake's attorneys," which

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[39]Under the *Johnson/Kerr* test, the factors considered in determining the amount of attorneys' fees awarded 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 70; see also *Johnson*, 488 F.2d at 717-19.

opined that "Earthquake's attorney rates were reasonable and customary"). Courts frequently use survey data as well in evaluating the reasonableness of an attorney's rates. See, e.g., *Petroleum Sales, Inc. v. Valero Refining Co.-California*, No. C 05-3526 SBA, 2007 WL 2694207, *4-5 (N.D. Cal. Sept. 11, 2007) (holding that survey evidence shedding light on the rates charged by lawyers of "comparable skill, experience and reputation" is relevant in evaluating the reasonableness of claimed rates).[40]

Class counsel have submitted time records indicating that three lawyers billed time in connection with this litigation: partner Greg Hafif and associates Farris Ain and Charles Hill.[41] Counsel seek to have Hafif's time compensated at a rate of $500 per hour.[42] As evidence that this is reasonable, counsel submit the declaration of Larry Sackey, who worked for the Law Offices of Herbert Hafif from 1991 through 2003 as a senior trial lawyer.[43] Sackey asserts that Hafif's hourly rate is reasonable in light of comparable rates for complex business litigation in the Southern California area.[44] Hafif graduated from Pepperdine School of Law in 1990, has

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[40]See also, e.g., *Fish v. St. Cloud State Univ.*, 295 F.3d 849, 852 (8th Cir. 2002) ("The parties presented two surveys of hourly rates, one reporting fees received by seven Twin Cities class action firms and the other reporting fees received by sixty-two firms doing a variety of work around the state. The court set individual hourly rates at the median of the class action survey and near the upper limit of the statewide survey, also taking into account the number of years an attorney had been admitted to practice"); *American Petroleum Inst. v. United States EPA*, 72 F.3d 907, 912 (D.C. Cir. 1996) ("Petitioners have provided support for the reasonableness of their rates through affidavits and a survey of rates and we hold that these rates are reasonable"); *Martin v. University of South Alabama*, 911 F.2d 604, 607 (11th Cir. 1990) ("Based on the testimony and survey produced by plaintiffs the reasonable non-contingent hourly rate for civil rights lawyers in the relevant market (Alabama) was found to be $135 to $150 per hour for senior counsel and $105 to $115 per hour for junior counsel").

[41]Suppl. Hafif Decl., Exh. A (*George v. Timberland* time records).

[42]*Id.*

[43]Suppl. Hafif Decl., Exh. E ("Sackey Decl.").

[44]Sackey Decl., ¶¶ 15-16 ("On all the class action matters in the past five years that I co-counseled with Greg Hafif we diligently maintained time and expense records charging our reasonable and customary hourly billing rates of $500. The fees we both requested, pursuant to

practiced as a civil trial lawyer in California since 1991, and is currently the managing attorney of the Law Offices of Herbert Hafif.[45] Given Hafif's experience and Sackey's corroborating declaration, the court finds his hourly rate of $500 reasonable.[46]

The reasonableness of the hourly rates requested for associates Ain and Hill, however, is less clear. First, although counsel originally requested that the associates' time be compensated at an hourly rate of $375, they now assert that $400 per hour is a reasonable rate for Ain's and Hill's time.[47] Second, despite the court's explicit instructions, counsel has once again failed to submit any extrinsic evidence that the associates' billing rate is reasonable. Sackey's declaration does not address the rates charged by either associate. Although counsel submitted a second declaration from Mark Calahan, Calahan addresses only his own and Hafif's hourly rates.[48] Rather than submitting survey data, class counsel filed a copy of a two-page article from

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preliminary settlements achieved[,] were also approved by presiding judges in these highly complex cases if not on the hourly basis on a common fund basis that turned out to be far more by the hour than $500. [¶] As a trial attorney with over 34 years litigation experience in Southern California, I have knowledge of the comparable hourly rates charged by skillful attorneys who specialize in similar complex business litigation. Based upon my extensive knowledge of Greg's litigation and trial skills and Greg's proven superior legal abilities and trial results, he has amply demonstrated that $500/hour is a reasonable fee request").

[45]Plaintiff's Motion, Exh. 1 (Declaration of Greg K. Hafif in Support of Plaintiff's Motion for Final Approval of Attorneys' Fees Award ("Hafif Decl.")), ¶¶ 38-40.

[46]Timberland contends that class counsel should not be permitted to rely on the Sackey declaration because it is authored by an "insider" who once worked for the Hafif firm. (Timberland Suppl. Resp. at 3.) While the court appreciates defendant's concern that Sackey may be less than fully neutral in his views concerning the reasonableness of the Hafif firm's rates, defendant cites no authority for the proposition that a lawyer who once practiced with class counsel's firm is disqualified from submitting a declaration that supports the rates requested. Based on its general knowledge of prevailing rates in the community, moreover, the court has no reason to conclude that Sackey's opinions lack credibility. Consequently, the court elects to consider Sackey's declaration.

[47]Compare Hafif Decl., ¶ 42 (stating that the hourly rate for Ain and Hill is $375) with *George v. Timberland* time records (billing for work completed by Ain and Hill at an hourly rate of $400).

[48]Suppl. Hafif Decl., Exh. E ("Calahan Decl.").

www.lawcrossing.com, which references a 2006 National Law Journal survey of partner billing rates in various regions of the United States.[49] This document indicates that the "highest-paid" West Coast partners had increased their rates by $20 to $45 per hour, with hourly rates "rang[ing] from $350 to just under $600."[50] Counsel provides no explanation as to why this information supports a finding that the associates' claimed rate is reasonable. Finally, counsel submitted three sets of orders and declarations from common fund class action settlements in which the firm was involved,[51] as well as a California Court of Appeal decision in which Herbert Hafif (who is not counsel in this matter) received a fee award in a non-class action contingency case.[52] These orders are not relevant in assessing whether the associates' hourly rates are reasonable, as they do not address specific attorneys' rates and merely reflect total fees awarded or the percentage of a common fund to which counsel were entitled.

When a fee applicant fails to meet its burden of establishing the reasonableness of the requested rates, the court may exercise its discretion to determine reasonable hourly rates based on its experience and knowledge of prevailing rates in the community. See, e.g., *Garcia-Goyco v. Law Environmental Consultants, Inc.*, 428 F.3d 14, 22 (1st Cir. 2005) ("The court also was within its discretion in relying upon its own knowledge and experience regarding attorneys' rates and the local market"); *Hanig v. Lee*, 415 F.3d 822, 825 (8th Cir. 2005) ("When determining reasonable hourly rates, district courts may rely on their own experience and knowledge of prevailing market rates"); *Guides, Ltd. v. Yarmouth Group Property Management, Inc.*, 295 F.3d 1065 (10th Cir. 2002) ("Where a district court does not have before it adequate evidence of prevailing market rates, the court may use other relevant factors, including its own knowledge, to establish the rate"); *Plan Administrator v. Kienast*, No. 2:06-cv-1529, 2008 WL 1981637, *4

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[49]Suppl. Hafif Decl., Exh. B ("Law Crossing Article").

[50]*Id.*

[51]Suppl. Hafif Decl., Exh. C.

[52]Suppl. Hafif Decl., Exh. D (*Glendora Community Redevelopment Agency v. Demeter*, 155 Cal.App.3d 465 (1984)).

(W.D. Pa. May 2, 2008) ("If a party fails to meet its burden to demonstrate a prima facie case that the requested rates were the prevailing rates in the community, 'the district court must exercise its discretion in fixing a reasonable hourly rate,'" quoting *Washington v. Philadelphia Court of Common Pleas*, 89 F.3d 1031, 1036 (3d Cir. 1996)); *Moreno v. Empire City Subway Co.*, No. CV 05-7768 (LMM) (HBP), 2008 WL 793605, *7 (S.D.N.Y. Mar. 26, 2008) (where a fee applicant "has submitted no evidence of the prevailing market rate for attorneys of like skill litigating cases similar to plaintiff's . . . it is within [the court's] discretion to determine the reasonable hourly rate at which plaintiff[']s counsel should be compensated based on [the court's] familiarity with plaintiff's case and the prevailing rates in the [relevant community]"); *Shephard v. Dorsa*, No. CV 95-8748 ER (JGx), 1998 WL 1799018, *2 (C.D. Cal. July 2, 1998) (determining a reasonable hourly rate based on "(1) the Court's own experience in considering the prevailing market rates in Los Angeles, (2) other fee awards in the relevant market, and (3) ALTMAN WEIL, PENSA, SURVEY OF LAW FIRM ECONOMICS (1996)" in a case where the fee applicant failed to meet his burden of establishing the reasonableness of the requested hourly rate). The court elects to evaluate whether the requested hourly rates for firm associates are reasonable based on its experience with similar cases and its knowledge of prevailing rates in the community.[53]

Ain graduated from Southwestern University School of Law and was admitted to the bar in December 2003. Hill graduated from the University of San Diego School of Law and was admitted to the bar in 1995. Counsel provides no information regarding the lawyers' relevant work experience or area(s) of expertise, if any. Based on its familiarity with prevailing market rates in the Central District of California for civil litigators who specialize in litigating consumer rights' class actions, and given its experience determining reasonable hourly rates in other cases,

[53]As discussed at length in the court's prior order, Ninth Circuit law is clear as to the type of evidence which a party seeking attorneys' fees must submit to establish the reasonableness of its requested rates. The court cautions that if the Law Offices of Herbert Hafif submits an improperly supported fee application such as this one in a future case, it will deny fees on the basis that the firm has not met its burden of demonstrating the reasonableness of its rates.

the court concludes that $400 per hour is a reasonable rate for Hill, a litigator with fourteen years' experience. The court concludes, however, that utilizing the same rate for Ain's time is not reasonable. Specifically, it is not reasonable that Ain's billing rate would be only $100 per hour below Greg Hafif's and the same as Hill's, who has been practicing nine years longer than he has. Consequently, the court concludes that Ain's time should be compensated at a rate of $375 per hour, the rate requested in counsel's original motion papers. Cf. *Smith v. Citifinancial Retail Services*, 2007 WL 2221072, *1 (N.D. Cal. Aug. 2, 2007) ("Analogous case law suggests that a somewhat lower rate may be appropriate. See *Schueneman v. 1st Credit of America, LLC*, [No. C 05 4505 MHP,] 2007 WL 1969708, at *3 (N.D. Cal. [July 6, 2007]) (reducing by $25 the requested rate in a consumer debt collection practices case and awarding $300 per hour to an attorney with five years in the field and an additional fourteen years litigation experience); *Defenbaugh v. JBC & Assoc., Inc.*, [No. C-03-0651 JCS,] 2004 WL 1874978, at *5-7 (N.D. Cal. [Aug. 10, 2004]) (in consumer debt class action, awarding fees of $435 per hour to attorney with over twenty years practice experience, and awarding $400 per hour to an attorney with slightly less practice experience)"). Accordingly, the court finds that Ain's time should be compensated at $375 per hour, while Hill's time should be compensated at $400 per hour.

2. Reasonableness of the Hours Expended

A court may award attorneys' fees only for the number of hours it concludes were reasonably expended litigating the case. "Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Hensley*, 461 U.S. at 434. "The fee applicant bears the burden of documenting the appropriate hours expended in litigation and must submit evidence in support of those hours worked." *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1992). "'The party opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the hours charged or the facts asserted by the prevailing party in submitted affidavits.'" *Common Cause v. Jones*, 235 F.Supp.2d 1076, 1079 (C.D. Cal. 2002) (quoting *Deukmejian*, 987 F.2d at 1397 (citing *Blum*,

465 U.S. at 892 n. 5 and *Toussaint v. McCarthy*, 826 F.2d 901, 904 (9th Cir. 1987)).

Class counsel has submitted detailed time records reflecting work undertaken by Hafif, Ain, and Hill. Timberland concedes that "the time entries overall appear responsive to the Court's [earlier] request" for documentation.[54] It contests only entries reflecting expert witness work billed on July 5, 2007, after the case had settled.[55] Class counsel offers little explanation of these entries, which total slightly over two hours of time.[56] Because the case had settled prior to July 5, 2007, the court will subtract these hours from its final fees award. With this exception, having reviewed counsel's time records, the court concludes that the time documented is reasonable and does not include excessive, redundant, or unnecessary hours.

Although Mark Calahan asserts in his declaration that he spent two hours preparing for mediation in this case, eight hours attending the mediation, and six hours doing legal research regarding class certification, the time records submitted do not reflect that he billed any time to the file.[57] Counsel does not explain why the firm's billing records do not reflect the time that Calahan contends he spent on the litigation. Additionally, counsel submits no evidence that Calahan's requested hourly rate of $450 is reasonable. Finally, counsel does not explain why Calahan's presence was required during the mediation (which Hafif and Ain also attended), or why the research he performed could not have been performed by an associate at a lower billing rate. As a result, the court declines to include Calahan's hours in its fees award.

3. Total Amount Awarded

In view of the foregoing, the court awards class counsel fees as follows:

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[54]Timberland Suppl. Resp. at 1.

[55]*Id.* at 5. A tentative settlement was reached following the mediation on June 28, 2007. See Plaintiff's Final Settlement Mot. at 3.

[56]*George v. Timberland* time records at 8 (recording the following entries on July 5, 2007: (1) "Telecom and meet with Hafif Re: Expert (Initial Conference)" for 1.60 hours; (2) "Telecom with Expert (Initial Conference)" for 1 hour; and (3) "Conference with Ain Re: Expert" for 0.60 hours).

[57]Calahan Decl., ¶ 2.

	Hourly Rate	Number of Hours	Total
Greg Hafif	$500/hr	25.06	$12,530.00
Charles Hill	$400/hr	0.60	$240.00
Farris Ain	$375/hr	90.87	$34,076.25
GRAND TOTAL			**$46,846.25**

III. CONCLUSION

For the reasons stated, class counsel's motion for attorneys' fees is granted. The court awards counsel $46,846.25 in fees.

DATED: June 10, 2009

Margaret M. Morrow

MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

EXHIBIT "C"

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 05-8990-GW(PLAx) Date March 22, 2012

Title *Michael Kenneth Paul Edwards, et al. v. City of Long Beach, et al.*

Present: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Javier Gonzalez	Pat Cuneo	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:

Greg Hafif
Katie J. Odenbreit
M. Alim Malik
Michael J. Fairchild
Jeffrey I. Golden - Bkcy Trustee

Attorneys Present for Defendants:

Samantha Zutler

PROCEEDINGS: **PLAINTIFFS' MOTION FOR ORDER GRANTING FINAL APPROVAL TO PROPOSED CLASS AND COLLECTIVE ACTION SETTLEMENT (filed 02/27/12);**

APPLICATION OF GREGORY G. PETERSEN FOR ORDER APPROVING PAYMENT OF ATTORNEYS' FEES AND COSTS (filed 01/03/12);

PLAINTIFFS OF THE LAW OFFICES OF HERBERT HAFIF'S MOTION FOR ALLOCATION OF ATTORNEY'S FEES AND COSTS (filed 01/03/12);

JACKSON DEMARCO TIDUS & PECKENPAUGH'S APPLICATION FOR ATTORNEYS' FEES AND COSTS (filed 02/21/12);

PLAINTIFFS' MOTION FOR TO AUGMENT JACKSON DEMARCO TIDUS & PECKENPAUGH'S APPLICATION FOR ATTORNEYS' FEES AND COSTS (filed 03/12/12)

The tentative circulated as to Plaintiffs' Motion for Order Granting Final Approval to Proposed Class and Collective Action Settlement is adopted as the Court's final ruling. Plaintiffs Motion is **GRANTED.**

The Court's Tentative Ruling re Attorneys' Fees and Costs, is circulated and attached hereto. Based on

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Initials of Preparer JG

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 05-8990-GW(PLAx)	Date:	March 22, 2012
Title	*Michael Kenneth Paul Edwards, et al. v. City of Long Beach, et al.*		

the tentative and for reasons stated on the record, Application of Gregory G. Petersen for Order Approving Payment of Attorneys' Fees and Costs, Plaintiffs of the Law Offices of Herbert Hafif's Motion for Allocation of Attorney's Fees and Costs, Jackson Demarco Tidus & Peckenpaugh's Application for Attorneys' Fees and Costs, and Plaintiffs' Motion for to Augment Jackson Demarco Tidus & Peckenpaugh's Application for Attorneys' Fees and Costs are **GRANTED IN PART, DENIED IN PART**, and **ALLOCATED**. The Hafif Firm will prepare a Final Order and Judgment in this action and *David Faris, et al. v. City of Long Beach, et al.*, Case No. SACV 07-954-GW(PLAx), by March 30, 2012. Any objections will be filed by April 4, 2012. A non-appearance status conference is set for April 9, 2012. Court to issue orders and judgments.

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Initials of Preparer JG

Edwards v. City of Long Beach, Case No. CV-05-8990
Tentative Thoughts on Three Applications for Attorney's Fees and Costs

Various attorneys who have represented the Plaintiffs in this matter - *i.e.* Gregory G. Petersen ("Petersen"), Jackson DeMarco Tidus & Peckenpaugh ("JDTP"), and Law Offices of Herbert Hafif ("Hafif") - have now filed competing applications for attorney's fees and costs pursuant to the settlement of this action. The Court has considered the position of each of the three sets of counsel seeking fees, the objections raised to each of those positions by the other attorneys, and also certain "side" issues that could affect the ultimate allocation (such as the bankruptcy of one of Petersen's former law firms. All in all, the Court concludes that it needs more information from all parties on several issues; but is inclined slightly to JDTP's proposal (perhaps because it is the least vituperative).

The terms of the settlement provides only $300,000 in fees and costs.

I. THE PETERSEN APPLICATION

Petersen's Application for Fees and Costs (Docket No. 1652):

Gregory Petersen (as an individual) seeks the full "$300,000 [for fees and costs] as compensation for his and his firm's collective efforts over the past 6-7 years" to be paid to his current firm, Barge, Petersen & Odenbreit. *See* Docket No.1652 at 3. No costs or attorney's fees would go to any other firm under this approach.

Petersen's Arguments for His Proposed Fee Allocation:

Petersen calls himself "lead class counsel," and says that the settlement was negotiated without his consent. *See* Docket No. 1652 at 3. He says the fees negotiated "do not even begin to reach the realm of reasonableness to compensate for Mr. Petersen's time and the time and expense put forth by himself and his firms." *See* Docket No. 1652 at 3. He claims that he and his colleagues put in 963.48 hours of work, billing between $425 and $575 per hour. Thus, he claims his lodestar amount is $332,127.04. *See* Docket 1652 at 3-4. Petersen has not submitted billing time records other than for the period of July 2008 through December 2010, and some recently filed evidence of work that his current partner has done in opposing (unsuccessfully so far) the settlement. *See* Docket No. 1667, Exh. 3; *see* Docket No. 1672, Exh. 1. He claims that "[s]ome of the time records in this case are maintained on a database which was partially corrupted. Mr. Petersen is working with IT professionals to retrieve the data and will submit a supplemental declaration once the additional records are secured." *See* Docket No. 1652 at 6. No significant supplemental evidence has been submitted.

He claims that he initiated the lawsuit and has been representing Plaintiffs since 2005. *See* Docket No. 1652 at 3. Moreover, he alleges, he and his firms "were the sole attorneys of record for Plaintiffs" for the first three years of litigation in this matter. *See* Docket No. 1652 at 8. He claims he and his firms worked on significant numbers of motions and oppositions, and

conducted investigations and interviews. *See* Docket No. 1652 at 8. Petersen summarizes Hafif's role as follows:

> On March 14, 2008, attorney Greg Hafif substituted in as attorney of record in place of [JDTP].... These substitutions were only as to specific named plaintiffs and only in place of JDTP. Mr. Petersen remained as class counsel. Mr. Hafif was hired by Mr. Petersen to assist him during a time Mr. Petersen was ill. Mr. Petersen, however, remained responsible for the legal strategy and client contact.... In mid-2010, Mr. Hafif entered into settlement negotiations with Defendant. It was during that period of time that Mr. Hafif failed in his obligation to operate under the supervision of Mr. Petersen.

See Docket No. 1652 at 9. Petersen claims that over 80 Plaintiffs have sent letters to Mr. Hafif "terminating any perceived legal representation he is asserting on their behalf," including named Plaintiff Michael Kenneth Paul Edwards. *See* Docket No. 1652, Exh. 1 at 20. However, he provides no proof of such letters.

Opposition to Petersen's Arguments for His Proposed Fee Allocation:

Hafif objects to the Petersen application because of the dearth of competent or timely evidence as to the hours he has billed and costs he has incurred. *See* Docket No. 1662 at 2. While Hafif is mostly right about this, Petersen has presented *some* evidence as to his hours, it just doesn't clearly show who did the work or account for all the years of the litigation. *See* Docket No. 1667, Exh. 3. Hafif emphasizes that Petersen applied for fees as an individual, yet he has not presented records singling out hours billed by him personally. *See* Docket No. 1662, 4-5. More generally, Hafif downplays the amount of work Petersen put in and disputes that he was ever lead counsel. *See* Docket No. 1662 at 7-8. Additionally, the Court notes that while Petersen has sought attorney's fees in an individual capacity, he indicates that portions of the legal work was performed by law firms of which either he is no longer a member or which now is in bankruptcy. Hence, there is a serious question as to his entitlement to the fees.

II. The JDTP Application

JDTP's Application for Fees and Costs:

JDTP argues that all parties' costs should be paid out in full before any fees are awarded, and thus the following costs should be awarded: ~~$27,561.21 to JDTP, $78,317.23 to Hafif, and~~ $251.54 to Greg Petersen. *See* Docket No. 1660 at 7.

Then, it contends that the remaining $193.870.02 should be divided between the three firms on a pro rata basis (based on hours billed), such that fees should be allocated to Hafif in the amount of $120,199 (62%), JDTP in the amount of $46,529, (24%) and to Petersen in the amount of $27,142.02 (14%). *See* Docket No. 1660 at 11.

JDTP's Arguments for Its Proposed Fee Allocation:

Petersen was employed at (and was a shareholder of) JDTP until 2008, and upon his

departure, JDTP withdrew as class counsel. *See* Docket 1660 at 1. At least four times after they withdrew, JDTP gave notice to Plaintiffs and the other counsel that they planned to seek fees and costs. *See* Docket No. 1660 at 3-5. Generally, JDTP claims that for "approximately fourteen months, [JDTP] - under the express direction of Petersen ... was lead counsel in the prosecution of these matters. Conversely, the Hafif Firm took a lesser role during this whole time period... [a]nd, during this fourteen month period, Petersen has no independent basis to claim recovery of fees, insofar as he was with [JDTP] during that entire period of time." *See* Docket No. 1660 at 9.

JDTP has submitted detailed billing records indicating that JDTP attorneys billed 932 hours on this case. *See* Docket No. 1660 at 9, Exh. 5. They also claim to have hired twelve investigators, who spent more than 502 hours on the case, and to have expended 266 paralegal hours on the case on account of their responsibility for the opt-in notice logistics. *See* Docket No. 1660 at 10. JDTP adds up all of these hours, including paralegal and investigator time (which is not the case for the other two firms' calculations), and reaches a total of 1700 hours for which they seek compensation at their billing rate (which they argue convincingly is reasonable). JDTP has provided adequate proof of costs. *See* Docket No. 1660, Exh. C.

Opposition to JDTP's Arguments for His Proposed Fee Allocation:

Hafif does not object to the methodology of the allocation suggested by JDTP, but rejects it insofar as it awards any costs or fees to Petersen, since Hafif reminds the Court that Petersen has not presented much evidence as to his costs and fees. *See* Docket No. 1664 at 3. Thus, Hafif would agree to the following version of the JDTP proposal: Hafif and JDTP both get their full amount of claimed costs ($78,317.22 to Hafif and $27,561.21 to JDTP), and fees are allocated to Hafif in the amount of $155,297.24 (which would constitute 80% of the award) and to JDTP in the amount of $38,824.32(which would constitute 20% of the award). *See* Docket No. 1664 at 3. Hafif's agreement to a pro rata fee allocation is notable and suggests this might be the path this Court should take - however, Hafif's stance that Petersen merits zero dollars is untenable.

Petersen objects to JDTP's application in its entirety, because while "Greg Petersen joined JDTP briefly, about 1 year during this 7 year litigation, their firm was not named as class counsel, and they have no contract with any plaintiff in this matter for representation by JDTP." *See* Docket No. 1667 at 5. Petersen's objections would be disregarded. JDTP were indeed counsel of record for the plaintiffs beginning on May 29, 2007[1] and ending on July 10, 2008.[2] Unlike Petersen, they have provided extensive billing and cost records. Also unlike Petersen (or Hafif) JDTP has submitted to the Court a plausible allocation suggestion that takes into account

[1] *See* Docket No. 48 ("STIPULATION AND ORDER that: plaintiffs' counsel, Gregory Petersen and Fenja Klaus of Jackson, DeMarco, Tidus, Petersen, Peckingpaugh are approved as counsel for plaintiffs and collective class members who file consents to join the action in place and in lieu of Castle, Petersen & Kraus; and the notice is approved as submitted and will be signed by the court by Judge George H. Wu.")

[2] *See* Docket No. 1085 ("MINUTES OF JACKSON DEMARCO TIDUS AND PECKENPAUGH'S MOTION TO BE RELIEVED AS COUNSEL OF RECORD FOR PLAINTIFFS Hearing held before Judge George H. Wu: For the reasons stated on the record, Jackson Demarco Tidus and Peckenpaugh's Motion to be Relieved as Counsel of Record for Plaintiffs is granted. The parties are to submit a joint notice regarding Jackson Demarco Tidus and Peckenpaugh's Motion to be Relieved as Counsel of Record for Plaintiffs by August 15, 2008."

the work of all three firms.

Petersen also objects to JDTP's application for fee allocation because he says that dispute should be resolved in a separate litigation regarding JDTP's rights to fees earned by Petersen during the time he was a shareholder. *See* Docket No. 1667 at 6. This argument, while facially appealing, lacks merit because Petersen claims that he and JDTP signed a Letter of Intent indicating that "any entitlement to fees would be the subject of the letter of intent." *See* Docket No. 1667, Exh. 1 ¶ 2. Petersen fails, however, to present this letter or any evidence as to its existence other than his own assertions. Therefore, it seems reasonable that since JDTP had no contractual obligation to eschew their fee allocation in a case the firm worked on for fourteen months, their application would not be rejected on this basis.[3]

Petersen also claims that JDTP is in possession of billing records from when he worked there and his billing records on this case from his previous firm, Castle, Petersen and Krause, LLP, and that JDTP has ignored his requests to give him these records. *See* Docket No. 1667 at 7. The Court would inquire of the parties about this issue.

III. The Hafif Application

Hafif's Application for Fees and Costs (Docket No. 1646):

The Law Firm of Herbert Hafif ("Hafif") requests an allocation of costs in the amount of $78.317.23 and an attorney's fee award of $221,682.77. No costs or attorney's fees would go to any other firm.

Hafif's Arguments for His Proposed Fee Allocation:

Hafif has submitted time records for four attorneys who worked on the case, Greg Hafif ($550/hour), Miguel Caballero ($450/hour), Fenja Klaus ($400/hour) and Kenneth Mariboho ($400/hour). *See* Docket No. 1646 at 9; *see* Docket No. 1648 Exhs. D and E. Hafif has submitted convincing arguments (and proof, in the form of extensive billing records and declarations) that their rates and hours are reasonable. *See* Docket No. 1646 9-10; *see* Docket No. 1648 ¶ 27, Exhs. D and E. According to their calculations, their rate and hours would add up to a lodestar total of $1,209,615.20 in the *Edwards* action and $54,635 in the *Faris* action, excluding paralegal fees. *See* Docket No. 1648 ¶ 29. Hafif argues that his firm was "the sole Class Counsel responsible for supporting these cases for a majority of the litigation." *See* Docket No. 1646 at 12. More specifically, Hafif asserts that they alone prepared Plaintiffs' written discovery responses. *See* Docket No. 1646 at 12; 1648; *see* Docket No. 1648 ¶¶ 7-11. They also claim they prepared and filed "all of the major law and motion in these cases, including all summary judgment motions, collective action certification and trial preparation." *See* Docket

[3] Petersen provides evidence that another District Court in the same scenario as between JDTP and Petersen denied JDTP's fee application because "the Court finds that this Court is not the appropriate forum to resolve such disputes between counsel." *See* Docket No. 1667, Exh. 3 at 2. However, Petersen does not offer the background of that case or the roles played by JDTP as compared with him individually. JDTP in fact reponds that this other case concerned Petersen's disability claim against JDTP, which puts that court's order in a better context. *See* Docket No. 1669 at 9. Since this matter seems factually intensive in nature, an unreasoned order from another district court with an entirely different factual and legal backdrop is not wholly persuasive.

No. 1646 at 12; *see* Docket No. 1648 ¶ 16. They claim that as of the date of their application for fees, January 3, 2012, they have expended over 4,135 attorney hours. *See* Docket No. 1648 ¶ 39. They also claim that Hafif "bore a majority of the risks and costs" and "undertook this speculative matter solely on a contingency basis with no guarantee of recovery." *See* Docket No. 1646 at 13. Further, they argue the ability and reputation of Hafif and the firm was "essential to achieving a settlement." *See* Docket No. 1646 at 14; *see* Docket No. 1648 ¶ 23 ("I am one of California's leading trial lawyers producing numerous million-dollar verdicts, including the 10th largest verdict in the State of California in 1995 ").

Opposition to Hafif's Arguments for His Proposed Fee Allocation:

Petersen argues that "Hafif is not, and never was, retained counsel for Plaintiffs." *See* Docket No. 1666 at 2. Petersen claims that Plaintiffs never signed a retainer agreement with Hafif, but then, crucially, adds "other than those [Hafif] may have improperly sought after Petersen terminated its services" (therefore concededing that Hafif does, in fact, have retainers signed with at least some Plaintiffs). *See* Docket No. 1666 at 4. Hafif sharply disputes the contention that his firm does not have signed retainer agreements, and provides proof of some retainers signed by various plaintiffs. *See* Docket No. 1668 at 2. Since Petersen alleges that Hafif has no contractual relationship with the Plaintiffs, he argues that it would be unethical for Hafif to share in the fees (citing the Rule of Professional conduct barring fee sharing outside of a partnership without client's consent), and similarly Hafif cannot seek an award in quantum meruit. *See* Docket No. 1666 at 4. This argument is conceptually skewed; Hafif is not seeking to *share* in Petersen's attorney's fees - he is seeking an allocation of his own fees, separate from any due to Petersen. Further, Hafif disputes the notion that he did not have signed retainers with any Plaintiffs. In sum, Petersen's arguments in opposition to Hafif's affirmative position fails to hold much water.[4]

IV. Other Issues

Bankruptcy of the Petersen Law Corporation

On June 2, 2011, Petersen's former firm, the Petersen Law Firm, filed for bankruptcy. *See* Docket No. 1652 at 13. On Petersen's request, the bankruptcy court ordered that Hafif was required to make certain disclosures in his meetings with Plaintiffs and any settlement negotiations in this case. The content of the disclosure mandated by the bankruptcy court is:

> The Petersen Law Firm asserts an economic interest in recoveries related to this case; nothing in this agreement shall affect, impede, impair or eliminate any such economic interest asserted by the Petersen Law Firm.

See Docket No. 1652 at 14. Petersen says that Hafif has violated this Order by failing to make this disclosure to the Court in the settlement negotiations and the application to this Court for approval of the settlement. There are at least three problems with Petersen's argument.

First, Petersen is applying for fees to be allocated to him as an individual. He can't very

[4] JDTP did not raise any new arguments specifically in opposition to the Hafif application, though their own application of course impliedly opposes Hafif's.

well argue that he should be able to keep the fees because they compensate his individual efforts outside of the Petersen Law Firm, and simultaneously fault Hafif for not asserting the Petersen Law Firm's rights in the settlement negotiations and approval filings. Second, the disclosure ordered by the Bankruptcy Court would basically have had no effect on the negotiations, as it does not actually assert what the "economic interest" is, on a substantive level.[5] Presumably, it would be the bankrupt firm's interest in Petersen's fees and, if that's the point of the disclosure, then one is back to the first issue with Petersen's argument. Third, the order from the Bankruptcy Court was never officially lodged or filed in this Court and thus a question arises as to whether it effects this Court's ability to approve the settlement on a technical level. Therefore, unless the trustee presents some evidence/argument to the contrary,[6] the Court would disregard the bankruptcy of the Petersen Law Firm for purposes of the final settlement approval. As to the fee allocation, it is unclear what the trustee's interest is in that matter aside from obtaining access to whatever amount Petersen ultimately receives from the attorney's fees portion of the settlement. If the trustee wants to go after Petersen for what is awarded to him as an individual, that is the trustee's battle to wage. Placing a hold on the distribution of any fees awarded to Petersen or placing such fees with the bankruptcy court would seemingly accommodate the trustee's interests.

Reimbursement of Plaintiff's Attorney Expense Contributions

To complicate matters further, Petersen claims that the opt-in Plaintiffs "agreed to pay a small amount monthly as attorney's fees to partially fund the litigation,"[7] so they are entitled to receive any fees awarded up to a full refund of what they have paid. *See* Docket No. 1652 at 7. He says that the opt-out period does not expire until January 31, 2012, so the individuals who are owed reimbursement are not yet identifiable. *See* Docket No. 1652, Exh. 1 ¶ 11.

Hafif disputes Petersen's portrayal of the clients' reimbursement rights, arguing that even if there was such a contractual obligation, only Petersen and the firm whose letterhead the contract was on is bound by it, and cites caselaw indicating that attorney's fees belong to the attorneys, not the clients. *See* Docket No. 1662 at 9.

JDTP, who employed Petersen for a 14-month period while he worked on this case, also

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[5] Despite its unnecessarily bombastic tone, Hafif's briefing aptly summarizes this issue: "[A]ny argument that [Hafif] has somehow violated the bankruptcy order is both illogical and absurd. The Order simply states The Petersen Law Firm may have an economic interest in the case. So what? [Hafif] has an economic interest in the case as well. To somehow suggest that the Bankruptcy Court's order limits [Hafif]'s obligations to represent its clients, or earn a fee, is ridiculous! [Hafif] is not a party to the bankruptcy and the case does not belong to the attorney. It is the client's case. Something Petersen seems to forget."

[6] The trustee has filed a request to continue the fee allocation matter for 60 to90 days. *See* Docket No. 1690. Both JDTP and Hafif have filed oppositions to that request.

[7] Mr. Petersen claims the retainer says: "Client shall pay Attorney the sum stated above in Paragraph 7 to be used for payment of non-contingent hourly fees and costs incurred. The total amount paid by Client will be reimbursed upon settlement or final adjudication if such settlement or adjudication provided the amount awarded and/or received exceeds the amount paid collectively by all clients/participants. If it does not, the reimbursed amount will be prorated based on amount paid by individual clients/participants." *See* Docket No. 1652 at 12.

disputes the clients' alleged reimbursement rights, and claims that this contractual obligation "is news to [JDTP]. No such payments were received during [JDTP] during its lengthy representation of Plaintiffs in these matters. Furthermore, *Petersen has failed to put forth any evidence supporting his assertions*." *See* Docket No. 1660 at 8 n.7 (emphasis added). This last point would appear to initially resolve the issue. JDTP is correct that Petersen has failed to produce any retainer evidencing such language, and thus until and unless he (or anyone else, including Plaintiffs) provides proof of the agreement and proof of any payments made pursuant to it, the Court would find that there is insufficient evidence to rule on this issue, other than to simply deny it. Furthermore, Petersen does not appear to allege how much those Plaintiffs have paid pursuant to these alleged terms, and to whom.

Timeliness of Papers

On November 18, 2011, this Court granted preliminary approval of the settlement, and ordered that:

> All motions for allocation of attorney's fees and costs by any interested attorney, their firms or attorneys claiming a lien on these related cases for services rendered or costs advanced must file a motion for allocation of attorney's fees and costs with this Court **no later than January 3, 2012. Any motions filed after January 3, 2012 will not be considered by this Court and such request for fees or costs will be waived by the party requesting them.** After considering all motions filed, the Court will allocate the $300,000 paid by defendant amongst those attorneys and firms firms who have filed such **timely** motions.

See Docket No. 1644 (emphasis added). Both Hafif and Petersen challenge JDTP's application as untimely, and thus argue it should not be considered by this Court. *See* Docket No. 1664 at 2; *see* Docket No. 1667 at 2. However, the Court would consider JDTP's application, because it reasonably claims to have lacked notice of the above-quoted order. Considering that the docket reflects that JDTP no longer received automatic notifications of docket entries, and their well-founded argument that it would be manifestly inequitable not to consider their application (*see generally* Docket No. 1660 at 5-6), this Court in its discretion would consider their application despite its being technically untimely. Various other motions, oppositions and replies are also alleged to be untimely by all parties and lack the above-described excuse of a lack of notice. However, due to the complex nature of this dispute the Court will simply consider all the material submitted, regardless of the date of submission, despite the deadlines.

Edwards, et al. v. City of Long Beach, et al., Case No. CV-05-8990
Tentative Ruling on Motion for Final Approval of Class Action Settlement

I. Background

Plaintiffs, law enforcement officers, brought this suit against the City of Long Beach ("Defendant" or "the City") for violations of the Fair Labor Standards Act ("FLSA") related to uncompensated pre- and post-shift time on the clock. On November 18, 2011, the Court granted preliminary approval of a settlement negotiated by counsel Greg Hafif ("Hafif"), and found that "the settlement is fair, adequate and reasonable and the collective action remains certified as previously ordered." *See* Docket Nos. 1631, 1644. Now before the Court is Plaintiffs' motion for final approval of the settlement. *See* Docket No. 1661. The Court has independently reviewed the settlement, and also addresses herein the objections raised by class member John Lembi ("Lembi") (*see* Docket No. 1647) and named plaintiff Michael Kenneth Paul Edwards ("Edwards") (*see* Docket No. 1674).[1]

II. Legal Standard

FLSA settlements must be approved by the court. *See Lynn's Food Stores, Inc. v. U. S.*, 679 F.2d 1350, 1355 (11th Cir. 1982). In determining the reasonableness of such settlements, the court evaluates the settlement to ensure that it is a "fair and reasonable resolution of a bona fide dispute over FLSA provisions." *Id.* at 1355. While there remains a dearth of published case law establishing factors that the court should consider in determining the fairness of a collective FLSA settlement, "various federal courts have analogized to the fairness factors generally considered for court approval of class action settlements under Rule 23(e)." *Hoffman v. First Student, Inc.*, No. WDQ-06-1882, 2010 U.S. Dist. LEXIS 27329, at *8 (D. Md. Mar. 23, 2010). Factors used to determine whether a proposed settlement is fair, adequate and reasonable under Fed. R. Civ. P. 23(e) include:

> the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998); *see also Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied sub nom. Byrd v. Civil Serv. Comm'n*, 459 U.S. 1217 (1983). This list is not intended to be exhaustive; the court must

[1] The Court would note as a threshold matter that "a class representative alone cannot veto a settlement, especially one that has been presented to and approved by the court." Federal Judicial Center, Manual for Complex Litigation Fourth (2004), § 21.642, at 325; *see also Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 591 (3d Cir. 1999).

consider the applicable factors in the context of the case at hand. *See Officers for Justice*, 688 F.2d at 625.

This Court is also mindful of the Ninth Circuit's policy favoring settlement, particularly in class action lawsuits. *See, e.g., id.* ("[V]oluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation[.]"). While balancing all of these interests, the Court must only inquire into the fairness of the settlement "to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties[.]" *Id.* The Court, in evaluating the agreement of the parties, is not to reach the merits of the case or to form conclusions about the underlying questions of law or fact. *See id.*

"It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Hanlon*, 150 F.3d at 1026. The Court may not delete, modify, or rewrite particular provisions of a settlement. *See id.* "Settlement is the offspring of compromise; the question ... is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Id.* at 1027.

III. Analysis

A. Terms of the Settlement

The settlement class consists of:

> "Every current and former Long Beach police officer who has held the rank of Lieutenant or below during the period running from two years prior to the filing of the lawsuit (i.e. December 29, 2005) until the date this settlement is approved by the Court that elects to participate in and be bound by the terms of the Settlement Agreement and/or who signed and filed a consent to join the *Edwards/Faris* actions."

Memorandum of Points and Authorities in Support of Pl.'s Motion for Final Approval of Settlement ("Final Approval Mot."), Docket No. 1661 at 2. The key terms[2] of the final settlement are:

- Special Vacation Leave Bank - All currently employed officers will receive 47 hours of special vacation time that accrues over a four year period. If the officers do not use the time for vacation, any accrued hours will be used to extend continuing health coverage for the officer upon retirement.
- Retired or Separated Employees - The City will pay each retired or separated officer the sum equal to ten hours of the officer's final pay grade.
- Attorneys' Fees and Costs - The City will make a lump sum payment to Plaintiffs' counsel of $300,000 for attorney's fees and costs.
- Release - Plaintiffs release all claims which were asserted in this action or could have been asserted based on or related to the facts alleged in this action.[3]

[2] The complete settlement agreement can be found at Docket No. 1661, Declaration of Greg Hafif in Support of Motion for Order Granting Final Approval of Settlement, Exh. 1.

[3] The wording of the release in the final settlement reflects and assuages the Court's worry, raised at the preliminary approval stage, that the release was overly broad. *See* Prelim. Approval Order, Docket No. 1631 at 4 n.6.

- Nullification - If more than 40 current class members opt out of the class upon receipt of the notice of settlement, the City can unilaterally void the agreement.

Id. at 2-3. Before addressing the adequacy of the settlement, the Court notes two minor matters that the parties must address before final approval may be granted. First, the parties have not demonstrated compliance with the provisions of 28 U.S.C. § 1715, requiring that federal and/or state officials be notified of all class action settlements. The parties must provide evidence of compliance, or, brief argument as to why this statute does not apply to the instant settlement. Second, the Court sees no evidence that the final settlement addresses a concern raised in the Court's preliminary approval of the settlement: the statute of limitations may run before any potential opt-outs would have a chance to file their claims. The Court thus seeks clarification from the parties as to whether any tolling provisions were discussed. *See* Preliminary Approval Tentative Order ("Prelim. Approval Order"), Docket No. 1631 at 4 n.6 (adopted as final preliminary approval order in Docket No. 1644).

B. Fairness of the Settlement

1) Presumption of Fairness

"A settlement following sufficient discovery and genuine arms-length negotiation is presumed fair." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004). As discussed more fully below, Plaintiffs were represented by experienced counsel and reached a settlement with Defendant only after completing discovery. The settlement was the result of arms-length negotiations in front of seasoned mediator Hon. Enrique Romero. *See* Final Approval Mot., Docket No. 1661 at 1. Thus, the settlement enjoys a presumption of fairness.

2) The Settlement is Fair

An analysis of the factors used to determine whether a proposed settlement is fair, adequate and reasonable under Fed. R. Civ. P. 23(e) discloses that the Court should approve this settlement. The Court will consider each factor in turn, and then consider the objections raised by class members Lembi and Edwards.

a) Strength of Plaintiffs' Case

Although Plaintiffs' case survived summary judgment motions, indicating that they stand a chance to prevail at trial, the strength of Plaintiffs' claims received a blow when the issue of whether donning and doffing claims are compensable under the FLSA was subsequently "decided contrary to Plaintiffs' position [by the Ninth Circuit] in *Bamonte v. City of Mesa*, [598 F.3d 1217 (9th Cir. 2010)]." *See* Final Approval Mot., Docket No. 1661 at 6. In addition, at trial, Plaintiffs would need to prove significant disputed factual matters such as the amount and extent of work performed by Plaintiffs, and that Defendant knew or should have known about it. *Id.* In sum, given the uncertainty of Plaintiffs' success were this case to proceed to trial, this factor weighs in favor of approving the settlement.

b) Risk, Expense, Complexity, and Likely Duration of Further Litigation

The expense and possible duration of the litigation should be considered in evaluating the

reasonableness of a settlement. *See Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 458 (9th Cir. 2000); *see also Nat'l Rural*, 221 F.R.D. at 526 ("[U]nless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results."). Given the amount of time and resources the parties have already devoted to this litigation, it is no stretch of the imagination to presume that they would have continued to vigorously litigate this case throughout trial and on appeal. Plaintiffs would face the risk inherent to a case with "little court precedent to guide the parties," since the FLSA, under which Plaintiffs claims arise, in recent years has only been applied in the contexts of local and municipal governments, not police departments. *See* Final Approval Mot., Docket No. 1661 at 7. In addition, the City is in a "precarious financial situation," rendering any money damages award garnered at trial a potentially pyrrhic victory. *Id.* On a similar note, further litigation would cause attorney's fees to continue to mount, which would benefit neither party, especially considering the City's financial woes and Plaintiffs' counsel's inability to resolve their fee allocation disputes without this Court's intervention. *See* Dockets Nos. 1646, 1652, 1660. Considering the significant risks to Plaintiffs if they were to proceed to trial, this settlement offers the parties immediate and certain relief, adequately compensating Plaintiffs for the injuries alleged in this lawsuit. This factor therefore weighs in favor of approving the settlement.

c) Risk of Maintaining Class Action Status Throughout the Trial

The City has previously attempted to decertify the class. *See* Docket No. 1347. While the Court has not granted any decertification motions, as noted in the Court's approval of the preliminary injunction, the City could always renew such a request. *See* Prelim. Approval Order, Docket No. 1631 at 3. In settling, while potentially giving up some of the rewards they might have reaped at trial, Plaintiffs also avoid the risk of decertification, which would of course be catastrophic for Plaintiffs' case. Considering that the Court has noted that the City's decertification arguments have some merit (*see* Docket No. 1534 at 2-3), this factor weighs in favor of approving the settlement.

d) Settlement Amount

"Basic to [the process of deciding whether a compromise is fair and equitable] in every instance ... is the need to compare the terms of the compromise with the likely rewards of litigation." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968). Thus, in determining whether the relief offered by way of settlement is fair, the Ninth Circuit has suggested that the Court compare the settlement to the parties' estimates of the maximum recovery in a successful litigation. *See Dunleavy*, 213 F.3d at 459; *see also Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). Here, the key settlement term provides non-monetary relief, namely the provision of 47 vacation hours for each class member still employed with the City. Thus, is difficult to conduct a dollar-to-dollar comparison of potential recovery at trial versus settlement obtained.[4]

[4] That said, as represented in the motion for preliminary approval, at approximately 900 officers compensated at an average rate of $65.00/hour, the 47 hours per officer amounts to a settlement value of approximately $2.75 million. *See* Final Approval Mot., Docket No. 1661 at 8.

Yet the reasonableness of a settlement is not necessarily dependent upon its approaching the recovery plaintiffs might receive if successful at trial. See *Nat'l Rural*, 221 F.R.D. at 528 (C.D. Cal. 2004) ("[A] proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery[.]"). The benefits achieved on behalf of the class by means of this settlement are considerable. As noted in the Court's preliminary approval, the adequacy of the settlement amount depends on the strength of Plaintiffs' case. *See Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 124 (8th Cir. 1975) ("(t)he most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in the settlement") (internal quotations and citation omitted). As discussed above, Plaintiffs' likelihood of success is far from assured. Further, when seeking preliminary approval of the settlement, Counsel Hafif provided a detailed explanation for how the number of 47 vacation hours was calculated and negotiated. *See* Declaration of Greg Hafif in Response to Gregory Petersen's Opposition re Motion for Settlement Approval of Consolidated Action, Docket No. 1626, ¶¶ 8-15. Considering the weaknesses in Plaintiffs' claims and the apparently detailed and transparent negotiations leading up to the settlement, this factor weighs in favor of approving the settlement.

e) Extent of Discovery Completed and Stage of the Proceedings

For Plaintiffs to broker a fair settlement, they must be armed with sufficient information about the case to have been able to reasonably assess its value. This consolidated case has been ongoing for over seven years. As noted by Plaintiffs, "discovery is predominantly complete, and this Court has ruled on most dispositive motions." *See* Final Approval Mot., Docket No. 1661 at 7. The discovery completed includes the exchange of thousands of documents, numerous depositions and the exchange of expert witness lists. *See id.* at 7-8. The Court has no hesitation in finding this factor to weigh in favor of approving the settlement.

f) Level of Experience and Views of Counsel

In assessing the adequacy of the terms of a settlement, the trial court is entitled to, and should, rely upon the judgment of experienced counsel for the parties. *See Nat'l Rural*, 221 F.R.D. at 528. The basis for such reliance is that "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir.1995). Mr. Hafif, counsel for Plaintiffs who negotiated the settlement, is a highly experienced and successful litigator. *See generally* Declaration of Greg K. Hafif in Support of Motion for Order Granting Final Settlement Approval ("Hafif Decl."), Docket No. 1661 (listing prior class action litigation and settlement experience, accolades from legal publications, counsel's significant involvement in the instant matter). This factor weighs in favor of approving the settlement.

g) Presence of a Governmental Participant

The presence of a governmental participant militates in favor of settlement approval. *See, e.g., Touhey v. U.S.*, 2011 U.S. Dist. LEXIS 81308, at *20-21 (C. D. Cal. July 21, 2011); *see also San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F. Supp.2d 1021, 1031-32 (N. D. Cal. 1999). Here, the Defendant is the City of Long Beach, a government actor, and was represented by a private firm specializing in public agency law, Meyers Nave. In addition, the

Long Beach City Council has approved the settlement. *See* Final Approval Mot., Docket No. 1661 at 1. Thus, this factor militates in favor of approving the settlement.

h) Reaction of the Class Members to the Proposed Settlement

"It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *Nat'l Rural*, 221 F.R.D. at 529. Here, only two[5] out of about 700 opt-in class members have filed objections to the settlement; this factor obviously favors approval. *See, e.g., In re Omnivision Tech., Inc.*, 559 F. Supp.2d 1036, 1043 (N.D. Cal. 2008) (affirming settlement where three class members objected of 57,630 class members receiving notice); *Churchill Village, LLC v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004) (affirming settlement with 45 objections out of 90,000 notices sent). While only two objections have been filed, there have been a slightly higher number of opt-outs, including six filed with the Court on March 16, 2012. *See generally* Docket No. 1681. Nonetheless, it appears that the number of class members opting out of this settlement agreement is still under twenty, though the Court would inquire at the hearing whether any counsel can argue and provide evidence (in the form of executed opt-out forms) that the number is higher. Crucially, no party has argued that there have been sufficient opt-outs to trigger the settlement agreement's nullification clause, set at 40 opt-outs. All in all, based on the low number of objectors and opt-outs, the reaction of the class members is generally positive and weighs in favor of approving the settlement.

In sum, a review of these eight factors illustrates that the settlement is fair, adequate and reasonable in conformance with the requirements of Rule 23(e), and thus FLSA settlement approval standards, and would be approved by the Court.

C. Objections to the Final Settlement

Two class members have filed objections with the Court as to the final settlement, John Lembi (Docket No. 1647) and named plaintiff Michael Kenneth Paul Edwards (Docket No. 1674), and both were submitted on their behalf by attorney Petersen. As an initial matter, the Court notes that the substance of the Lembi and Edwards objections is largely identical to Petersen's objections to the Court's preliminary approval of the settlement (and also identical to Petersen's motions regarding allocation of attorney's fees), and the Court rejected many such arguments at the preliminary approval phase. *See* Final Approval Mot., Docket No. 1661 at 9; *see also* Docket No. 1644. The Court will address the merits of the objections together by topic.

1) Conflict of Interest Between Class Members

Edwards objects to the settlement because he alleges that there was "divided loyalty between Mr. Hafif and the various settlement sub-classes." Opposition to Final Approval of Collective Action Settlement ("Edwards Opp."), Docket No. 1674 at 9. While there are in fact no official subclasses here, Edwards is referring to the fact that a subset of class members,

[5] As discussed below, the objectors are John Lembi and named Plaintiff Michael Kenneth Paul Edwards; however, Hafif alleges that Edwards has not filed the requisite opt out form, thus has not officially objected to the settlement. *See* Hafif Reply Decl., Docket No. 1684 ¶ 3.

namely employees who were terminated by the City (as distinct from those who retired or resigned), receive absolutely nothing under the settlement. *Id.* Edwards argues that because Defendant was able to negotiate this outcome, there was likely collusion between Hafif and the City, to the detriment of some class members. *Id.* Edwards claims that a lack of recovery for terminated employees indicates the "fundamental unfairness" of the settlement. *Id.* Hafif responds that he:

> "attempted during the settlement process to vigorously have Defendant drop their demand that any plaintiff who was 'terminated' by the Department receive nothing. Defendant steadfastly refused. At the time, and throughout the negotiations, it was a dealbreaker for the Defendant. Maybe now they will change their minds. Nonetheless, those officers that were terminated were notified through the Notice of Settlement and provided the option to opt-out of the settlement and pursue the action on their own and preserve all their rights."

Declaration of Greg Hafif in Reply to Gregory Petersen's Opposition re Motion for Final Settlement of Consolidated Action ("Hafif Reply Decl."), Docket No. 1684 ¶ 27. While the Court does find it somewhat troubling that one segment of the class receives nothing under the settlement, Hafif's statements indicate that he zealously advocated for the terminated class members' recovery, but simply was not able to convince Defendant to include them in the settlement.[6] Most importantly, though, is the fact that terminated employees can simply opt out of the class. While the objection concerning terminated employees' lack of recovery is the closest Edwards, Lembi or Petersen come to scuttling this settlement, there is insufficient evidence that such exclusion "points towards collusion" between the City and Hafif, and as such this objection should not preclude the Court's approval of the final settlement. *See* Edwards Opp., Docket No. 1674 at 9.

2) Reverse Auction

Edwards and Lembi argue that the settlement was the result of a "reverse auction," where Defendant essentially cherry-picked the plaintiffs' counsel they thought would be most amenable to settlement terms favorable to the City. *See* Edwards Opp., Docket No. 1674 at 6; Objection to Final Settlement ("Lembi Opp."), Docket No. 1647 at 7. Edwards points to evidence of Hafif's alleged exclusion of Petersen from the settlement negotiations, which is hotly contested by Hafif. *See* Hafif Reply Decl., Docket No. 1684 ¶ 5. The Court has already disposed of this argument during the preliminary approval process, as the Court noted that Petersen could have consulted the Court's "CM/ECF" program to discover that settlement negotiations were occurring, and could have inserted himself therein. *See* Prelim. Approval Order, Docket No. 1631 at 3. Moreover, this objection misconstrues the concept of a reverse auction. "A reverse auction is said to occur when 'the defendant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement with in the hope that the district court will approve a weak settlement that will preclude other claims against the defendant.'" *Negrete v. Allianz Life Ins.*

[6] The Court also notes the qualitative difference between a terminated employee versus a retired or resigned employee, and finds the City's disparate treatment of such former employees not entirely incomprehensible.

Co. of North America, 523 F.3d 1091, 1099 (9th Cir. 2008) (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002)). Here, the City engaged in negotiations with Hafif, a highly experienced litigator who has obtained some of the largest verdicts in California. *See* Hafif Reply Decl., Docket No. 1684 ¶ 6. Defendant has filed a reply brief addressing this issue, and has stated that it negotiated with Hafif because Petersen had not been significantly involved in the case in years. *See* Def.'s Reply in Support of Motion, Docket No. 1685 at 2-3. To put it mildly, Plaintiffs' suggestion that Defendant purposely excluded Petersen because it thought Hafif would be a less skilled negotiator is implausible, and the Court would decline to reject the settlement on the basis of this unsupported objection.

3) Insufficient Record

Lembi objects that the Court lacks a sufficient record on which to base its assessment of the settlement's fairness. *See* Lembi Opp., Docket No. 1647 at 11-14. He argues that the settlement, which offers equal compensation to each class member, would dramatically undercompensate the some class members and thus is unfair, and suggests that the Court cannot assess the fairness of the settlement without expert analysis comparing the individual damages each plaintiff might win at trial with the settlement allocation. *Id.* at 14. In response, Mr. Hafif provides a detailed analysis of the value of plaintiffs' claims, as well as describing his utilization of an expert, Rick Stevenson, who performed calculations valuing plaintiffs' claims. *See* Hafif Reply Decl., Docket No. 1684 ¶¶ 8-14. The Court notes that Hafif has not filed with the Court any documents or reports written by Mr. Stevenson, which would have decisively put this objection to bed. That said, the declarations of Mr. Hafif, as well as his reliance upon a reputable expert he has identified, provide an ample record on which to base the Court's assessment that the settlement is fair and adequate.

4) Adequacy of the Settlement Amount

Relatedly, Lembi and Edwards object that the settlement amount is too low. Lembi offers expert analysis by a CPA hired by Petersen, Mr. James Nicholson ("Nicholson"), suggesting that the damages in this case approaches $72 million. Lembi Opp., Docket No. 1647, at 15-16. Hafif challenges the credibility of Mr. Nicholson, recounting: "After Mr. Petersen's expert, James Nicholson, advised me that he did not have the requisite experience to use the payroll records provided... he recommend and [*sic*] I hire expert, Rick Stevenson." Hafif Reply Decl., Docket No. 1684 ¶ 13. Regardless of the contrary opinion of Petersen's expert, the Court finds in its independent assessment that the terms of the settlement are fair and adequate, and no party has cited a requirement that the Court must be provided with expert analysis before reaching this conclusion. Crucially, as noted at the preliminary approval phase, the objection that the settlement amount falls far below plaintiffs potential recovery at trial fails to discount that amount by the risk of a verdict in Defendant's favor. *See* Prelim. Approval Order, Docket No. 1631 at 3. Nicholson's numbers, Hafif argues, "do not include a realistic compromise by a jury, but rather assume one hundred percent (100%) of what the officers 'estimate' as their time for off-the-clock work." *See* Law Offices of Herbert Hafif's Reply re: Motion, Docket No. 1684 at 5, 7. Furthermore, certain of Plaintiffs' claims were withdrawn by them previously and the Court granted summary adjudication in Defendant's favor as to certain others. Also, part of Plaintiffs'

remaining causes of action for pre- and post- shift donning and doffing has largely been vitiated by the Ninth Circuit's opinion in *Bamont*. Overall, given the potential weaknesses of Plaintiffs' case, the City's financial woes, and the benefits offered by the settlement terms, the Court would reject the contention that the settlement amount is too low to be reasonable.

5) Hafif's Authority to Settle

Lembi and Edwards argue that Hafif had no authority to settle the case, since only Petersen was retained counsel with such authority. *See* Lembi Opp., Docket No. 1647 at 18-19; Edwards Opp., Docket No. 1674 at 20. The Court flatly rejected this argument during the preliminary approval phase, and will not reiterate all of its reasoning here. *See* Prelim. Approval Order, Docket No. 1631 at 2. The Court notes again simply that Edwards himself filed a substitution of attorney notice requesting that Hafif be his attorney of record (*see* Docket No. 962) and notice was sent to all class members informing them that both Petersen and Hafif were counsel for Plaintiffs (*see* Docket No. 1110). Hafif has been far more active in this case in the past few years than Petersen. While this fact may unfortunately be due to Petersen's suffering from illness, the Court cannot reasonably find that Hafif had no authority to settle this case.[7]

6) Bankruptcy Court Order

Edwards and Lembi argue that Hafif's settlement of this case contravenes an order of the Bankruptcy Court handling the bankruptcy of Petersen's former law firm, the Petersen Law Firm. *See* Edwards Opp., Docket No. 1674, Exhs. 1, 2; Lembi Opp., Docket No. 1647 at 22. That order required that, at a specific September 2011 meeting regarding a completely unrelated case and in all retainer agreements executed by Hafif connected with that other case, Hafif make a disclosure that the "Petersen Law Firm asserts an economic interest in recoveries *related to this case*."[8] Edwards Opp., Docket No. 1674, Exh. 2 (emphasis added). The Court cannot see what

[7] The Court finds it notable that the exact same situation has arisen between Petersen and Hafif in another case, and the District Court Judge in that case found that Hafif was indeed counsel for plaintiffs with authority to settle the case, despite Petersen's protestations. *See generally* Hafif Reply Decl., Docket No. 1684, Exh. B.

[8] The full text of the Order, found only in a Bankruptcy Court docket entry, is:

> "GRANT LIMITED RELIEF AS FOLLOWS: AS TO THE MEETING BEING HELD BY HAFIF LAW FIRM ON SEPTEMBER 1, 2011, THE FOLLOWING STATEMENT (OR OTHER STATEMENT AS MAY BE AGREED TO BY THE PARTIES) SHALL BE GIVEN AT THE SUCH [*sic*] MEETING TO ALL ATTENDEES: 'The Petersen Law Firm, a law corporation, has filed a chapter 11 bankruptcy case. The Petersen Law Firm asserts an economic interest in recoveries related to these cases. Nothing that will be discussed at this meeting shall affect, impede, impair or eliminate any such economic interest asserted by the Petersen Law Firm.' AS TO ANY RETAINER AGREEMENTS ENTERED INTO BETWEEN THE HAFIF FIRM FROM THE DATE OF THIS HEARING UNTIL FURTHER ORDER OF THIS COURT, SUCH AGREEMENTS SHALL STATE THAT: 'The Petersen Law Firm asserts an economic interest in recoveries related to this case; nothing in this agreement shall affect, impede, impair or eliminate such economic interest asserted by the Petersen Law firm."

possible bearing that Order has on settlement of the instant matter. Significantly, the trustee for the estate of the Petersen Law Firm filed a pleading stating that he "has no objection to the substantive settlement between the parties[.]"[9] *See* Docket No. 1690 at 3.

7) Alleged Violation of FLSA Regulations

Edwards argues that the settlement violates regulations promulgated pursuant to the FLSA, because FLSA settlements, they argue, are only permitted to be in cash. *See* Edwards Opp., Docket No. 1674 at 10. This argument is unavailing, however, because these regulations merely require that *wages* be paid in cash, and do not require that settlements of FLSA claims only provide monetary relief to employees. *See* 29 C.F.R. §§ 216(c), 531.27(a). Moreover, the sixty-year old case cited by Edwards for the proposition that employees may not waive their rights to liquidated damages under the FLSA is not on point; a waiver of rights is distinct from a settlement compromise where each side gives up some rights in exchange for others. *See Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697, 707-09 (1945). Given the Ninth Circuit's strong policy in favor of settlement, and the unlikelihood that this case (or similar matters) could ever settle adequately were the parties restricted to monetary relief, the Court declines to adopt the objectors' novel interpretation of the FLSA regulations.

D. Notice was Adequate

Notice is adequate if it is "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1351 (9th Cir. 1980), *cert. denied sub nom., Sanchez v. Tucson Unified Sch. Dist. No. 1*, 450 U.S. 912 (1981). The Notice issued by the parties following the Court's preliminary approval of the settlement was approved by the Court prior to its distribution, and resulted in 85 additional class members opting in. *See* Final Approval Mot., Docket No. 1661 at 9. The Court also notes that there have been no objections to the method or substance of the notice provided to class members of this settlement. The Court has determined that the Notice issued here was reasonably calculated to apprise interested parties of the pendency of this action and to afford them the opportunity to object. *See* Fed. R. Civ. P. 23(e). Such notice satisfies the due process requirements of the Fifth Amendment. *See Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 962 (9th Cir. 2009); *Brown v. Ticor Title Inc.*, 982 F.2d 386, 392 (9th Cir.1992), *cert. dismissed sub nom. Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994); *Mandujano v. Basic Vegetable Prods., Inc.*, 541 F.2d 832, 835 (9th Cir. 1976).

IV. Conclusion

In sum, the settlement the parties have reached is eminently reasonable, provides substantial benefit to Plaintiff class and others, and was the result of an arm's length negotiation process between the parties before an experienced retired judicial officer. The Court would therefore GRANT the motion for final approval of the settlement.

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[9] The Trustee does, however, seek input into the ongoing dispute as to allocation of attorney's fees. See Docket No. 1690 at 3.

EXHIBIT “D”

Selection Criteria

Clie.Selection	Include: Skechers-465
Slip.Date	1/1/2009 - 12/20/2012

Nickname	Skechers-465 | CA		
Full Name	Sonia Stalker		
Address			
Phone		Fax	
Home		Other	
In Ref To	Stalker v Skechers - #465		
Fees Arrg.	By billing value on each slip		
Expense Arrg.	By billing value on each slip		
Tax Profile	Exempt		
Last bill			
Last charge	5/22/2012		
Last payment		Amount	$0.00

Date / ID	Timekeeper / Task	Rate / Markup %	Hours / DNB Time	Amount / DNB Amt	Total
6/27/2010 26880	GKH R Research claims for complaint - B&P 17200	550.00	3.50	1,925.00	Billable
6/28/2010 26866	GKH R Research for claims re complaint	550.00	2.90	1,595.00	Billable
6/29/2010 26852	GKH L Review Letter to Sketchers per Civil Code 1782	550.00	0.20	110.00	Billable
6/29/2010 26878	GKH R Research B&P Code 17200 for complaint	550.00	4.20	2,310.00	Billable
6/30/2010 26853	GKH L Review and Revised Letter to Sketchers per Civil Code 1782	550.00	0.20	110.00	Billable
6/30/2010 26879	GKH R Research CA B&P Code 17200 re claims in complaint	550.00	4.50	2,475.00	Billable
7/1/2010 26795	GKH Z Review complaint for filing with court, summons - LASC	550.00	0.50	275.00	Billable

Skechers-465:Sonia Stalker (continued)

Date / ID	Timekeeper / Task	Rate / Markup %	Hours / DNB Time	Amount / DNB Amt	Total
7/8/2010 26798	GKH R Research case law re class certification	550.00	3.20	1,760.00	Billable
7/16/2010 26794	GKH R Research case law re class certification	550.00	1.70	935.00	Billable
7/20/2010 26793	GKH R Research and review case law for class certification motion	550.00	2.30	1,265.00	Billable
7/22/2010 26791	GKH C Meeting - with Chris Morsoff & Ray Mandalcar	550.00	1.00	550.00	Billable
7/26/2010 26796	GKH Z Review def's answer to complaint, ntc of related cases/interested parties, decl of David Weinberg,	550.00	0.80	440.00	Billable
7/28/2010 26797	GKH Z Review def's ntc of removal to federal court	550.00	0.40	220.00	Billable
7/29/2010 26867	GKH R Research re def's notice of removal, claims	550.00	2.60	1,430.00	Billable
7/30/2010 26792	GKH C Meeting - with Chris Morsoff & Ray Mandalcar	550.00	1.20	660.00	Billable
8/3/2010 26868	GKH R Research for class certification motion	550.00	2.10	1,155.00	Billable
8/6/2010 26869	GKH R Research re case law for class certification motion	550.00	4.90	2,695.00	Billable
8/9/2010 26854	GKH L Letter to opposing counsel re meet and confer	550.00	0.10	55.00	Billable

Skechers-465:Sonia Stalker (continued)

Date / ID	Timekeeper / Task	Rate / Markup %	Hours / DNB Time	Amount / DNB Amt	Total
8/9/2010 26855	GKH L Prep letter to Petrocelli requesting dox for use in prep scheduling order per Court order	550.00	0.40	220.00	Billable
8/10/2010 18352	GKH E Email with co-counsel regarding video conf tomorrow. Review draft class cert motion.	550.00	2.20	1,210.00	Billable
8/10/2010 26856	GKH L Prep letter to Barker re meet and confer	550.00	0.10	55.00	Billable
8/11/2010 18350	GKH C Conference with defendants by video regarding motion to dismiss or transfer. Meet and confer on class cert motion. Discuss 26f conf, to be Monday and discuss amendment to complaint for CLRA now that 30 days have passed.	550.00	0.50	275.00	Billable
8/11/2010 18351	GKH E Email to co-counsel regarding video conf and status. Memo.	550.00	0.20	110.00	Billable
8/13/2010 18357	GKH E Emails re meet and confer and 26f with defendant and co-counsel	550.00	0.20	110.00	Billable
8/13/2010 26801	GKH P Prep decl in support of motion for class certification	550.00	0.40	220.00	Billable
8/13/2010 26803	GKH Z Review mtn for class certification	550.00	2.40	1,320.00	Billable
8/13/2010 26870	GKH P Prep & Plan for Rule 26f conference, research and review	550.00	2.60	1,430.00	Billable
8/14/2010 18356	GKH E Emails with defendants re 26f and meet and confer for class cert motion. Emails with co-counsel re the same.	550.00	0.20	110.00	Billable

Skechers-465:Sonia Stalker (continued)

Date / ID	Timekeeper / Task	Rate / Markup %	Hours / DNB Time	Amount / DNB Amt	Total
8/14/2010 18358	GKH Z Review & Analyze cases sent by defendant for motion to dismiss or transfer as well as own research on the issue based on first to file	550.00	3.70	2,035.00	Billable
8/14/2010 18359	GKH D Dictation and preparation of draft declaration for class cert.	550.00	0.50	275.00	Billable
8/16/2010 18364	GKH C Conference with defendants on 26f, meet and confer on class cert and meet and confer on motion to dismiss. CM present. Video conf. Draft Joint statement for review and comment.	550.00	3.50	1,925.00	Billable
8/17/2010 26802	GKH Z Rev ltr to client	550.00	0.20	110.00	Billable
8/18/2010 26857	GKH Z Review letter to client from Mandlekar re case	550.00	0.10	55.00	Billable
9/1/2010 26799	GKH Z Review def's motion to dismiss case, stay or transfer proceeding, memo in support, decl of Jeffrey Barker and exhibits	550.00	0.80	440.00	Billable
9/1/2010 26807	GKH Z Review 8/30 minute order	550.00	0.10	55.00	Billable
9/1/2010 26871	GKH R Research re def's motion to dismiss	550.00	2.70	1,485.00	Billable
9/2/2010 26800	GKH Z Review mtn to certify class and supporting documents	550.00	0.90	495.00	Billable
9/2/2010 26804	GKH Z Review joint scheduling conference statement / Rule 26 report	550.00	1.30	715.00	Billable
9/2/2010 26805	GKH Z Review opp to mtn to dismiss, decl of Morosoff	550.00	0.70	385.00	Billable

Skechers-465:Sonia Stalker (continued)

Date / ID	Timekeeper / Task	Rate / Markup %	Hours / DNB Time	Amount / DNB Amt	Total
9/6/2010 26808	GKH Z Review reply re mtn to dismiss/stay case and supporting documents	550.00	1.10	605.00	Billable
9/6/2010 26861	GKH P Prep & Plan RPD set one to defendant, research for same	550.00	4.40	2,420.00	Billable
9/7/2010 26851	GKH L Letter from Baker re Rule 26 disclosure of Stalker	550.00	0.10	55.00	Billable
9/7/2010 26858	GKH L Prepare letter to Barker re initial Rule 26 disclosure	550.00	0.10	55.00	Billable
9/8/2010 26862	GKH W Writing of RPD set one to defendant, addl research	550.00	2.70	1,485.00	Billable
9/10/2010 26859	GKH Z Review Barker's letter objecting to meet and confer re mtn for class cert	550.00	0.40	220.00	Billable
9/10/2010 26863	GKH W Revise req for prod of document set one to defendants	550.00	1.80	990.00	Billable
9/14/2010 26806	GKH C Conference with co-counsel re case strategy	550.00	1.00	550.00	Billable
9/15/2010 26809	GKH Z Review def's ex parte app to continue mtn for class certification, and supporting documents	550.00	0.90	495.00	Billable
9/15/2010 26810	GKH Z Review 9/15 minute order taking mtn to dismiss under submission	550.00	0.10	55.00	Billable
9/15/2010 26811	GKH Z Review & Analyze opp to ex parte appl to continue class certification; meetings with co-counsel	550.00	2.20	1,210.00	Billable

Skechers-465:Sonia Stalker (continued)

Date / ID	Timekeeper / Task	Rate / Markup %	Hours / DNB Time	Amount / DNB Amt	Total
9/16/2010	GKH	550.00	0.10	55.00	Billable
26812	Z				
	Review minute order vacating scheduling conference				
9/27/2010	GKH	550.00	0.30	165.00	Billable
18387	C				
	Conference with co-counsel				
9/28/2010	GKH	550.00	1.60	880.00	Billable
18402	W				
	Draft discovery requests				
9/28/2010	GKH	550.00	0.70	385.00	Billable
26813	Z				
	Review def's opp to mtn for class certification, supporting documents				
9/28/2010	GKH	550.00	2.30	1,265.00	Billable
26814	R				
	Research for reply re mtn for class certification				
9/28/2010	GKH	550.00	0.90	495.00	Billable
26815	Z				
	Review decl of Barker in support of opp to mtn for class cert and all exhibits attached				
9/29/2010	GKH	550.00	6.80	3,740.00	Billable
18403	B				
	Brief and research for reply to class cert motion				
10/4/2010	GKH	550.00	0.70	385.00	Billable
26816	Z				
	Review reply in support of mtn for class certification, decl of Ray Mandlekar, exhibits				
10/13/2010	GKH	550.00	0.10	55.00	Billable
26817	Z				
	Review minute order taking mtn for class cert under submission				
10/13/2010	GKH	550.00	0.30	165.00	Billable
26818	Z				
	Review def's objection to new evidence in reply to mtn for class certification				
12/13/2010	GKH	550.00	1.10	605.00	Billable
26860	Z				
	Review Morosoff's letter to Barker re defendant's deficient responses to req for production of documents				

Skechers-465:Sonia Stalker (continued)

Date / ID	Timekeeper / Task	Rate / Markup %	Hours / DNB Time	Amount / DNB Amt	Total
1/4/2011	GKH	550.00	1.20	660.00	Billable
26819	Z				
	Review def's mtn to stay case pending further proceedings, supporting decls and exhibits				
1/4/2011	GKH	550.00	0.10	55.00	Billable
26822	Z				
	Review def's ntc of association of counsel				
1/6/2011	GKH	550.00	2.60	1,430.00	Billable
26820	R				
	Research re opp to mtn to stay				
1/7/2011	GKH	550.00	4.20	2,310.00	Billable
26821	R				
	Research re opp to mtn to stay				
1/10/2011	GKH	550.00	0.70	385.00	Billable
26823	Z				
	Review opposition to def's mtn to stay case				
1/17/2011	GKH	550.00	0.50	275.00	Billable
26824	Z				
	Review def reply for motion to stay case				
4/21/2011	GKH	550.00	0.10	55.00	Billable
26826	Z				
	Review order denying def's ex parte appl to continue hearing date for class cert				
4/25/2011	GKH	550.00	0.10	55.00	Billable
26827	Z				
	Review order transferring case to new judge				
4/28/2011	GKH	550.00	0.30	165.00	Billable
26828	Z				
	Review & Analyze Judge Otero's standing order				
6/24/2011	GKH	550.00	0.10	55.00	Billable
26829	Z				
	Review minute order reassigning case				
7/5/2011	GKH	550.00	0.30	165.00	Billable
26830	Z				
	Review joint status report				

Skechers-465:Sonia Stalker (continued)

Date / ID	Timekeeper / Task	Rate / Markup %	Hours / DNB Time	Amount / DNB Amt	Total
7/5/2011 26865	GKH C Conference with co-counsel re status report	550.00	0.50	275.00	Billable
7/8/2011 26831	GKH Z Review stip to continue status conference	550.00	0.10	55.00	Billable
7/8/2011 26832	GKH Z Review order granting stip to continue status conf	550.00	0.10	55.00	Billable
7/12/2011 26833	GKH Z Review minute order continuing status conf.	550.00	0.10	55.00	Billable
8/8/2011 26834	GKH Z Review minutes of status conference, staying case	550.00	0.10	55.00	Billable
9/29/2011 26835	GKH Z Review joint status report	550.00	0.30	165.00	Billable
9/30/2011 26836	GKH Z Review minute order continuing status conference	550.00	0.10	55.00	Billable
11/28/2011 26837	GKH Z Review joint status report	550.00	0.20	110.00	Billable
11/29/2011 26838	GKH Z Review minute order cont status conf	550.00	0.10	55.00	Billable
2/6/2012 26839	GKH Z Review joint status report	550.00	0.10	55.00	Billable
2/13/2012 26841	GKH A Appearance at Status Conference on Grabowski action	550.00	4.70	2,585.00	Billable
2/14/2012 26840	GKH Z Review minute order cont status conference	550.00	0.10	55.00	Billable

Skechers-465:Sonia Stalker (continued)

Date / ID	Timekeeper / Task	Rate / Markup %	Hours / DNB Time	Amount / DNB Amt	Total
4/12/2012 26842	GKH Z Review joint status report	550.00	0.20	110.00	Billable
4/13/2012 26843	GKH Z Review order continuing status confernce	550.00	0.10	55.00	Billable
4/30/2012 26849	GKH C Conference with co-counsel	550.00	0.40	220.00	Billable
5/1/2012 26864	GKH C Conference call re MDL with counsel	550.00	0.50	275.00	Billable
5/2/2012 26844	GKH Z Review joint status report	550.00	0.30	165.00	Billable
5/4/2012 26845	GKH Z Review order continuing status conf	550.00	0.10	55.00	Billable
5/8/2012 26850	GKH C Conference call re MDL	550.00	0.80	440.00	Billable
5/21/2012 26846	GKH Z Review condintional transfer to Kentucky court	550.00	0.30	165.00	Billable
5/21/2012 26847	GKH Z Review court's transfer letter	550.00	0.10	55.00	Billable
5/22/2012 26848	GKH Z Review order vacating status conference	550.00	0.10	55.00	Billable
TOTAL	Billable Fees		109.30		$60,115.00

Total of billable expense slips $0.00

Skechers-465:Sonia Stalker (continued)

Calculation of Fees and Costs

	Amount	Total
Fees Bill Arrangement: Slips By billing value on each slip.		
Total of billable time slips	$60,115.00	
Total of Fees (Time Charges)		$60,115.00
Total of Costs (Expense Charges)		$0.00
Total new charges		$60,115.00
New Balance Current	$60,115.00	
Total New Balance		$60,115.00

Timekeeper Summary

Timekeeper	Rate	Hours	Charges	Slip Value	Adjustment
GKH	550.00	109.30	$60,115.00	$60,115.00	0.00