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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION

A.A., a minor, by and through her guardian ad litem, and all others similarly situated,

Plaintiffs,

vs.

County of Riverside, a public entity; Karla Torres and Felicia Butler, individuals, together with all others similarly situated,

Defendants.

CASE NO.: 5:14-cv-02556-VAP-(SPx)

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR ATTORNEYS FEES; DECLARATION OF DOUGLAS C. SMITH; DECLARATION OF ERIN R. BROWN**

*Complaint Filed on 12/12/14*

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## INTRODUCTION

Plaintiff seeks over $1 million in attorney fees.

Only a fraction of that amount could possibly be justified. Indeed, plaintiff's fee demand, both on its own terms and when viewed in the long perspective of A.A.'s individual claim, is so outlandishly excessive and shocking to the conscience that this Court has discretion to deny all of the fee demand, or at least to radically reduce it to the hours her attorneys expended after the time A.A. lost on her class action lawsuit, i.e., the hours they spent in preparation of a summary judgment motion and acceptance of defendants offer of judgment made for cost of defense.

A.A. had no damages, and the incident in which she was separated from her mother for six days following birth had already been compensated in a million dollar settlement with her mother Tonita Rogers, who was represented by A.A.'s attorneys. A.A.'s claim could have been part of that settlement, but A.A.'s attorneys consistently refused to settle A.A.'s claim so as to use A.A. as a front to bring this class action lawsuit, which they milked for fees by demanding massive class discovery, nearly all of which they already had from multiple sources, including Monell and other discovery in the Tonita Rogers case and A.A.'s juvenile court file.

The undifferentiated fee demand wholly fails to eliminate hours A.A.'s attorneys patently expended on class action proceedings, and having nothing directly to do with A.A.'s individual claim, whether A.A.'s unsuccessful class certification motion, reconsideration motion and Rule 23(f) appeal to the Ninth Circuit, or the unrestrained and unnecessary discovery her attorneys took during the class action phase of the case, where, by court order, no merits discovery could occur.

All of this is set out in great detail in the accompanying Declaration of Douglas Smith.

If fees are to be granted here at all, they must be minimal given A.A.'s limited success here and the need to restrict compensable hours to those spent on her successful claim only. In short, A.A. cannot be awarded the amount of her fee demand or anything approaching it.

**A. Plaintiff's Million-Dollar-Plus Fee Demand Must Be Denied Or Radically Reduced To Reflect Her Very Limited Success.**

"Under 42 U.S.C. § 1988, a court may award the prevailing party in a § 1983 claim a reasonable attorney's fee as part of the costs. The reasonableness of the fee is determined primarily by reference to the level of success achieved by the plaintiff," and "must be adjusted downward where the plaintiff has obtained limited success on his pleaded claims." *McCown v. City of Fontana*, 565 F.3d 1097, 1101-03 (9th Cir. 2009) (internal quotation marks omitted). In judging the level of success, "a district court should give primary consideration to the amount of damages awarded as compared to the amount sought." *Id*. at 1104 (internal quotation marks omitted).

This was put to the test in *McCown* where eight of the plaintiff's nine claims were dismissed on summary judgment, and he received only "a fraction of what he originally requested" in his complaint and settlement demands. *Id*. at 1103, 1104. In that circumstance, the Ninth Circuit held "that attorney's fees awarded under 42 U.S.C. § 1988 must be adjusted downward where the plaintiff has obtained limited success on his pleaded claims, and the result does not confer a meaningful public benefit." *Id.* at 1103.

Thus, a district court must reduce the fee award "if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Hensley v. Eckerhart,* 461 U.S. 424, 439-40 (1983). And, most importantly, "in judging the plaintiff's level of success and *the reasonableness of hours spent achieving that success*, a district court should give *primary consideration* to *the amount of damages awarded* as compared to the amount sought." *McCown*, 565

F.3d at 1104 (internal quotation marks omitted; emphasis added).

Following these dictates, the Ninth Circuit vacated a district court's decision because it "abused its discretion by expressly refusing to relate the extent of success to the amount of the fee award," holding that "[t]he district court must reduce the attorneys fees award so that it is commensurate with the extent of the plaintiff's success." *McGinnis v. Kentucky Fried Chicken of Cal.*, 51 F.3d 805, 808, 810 (9th Cir. 1994). And in *McCown*, the Ninth Circuit reversed the fees award where the damages plaintiff received as part of a settlement agreement for his single remaining claim was roughly one-fourth of the "damages in excess of $75,000" that he pled in his complaint and less than one-tenth of what he requested in settlement. *McCown*, 565 F.3d at 1104. Thus, the appellate court concluded, as the plaintiff's "victory clearly fell far short of his goal . . . it is unreasonable to grant his attorneys more than a comparable portion of the fees [he] requested." *Id*. at 1104-05.

Here, A.A. has accepted an offer of judgment in the sum of $49,999. That amount is a far cry from the millions of dollars from the claims of thousands of class plaintiffs A.A. sought to recover in her class action complaint, where she requested "[a]n award of *all* recoverable compensatory, statutory, and other damages sustained by Plaintiff *and members of the Plaintiff Class* in such amounts as may be *separately determined for each individual*." (Doc. 1:27, emphasis added.) According to plaintiff, the "members of the Plaintiff Class" potentially numbered in the thousands (Smith Declaration, ¶¶ 12, n.2; 15); indeed, plaintiff's ever-changing class definitions, each more expansive than the prior ones, increased the potential class size and thus the potential recovery plaintiff expected.

The huge gap between the potential millions that plaintiff sought and the $49,999 offer of judgment cannot possibly support plaintiff's sky-high attorney fees demand.

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**B. Plaintiff's Million-Dollar-Plus Fee Demand Must Be Denied Or Radically Reduced To Reflect The Fact That Nearly All Of Her Attorneys' Time Was Expended On Her Unsuccessful Class Certification Claim.**

When claims are unrelated to each other, "'the final fee award may not include time expended on the unsuccessful claims.'" *Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 901 (9th Cir. 1995); *Melland v. Cornerstone Dental, PC*, 691 Fed.Appx. 354 (9th Cir. 2017). This is also true where claims are related: No award can be made for time expended on an unsuccessful claim *unless* "the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation" is "significant" and the plaintiff has obtained "excellent results" overall, *Schwarz*, 73 F.3d at 901-02; *Hensley,* 461 U.S. at 435-37, 439-40. But where "a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith." *Hensley*, 461 U.S. at 435-36.

Plaintiff's class action hours are unrelated to her individual claim, as they involve meeting the statutory tests for class certification rather than proving any person's individual claim. Even if seen as related, plaintiff obtained nothing like an "excellent result" overall. She lost on class certification, and prevailed only on her individual claim in the technical sense that she accepted an offer of judgment in the modest sum of $49,999, representing what the County saw as its cost of defense, and not damages, of which A.A. had none. (See Smith Decl., ¶¶ 29, 30.)

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**C. Plaintiff's Million-Dollar-Plus Fee Demand Can Be Denied In Its Entirety (Or At Least Radically Reduced) To Reflect The Fact That It Is Outrageously Inflated And Shocks The Conscience In That Was Made In Bad Faith And Fails To Eliminate Attorney Time Expended On Class Certification Discovery And Proceedings.**

A district court may even deny a fee request in its entirety when it is made in bad faith and so inflated as to shock the conscience. "Even in civil rights cases, fees may be denied in their entirety when petitioning lawyers are guilty of overreaching in seeking outrageously unreasonable fees." *Farris v. Cox*, 508 F.Supp. 222, 227 (N.D. Cal. 1981); *Serrano v. Unruh*, 32 Cal.3d 621, 635 (1982) ("fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether") (cited with approval in *Rosenfeld v. U.S. Dep't of Justice*, 903 F.Supp.2d 859, 878 (N.D. Cal. 2012); *Jadwin v. Cty. of Kern*, 767 F.Supp.2d 1069, 1140 (E.D. Cal. 2011) (denying attorney's motion for "fees-on-fees" due to lack of a reasonable basis for such an award); *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980) (affirming district court's denial of an entire fee claim where it found "appellants' claim outrageously excessive" and "obviously inflated to an intolerable degree," as any other practice would encourage a party "to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked for in the first place"); *Fair Housing Council of Greater Wash. v. Landow*, 999 F.2d 92, 96 (4th Cir. 1993) (upholding a denial of fees to a prevailing plaintiff as shocking to the conscience because the plaintiff made no effort to eliminate large numbers of hours spent on unsuccessful, unrelated claims).

The Ninth Circuit has not affirmed or rejected the right of a district court to deny a fee request in its entirety. In *Mendez v. Cty. of San Bernardino*, 540 F.3d

1109 (9th Cir. 2008), overruled on other grounds in *Arizona v. ASARCO LLC*, 773 F.3d 1050 (9th Cir. 2014), the Court reviewed cases from other circuits that endorsed a district court's power to deny all attorney fees to a prevailing plaintiff under certain circumstances, and, while not ruling out such a result, held that it could not affirm the application of that power in the case before it.

Finding that there were two lines of out of circuit cases, *Mendez* first chose not to decide whether a district court could deny fees and costs under § 1988 on the ground that a fee demand was inflated and outrageously excessive (as the Seventh Circuit had allowed in *Brown*) as those circumstances were not before it. *Mendez*, 540 F.3d at 1127. Citing the other line of out of circuit cases, *Mendez* left open whether the denial of all fees would be proper where a fee request "shocked the conscience" as it "appeared to have been made in bad faith, such as billing outrageous numbers of hours on simple matters, or where the plaintiff made no effort to eliminate hours spent on unsuccessful, unrelated claims." *Id.*; *see Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, 2009 WL 10669361 at *21, n.87 (C.D. Cal. March 25, 2009).

As clearly shown in the Smith Declaration, the facts here fall squarely into the case law cited above: California district courts, out of circuit cases, a California Supreme Court case cited with approval by a California district court, and even *Mendez*, which definitively described the holdings of the out of circuit cases. A.A.'s claim, which could have been settled with the rest of her family's claims, was artificially kept alive to allow her attorneys to file a class action. A.A.'s attorneys then used the class action to seek massive written discovery, nearly all of which it had obtained from other sources, including all of A.A.'s juvenile court files, and Monell discovery in their earlier representation of A.A.'s mother. All this discovery was class not merits discovery, as required by the several orders of this Court prohibiting the latter, and plaintiff's attorneys in fact took no discovery once this Court denied class certification.

Notwithstanding all of this, A.A.'s attorneys have presented a fee demand based on an undifferentiated mass of hours that entirely fails to eliminate any of the hours spent on discovery for class certification. That includes, incredibly, and among many other clearly inappropriate entries, the hours spent on A.A.'s sprawling motion for class certification, her motion for reconsideration and her unsuccessful Rule 23(f) appeal to the Ninth Circuit.

**D. Plaintiff's Million-Dollar-Plus Fee Demand Must Be Denied Or Radically Reduced Because To Award Anything Approaching The Fee Amount Plaintiff Seeks Would Violate Congress' Bar On Windfalls For Civil Rights Attorneys.**

While "section 1988 is intended to encourage vigorous enforcement of civil rights protections, at the same time . . . Congress did not intend the statutory fee award to provide windfalls for civil rights attorneys." *Wilcox v. City of Reno*, 42 F.3d 550, 554 (9th Cir. 1994); *Blum v. Stenson*, 465 U.S. 886, 896 (1984) ("The legislative history explains that 'a reasonable attorney's fee' is one that is 'adequate to attract competent counsel, but . . . [that does] not produce windfalls to attorneys.'").

This case exists to provide a windfall for A.A.'s attorneys. As shown by the Smith declaration, plaintiff's attorneys have kept the A.A. claim alive to facilitate their hopes of a jackpot fee recovery from pursuing a class action, even though it was clear to everyone that A.A.'s claim was worth nominal damages at best, and could years ago have been settled for the modest amount it has finally been permitted to settle for, had her attorneys not needed A.A. as their representative plaintiff.

That fees were the animating motive for this class action, as opposed to any interest in the public good, let alone in A.A.'s individual claim, is shown by the unrestricted, ruinous discovery assault A.A.'s attorneys launched. As shown in the Smith Declaration, they bombarded defendants with massive written discovery

that A.A.'s attorneys already had from multiple sources, including Monell discovery in the Tonita Rogers case and A.A.'s juvenile court file.

This is also shown, as discussed in the Smith declaration, by A.A.'s effort to obtain market rates for services far above what they have been awarded in the past.

## CONCLUSION

For all the foregoing reasons, and the facts and reasons set out in the accompanying Declaration of Douglas Smith, A.A.'s fee demand should be denied in its entirety or radically reduced to the hours her attorneys spent on A.A.'s individual case after the denial of the motion for certification, the motion for reconsideration, and the Rule 23(f) appeal.

Dated: January 14, 2019

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