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3:04-CV-01018 JONES V. WILD OATS MARKETS

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9 dba HENRY'S MARKETPLACE

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COURT REPORTER
SOUTHERN DISTRICT OF CALIFORNIA

BY  0 2006

10 UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA

11 GYPSIE JONES

12 Plaintiff,

13 vs.

14 WILD OATS MARKETS, INC. dba
15 HENRY'S MARKETPLACE ; VERNON E.
TAYLOR ; and DOES 1 through 10,

16 Defendants.

Case No. 04-CV-1018 WQH (WMc)

[Assigned to the Hon. William Q. Hayes]

**[PROPOSED] ORDER GRANTING
DEFENDANT'S ATTORNEYS' FEES AND
LITIGATION EXPENSES IN THE
AMOUNT OF \$198,634.84**

Date: July 6, 2006

Complaint filed: May 18, 2004
Trial Date: N/A
Discovery Cutoff Date: June 24, 2005

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that Defendant Wild Oats Markets, Inc.'s Motion for Attorneys'
3 Fees and Costs had been taken under Submission by this Court pursuant to Local Civil Rule 7.1,
4 without oral argument. After having read and considered all of the papers submitted, as well as
5 supplemental briefs, the Court issued an Order entered on July 6, 2006, a copy of which is attached
6 as Exhibit "A," and incorporated herein by reference.

7 Pursuant to this Order, Defendant was requested to submit a new [Proposed] Order to the
8 Court, as follows:

9 1. Defendant's outside counsel recorded 749.20 hours of billable time from inception of
10 this action on May 18, 2004 through the time that Defendant's Motion for Summary Judgment was
11 granted by the Court on November 25, 2005. The Court determined that the number of billable hours
12 incurred by Defendant's outside counsel should be reduced by 33%. Thus, Defendant is entitled to
13 recover fees based on **501.96 hours**;

14 2. The average rate of billed by Defendant's outside counsel for this matter was \$377.39
15 per hour. The Court determined that a reasonable hourly rate for this matter should be **\$325.00**
16 **per hour**;

17 3. The Court further determined that the fees incurred by Defendant's outside counsel
18 should be reduced to the extent that the fees included clerical tasks, in the amount of **\$1,080.00**;

19 4. The reasonable attorneys' fees recoverable by Defendant, therefore, equals
20 **\$162,058.30**;

21 5. The Court further determined that Defendant should be entitled to all of its reasonable
22 litigation expenses, in the amount of **\$33,327.84**;

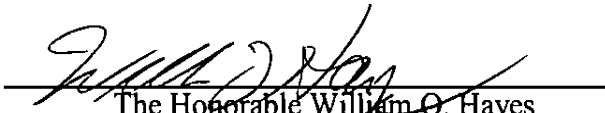
23 6. The Court further determined that Defendant shall be entitled to recover its attorneys'
24 fees in connection with preparing the moving papers for their motion, but not the papers in
25 conjunction with the supplemental briefing. Defendant incurred 15 billable hours in preparing its
26 Motion for Attorneys' Fees, which after being reduced by 33%, equals 10 hours at an average billing
27 rate of \$325.00 per hour. Defendant, therefore, shall be entitled to recover its fees in connection with
28 this motion in the amount of **\$3,250.00**;

1 7. In total, Defendant shall be entitled to recover its reasonable attorneys' fees and
2 litigation expenses in this matter in the total amount of **198,634.84**; and

3 8. Defendant shall contact the Clerk of the Court to set a hearing for its Bill of Costs and
4 the Clerk shall determine the amount of taxable costs in this matter.

5
6 IT IS SO ORDERED:

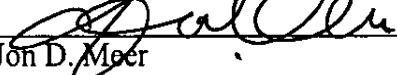
7
8 Dated: July 24, 2006


The Honorable William Q. Hayes
Judge of the United States District Court,
Southern District of California

9
10
11 PRESENTED BY:

12
13 Dated: July 18, 2006

14 DLA PIPER RUDNICK GRAY CARY US LLP

15
16 By: 
Jon D. Meer
Attorneys for Defendant
WILD OATS MARKETS, INC.
dba HENRY'S MARKETPLACE

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a
4 party to the within action; my business address is: 1999 Avenue of the Stars, Fourth Floor, Los
Angeles, California 90067-6022.

5 On July 18, 2006, I served the foregoing document(s) described as:

6 **[PROPOSED] ORDER GRANTING DEFENDANT'S ATTORNEYS' FEES AND**
7 **LITIGATION EXPENSES IN THE AMOUNT OF \$198,634.84**

8 on interested parties in this action by placing the original true copy(ies) thereof enclosed in
sealed envelopes as follows:

9 Mr. Lynn Hubbard III, Esq.
10 Law Offices of Lynn Hubbard
11 12 Williamsburg Lane
Chico, CA 95926
12 Fax: (530) 894-8244

12 **BY MAIL** (C.C.P. § 1013(a)) I am readily familiar with the firm's practice of collection and processing
13 correspondence for mailing with the U.S. postal service. Under that practice it would be deposited
with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles,
14 California in the ordinary course of business. The envelope was sealed and placed for collection and
mailing on that date following ordinary business practices.

15 **BY FAX** (C.C.P. § 1013(a),(e); CRC 2008) by transmitting said document(s) by electronic facsimile at 1999
16 Avenue of the Stars, Fourth Floor, Los Angeles, California 90067-6022 to the respective facsimile
number(s) of the party(ies) as stated on the attached mailing list. The transmission was reported as
17 complete without error.

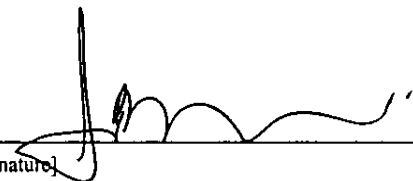
18 **BY OVERNIGHT MAIL** (C.C.P. § 1013(e)) I am readily familiar with the firm's practice of collection and
19 processing correspondence for mailing with United Parcel Service. Under that practice it would be
deposited with United Parcel Service on that same day thereon fully prepaid at Los Angeles,
20 California in the ordinary course of business. The envelope was sealed and placed for collection and
mailing on that date following ordinary business practices.

21 (STATE) I declare under penalty of perjury under the laws of the State of California that the above
is true and correct.

22 (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at
23 whose direction the service was made.

24 Executed on July 18, 2006, at Los Angeles, California.

25 Inah Lee
26 [Print Name Of Person Executing Proof]

[Signature] 



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BY RO

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GYPSTIE JONES,

Plaintiff,

v.

WILD OATS MARKETS, INC.,
dba HENRY'S MARKETPLACE,
et al.,

Defendants.

Civil No. 04-1018- WQH-(WMc)

ORDER

HAYES, Judge:

Pending before the Court is Defendant Wild Oats' Motion for Attorney's Fees and Costs. The Court finds this matter suitable for submission on the papers and without oral argument pursuant to Local Civil Rule 7.1. After considering the arguments raised by the parties in their briefing, the Court now issues the following rulings.

BACKGROUND

Plaintiff is a thirty-three year-old woman who has been a paraplegic since she was

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1 seventeen. Plaintiff uses a wheelchair when traveling in public. On December 14, 2003,¹
2 Plaintiff visited Henry's Marketplace (hereinafter "the Store") in Pacific Beach, San Diego.
3 According to Plaintiff, she encountered numerous architectural barriers that deprived her of full
4 and equal access to the Store. Plaintiff's Complaint alleged violations of the ADA and state law
5 for barriers inside the Store.

6 Plaintiff and Defendant filed cross motions for Summary Judgment in this matter. On
7 November 25, 2005, the Court denied Plaintiff's Motion for Summary Judgment and granted
8 Summary Judgment in favor of Defendant Wild Oats. Defendant now moves for attorney's fees
9 and costs.

10 STANDARD OF REVIEW

11 While attorney's fees generally are not recoverable, such fees may be awarded if
12 authorized by enforceable contract or by applicable statute. *Alyeska Pipeline Services Company*
13 *v. Wilderness Society*, 421 U.S. 240, 257, (1975). The Americans with Disabilities Act provides
14 that "the court in its discretion, may allow the prevailing party ... a reasonable attorney's fee,
15 including litigation expenses and costs." 42 U.S.C. § 12205.

16 Strong policy considerations support awarding attorney's fees to prevailing plaintiffs.
17 *Christianburg Garment Co. V. Equal Employment Opportunity Commission*, 434 U.S. 412, 418
18 (1978). However, "fees are not awarded as a matter of course to prevailing defendants, and
19 should only be awarded under exceptional circumstances, 'upon a finding that the plaintiff's
20 action was frivolous, unreasonable, or without foundation.'" *Summers v. Teichert & Son, Inc.*,
21 127 F.3d 1150, 1154 (9th Cir. 1997).

22 "An action is frivolous if it lacks an arguable basis in law or in fact, though it need not be
23 brought in bad faith. Even where plaintiff is unaware at the commencement of the suit that the
24 claim is frivolous, he may be liable for attorneys fees if he continues to litigate after it becomes
25
26

27 ¹Plaintiff's Motion for Summary Judgment also included information regarding trips to the Store on
28 September 7, 2004 and March 25, 2005. However, Plaintiff's Complaint was filed on May 18, 2004 and was not
amended at anytime thereafter. Therefore, the Court only considered the allegations concerning Plaintiff's
December 14, 2003 visit to the Store when conducting its analysis.

1 clear that the action lacks factual substance." *Peters v. Winco Foods, Inc.*, 320 F. Supp. 2d
2 1035, 1037 (N.D. Cal. 2004) (internal citations omitted).

3 DISCUSSION

4 On November 25, 2005, the Court granted Summary Judgment in favor of Wild Oats.
5 From the Order, it is clear that Wild Oats prevailed on each of the claims. Attached to Plaintiff's
6 Complaint was a "preliminary site report" containing forty-three (43) alleged violations. Of
7 those alleged violations, only a few were the subject of the Summary Judgment Motions filed in
8 this case. The alleged violations can be easily categorized into five "claims": (1) alleged barriers
9 regarding the width of the store aisles; (2) alleged barriers regarding the height of the produce
10 scales; (3) alleged barriers regarding the check out stands (4) alleged barriers regarding the
11 drainpipes under the sink in the women's restroom; and (5) alleged barriers in the women's
12 restroom. Of those that were at issue in the Motions, the Court granted summary judgment on
13 several of the claims after finding that Plaintiff wholly failed to submit evidence in support of its
14 claims, and after finding that in some cases, the evidence of the Plaintiff's own expert *confirmed*
15 that the claims were *without merit*.

17 I. Federal Claims

18 As to the alleged barriers regarding the width of the store aisles, the Court finds that the
19 barriers did not exist and will grant fees on this claim. Plaintiff's own expert found the width of
20 the aisles and the check out stands to be in compliance with the applicable regulations. *See MSJ*
21 *Order; See also Settle Depo*, 129:7-18. The Court finds that this claim lacked "an arguable basis
22 in law or in fact" at the time the summary judgment motions were filed, and the Court will
23 therefore award fees based on this claim.

24 As to the alleged barriers regarding the check out stands, Plaintiff argued that the Store
25 lacked a designated check out stand for the disabled, leaving Plaintiff unable to use the Pay-
26 Point credit card machine because it was too high and unable to sign a credit card receipt on the
27 counter because the counter was too high. However, as noted by the Court in the Order granting
28

1 Summary Judgment in favor of Defendants, Plaintiff's own expert found the width of the aisles
2 and the check out stands to be in compliance with the applicable regulations. *See MSJ Order;*
3 *See also Settle Depo*, 81:1-9. The Court finds that this claim lacked "an arguable basis in law or
4 in fact" at the time the summary judgment motions were filed, and the Court will therefore
5 award fees based on this claim.

6 As to the alleged barriers regarding the drainpipes under the sink in the women's
7 restroom, the Plaintiff argues that the Court's request for supplemental briefing on this issue
8 deems it non-frivolous. The Court notes that the Court requested supplemental briefing not
9 because there was a arguable basis in law or in fact, but because questions regarding the
10 drainpipe claim remained after oral argument. After consideration of the supplemental briefing,
11 the Court found that the evidence showed that any problem with respect to the lack of insulation
12 around the drainpipe had been fixed. *See Summary Judgment Order at 15; Pltf's Depo 155:17-*
13 *17, 156:6-14.* The Court noted that the Plaintiffs own expert conceded during deposition, and
14 before the summary judgment phase, that the drainpipe "is *probably* adequately insulated." *See*
15 *Deposition of Reed Settle at 83:21.*

17 The Court finds that this claim did not wholly lack any "an arguable basis in law or in
18 fact" at the time the summary judgment motions were filed. While Defendants ultimately
19 prevailed on the claim, it was not so clear as to deem the claim frivolous. Thus, the Court will
20 deny fees based on this claim.

21 As to the alleged barriers regarding the height of the produce scales, and the alleged
22 barriers in the women's restroom, while Plaintiff did not ultimately prevail on these claims, the
23 Court finds that Plaintiff's claims were not wholly without factual substance.

24 Defendants argue that Plaintiff's claims regarding the produce bags and scales were
25 frivolous because "...Plaintiff's counsel knew that this claim entirely lacked merit at the time
26 Plaintiff's Complaint was filed. In fact, Plaintiff's counsel litigated *exactly* the same issues in
27 *Peters*, with the court granting summary judgment in favor of the defendant on May 4, 2004.
28

1 Here, Plaintiff's Complaint was not filed until May 18, 2004, a full two weeks after entry of the
2 order granting summary judgment in *Peters*. Thus, Plaintiff's counsel had *actual notice* that
3 Plaintiff's claim based on the height of the produce bags and scales was baseless at the time it
4 was filed." See Reply at 4.

5 In its Order granting Summary Judgment, the Court found that Plaintiff failed to show
6 how the Store denied her full and equal treatment with regard to the produce scales and bags.
7 While the Court ultimately found that the Plaintiff could not establish that a genuine issue of
8 material fact existed with regard this particular claim, the claim did not clearly lack an arguable
9 basis in law or in fact. Furthermore, the ruling by the court in *Peters* did not deem this claim
10 frivolous. The merit of the claim turned entirely on whether Plaintiff was denied equal access
11 under the circumstances, a fact specific inquiry.
12

13 Similarly, with respect to Plaintiff's claims regarding additional barriers in the restroom,
14 the Court ultimately ruled in favor of Defendants finding that Plaintiff failed to set forth
15 evidence establishing a genuine issue for trial. However, the Court's finding indicated that
16 Plaintiff lacked evidence that she was denied access. For example, the Court found that Plaintiff
17 failed to establish that she was denied full use and enjoyment of the Store due to the placement
18 of a garbage can in the women's restroom. However, while the Defendant ultimately prevailed
19 after a fact specific inquiry by the Court, the Plaintiff's claims did not clearly lack an arguable
20 basis in law or in fact. It is conceivable that a plaintiff could bring successful claims under the
21 ADA if the plaintiff could show both a violation of the ADAGGs regarding scales, produce
22 bags, fixtures AND a denial of full and fair use and enjoyment of the Store. While Plaintiff could
23 not show a denial of full and fair use and enjoyment here, the Plaintiff's allegations were not
24 wholly without factual substance or an arguable basis in law or in fact when they were filed.
25 Thus, finding that these claims were not frivolous, the Court will decline to award fees on these
26 claims.
27

28 In support of its argument that the Court should grant fees, the Defendant relies on *Peters*

1 v. *WinCo Foods, Inc.*, 320 F.Supp. 2d 1035 (E.D. Cal. 2004). In *Peters*, the court found that a
2 60% award of the fees sought was proper because three of the five claims still being pursued at
3 summary judgment phase were patently frivolous. *See Id.* The court stated:

4 The court finds that attorney's fees are warranted under the
5 circumstances of this case. The sweeping allegations of ADA
6 violations contained in plaintiff's form complaint stated only one
7 legally and factually tenable claim regarding the height of a produce
8 scale. Moreover, the circumstances of this case suggest that it was
9 filed for the purpose of obtaining a quick settlement, rather than
10 remedying barriers to access for the disabled.

11 This is particularly troubling in light of plaintiff's remarkable
12 litigiousness. Plaintiff has initiated no less than thirty separate
13 lawsuits in this court, filing form complaints which stretch the
14 meaning of notice pleading by alleging boilerplate violations of the
15 ADA and state law. Such multiplicitous "off the shelf" filings of
16 questionable merit divert judicial resources away from cases alleging
17 specific, legitimate and substantial violations of the rights of
18 disabled persons. Further, such litigation "brings into disrepute" the
19 important objectives of the ADA by instead focusing public attention
20 on the injustices suffered by defendants forced to expend large sums
21 to mount defenses to groundless or hyper-technical claims.

22 *Id.* at 1040-1041 (*internal citations and footnote omitted*).

23 Plaintiff argues that the Court should disregard *Peters* because "that case has a good
24 chance of being overturned on appeal." *See* Opposition at 3. However, four months before
25 counsel filed the Opposition in this case, the Ninth Circuit *affirmed* the *Peter's* decision. *See*
26 *Peters v. Winco Foods, Inc.*, 151 Fed. Appx. 549 (9th Cir. 2005).²

27 The district court did not abuse its discretion in awarding attorneys
28 fees to the defendants. The district court properly recognized that a
fee award to a defendant may be made only in narrow, exceptional

29 ²The Court notes that this is an unpublished decision and therefore cannot be cited by the Court unless
30 an exception under Ninth Circuit Rule 36-3 applies. The Court finds that this case may be cited pursuant to Ninth
31 Circuit Rule 36-3(B)(ii) which provides:

32 (ii) [Unpublished decisions] may be cited to this Court or by any other courts in this circuit for
33 factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to
34 attorneys' fees, or the existence of a related case.

1 circumstances "upon a finding that the plaintiff's action was
2 frivolous, unreasonable, or without foundation." After a careful
3 review of the record, we conclude that the district did not abuse its
4 discretion in making a fee award under the unusual circumstances
5 presented by this case.

6 *Id.* at 550 (*internal citations omitted*).

7 The Ninth Circuit issued its decision affirming *Peters v. WinCo Foods, Inc.*, 320 F.Supp.
8 2d 1035 (E.D. Cal. 2004) on October 20, 2005. Plaintiff filed its Opposition arguing that *Peters*
9 might be overturned some four months after the decision was filed. Plaintiff's counsel was
10 counsel of record in *Peters*. Therefore, the Court can only assume that Plaintiff had notice of the
11 decision, and that Plaintiff's argument was made either recklessly, or in bad faith.

12 The Plaintiff further argues that "[a] lack of standing does not equate to a lack of an
13 arguable basis in law or fact at the time the Complaint was filed. Indeed, in a recent Central
14 District Court decision, Judge Carter declined to award attorneys' fees to Defendant- who had
15 been successful in a motion for summary judgment- for this very reason. *See Harris v. Del*
16 *Taco, Inc.*, 2005 WL3388144 (C.D.Cal 2005)." Plaintiff's Opposition at 8 (*emphasis in*
17 *original*). In *Harris*, the Court stated:

18
19 Here, the Court granted Defendants' motion for summary judgment
20 on the ground that Plaintiff lacked Article III standing to bring his
21 claim. Although Plaintiff's suit failed for lack of standing, the suit
22 did not lack an arguable basis in law or fact. Especially in light of the
23 possibility that awarding attorneys' fees to prevailing defendants in
24 cases like this one will chill meritorious claims, the Court declines to
25 exercise its discretion to award Defendants attorneys fees.

26 *Harris v. Del Taco, Inc.* 2005 WL 3388144, 1 (C.D.Cal.,2005). From the ruling, it is clear that
27 the *Harris* court's ruling was based on standing, which is not the case here. While the Court
28 discussed mootness and its application to this case, the Court ultimately granted summary
judgment on each of the claims because Plaintiff failed to submit any evidence that the barriers
existed.

1 In *Peters*, the Court stated:

2 An action is frivolous if it lacks an arguable basis in law or in fact,
3 though it need not be brought in bad faith. Even where plaintiff is
4 unaware at the commencement of the suit that the claim is frivolous,
5 he may be liable for attorneys fees if he continues to litigate after it
6 becomes clear that the action lacks factual substance.

7 *Peters v. Winco Foods, Inc.*, 320 F.Supp.2d 1035, 1037 (E.D.Cal.,2004) (*internal citations*
8 *omitted*) (*emphasis added*). Here, Plaintiff submitted expert reports which confirmed that the
9 barriers did not exist at the time the Summary Judgment Motions were filed. Plaintiff's choice
10 to continue to argue that alleged barriers existed, in light of their own expert's evidence showing
11 that the barriers did not in fact exist, deems the claims frivolous. Therefor, regardless of the
12 nature of the claims at the time the Complaint was filed, the Plaintiff's choice to continue to
13 litigate claims that lacked factual substance deems those claims frivolous.

14 The Court finds that exceptional circumstances, warranting a finding that the Plaintiff's
15 action was frivolous, unreasonable, or without foundation, are present here. *See Summers v.*
16 *Teichert & Son, Inc.*, 127 F.3d 1150, 1154 (9th Cir. 1997). The record shows that of the claims
17 remaining at the time summary judgment was sought, many lacked foundation. The Court finds
18 that Plaintiff's arguments regarding *Peters* are wholly without merit and are themselves,
19 borderline frivolous.

20 **II. State Law Claims**

21
22 Plaintiffs argue that the Court should decline to award fees because the legislative intent
23 behind the California's Disabled Person's Act was to award fees to prevailing *plaintiff's* only.
24 *See* Opposition at 11. Plaintiff argues "Notwithstanding the language of the California Civil
25 Code section 55, the legislative intent behind the act itself reveals a different conclusion.
26 Legislative intent of course, is the most important key in determining what exactly the state
27 legislature had in mind when it passed the subject statute." *Id.*

28 In *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482, (9th Cir. 1996), the Ninth Circuit stated:

1 Under California law, statutory construction begins with the
2 language of the statute. See *Delaney v. Superior Court*, 789 P.2d
3 934, 268 Cal. Rptr. 753, 50 Cal. 3d 785 (Cal. 1990). If the language
4 of the statute is clear and unambiguous, the statutory analysis ends.
5 *Id.*

6 *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482, 490 (9th Cir. 1996).

7 Here, the language of the relevant statute is unambiguous. It states:

8 § 55. Action to enjoin violation

9 Any person who is aggrieved or potentially aggrieved by a violation
10 of Section 54 or 54.1 of this code, Chapter 7 (commencing with
11 Section 4450) of Division 5 of Title 1 of the Government Code, or
12 Part 5.5 (commencing with Section 19955) of Division 13 of the
13 Health and Safety Code may bring an action to enjoin the violation.
14 The prevailing party in the action *shall be entitled to recover*
15 *reasonable attorney's fees.*

16 Cal Civ Code § 55 (emphasis added). The statute states that the prevailing party shall recover
17 fees. Despite Plaintiff's effort to show that the legislature meant *prevailing plaintiff* when it
18 stated *prevailing party*, the Court finds that the language is clear.

19 While the ADA grants the court discretion to award attorney's fees, a fee award to a
20 prevailing party under the California Disabled Persons Act ("CDPA") is not discretionary.
21 *Goodell v. Ralphs Grocery Co.*, 207 F. Supp. 2d 1124, 1126 (E. D. Cal. 2002). "The prevailing
22 party in [an] action [brought under the CDPA] shall be entitled to recover reasonable attorney's
23 fees. Cal. Civ. Code § 55 (emphasis added). A 'prevailing party' includes a defendant 'as
24 against those plaintiffs who do not recover any relief against that defendant,' unless 'the context
25 clearly requires otherwise.' Cal. Code Civ. Proc. § 1032(a)." *Id.*

26 When filing the Complaint in this matter, Plaintiff chose to include state law claims.
27 Defendants ultimately prevailed on each of the state law claims for the same reason that
28 summary judgment was granted in their favor on the Federal claims. In *Goodell*, the court
explained:

Plaintiff elected to bring state law claims in addition to his federal

1 claim under the ADA. The risk of paying attorney's fees to defendant
2 was one plaintiff accepted when he chose to seek relief based on
3 state law. If plaintiff elected to rely exclusively on federal law, he
4 would have had to forgo a claim for damages (because the ADA
5 provides only for injunctive relief), but would not have exposed
6 himself to liability for attorney's fees under state law. Plaintiff
7 decided to lump his federal and state claims together, and therefore
8 ran the risk of an award of attorney's fees under state law. Cf.
9 *Passantino v. Johnson & Johnson*, 212 F.3d 493, 518 (9th Cir. 2000)
10 (where issues are "inextricably intertwined" and the prevailing party
11 achieves excellent results, reduction in attorney's fees is not
12 warranted just because plaintiff succeeds on some but not all claims).

13 *Goodell v. Ralphs Grocery Co.*, 207 F. Supp. 2d 1124, 1129 (E.D. Cal. 2002).

14 The Court finds that Defendants prevailed on their state law claims for the same reasons
15 they prevailed on their Federal claims. While the Court has discretion to award fees on the
16 federal claims, the imposition of fees is mandatory on the state law claims. Because the
17 evidence and argument submitted on the federal claims was identical to the state law claims, the
18 Court finds that Defendants are entitled to the entire amount of fees sought, subject to any
19 amounts found to be excessive.

20 III. The Amount of Fees Sought

21 Plaintiff argues that the "amount of fees sought is outrageous." Opposition at 18.

22 The amount of the prevailing party's reasonable fees shall be calculated according to the
23 lodestar method, in which an initial estimate of fees is obtained by multiplying the number of
24 hours reasonably expended by counsel on the litigation by a reasonable hourly rate. There is a
25 strong presumption that this lodestar figure constitutes a reasonable attorneys' fee because most
26 relevant considerations are subsumed within this initial calculation. Only in rare or exceptional
27 cases will adjustment of the lodestar be appropriate. *Cancio v. Fin. Credit Network, Inc.*, 2005
28 U.S. Dist. LEXIS 13626 (N.D. Cal. 2005) (*internal citations omitted*).

"After making the lodestar computation, the Court can assesses whether it is necessary to
adjust the presumptively reasonable lodestar figure on the basis of the *Kerr* factors that are not
already subsumed in the initial lodestar calculation." *Morales v. City of San Rafael*, 96 F.3d 359,

1 363-364 (9th Cir. 1996) (*internal citations omitted*).

2 "Among the subsumed factors presumably taken into account in either the reasonable
3 hours component or the reasonable rate component of the lodestar calculation are: (1) the
4 novelty and complexity of the issues, (2) the special skill and experience of counsel, (3) the
5 quality of representation (4) the results obtained and (5) the contingent nature of the fee
6 agreement." *Id.* at 364, citing *City of Burlington v. Dague*, 505 U.S. 557 (1992) (*internal*
7 *citations omitted*). Furthermore, the twelve *Kerr* factors are: (1) the time and labor required, (2)
8 the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal
9 service properly, (4) the preclusion of other employment by the attorney due to acceptance of the
10 case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations
11 imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9)
12 the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11)
13 the nature and length of the professional relationship with the client, and (12) awards in similar
14 cases. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975).

15
16 A. Hourly Rate

17 Information regarding the special skill and experience of counsel, the novelty and
18 complexity of the issues, the fee type and amount involved, the experience, reputation, and
19 ability of the attorneys, the time and labor required, the nature and length of the professional
20 relationship with the client, and the quality of representation, is set forth in the Declaration of
21 Jon Meer and Supplemental Declaration of Jon Meer.

22
23 Attorney Jon Meer served as lead counsel in this matter. Mr. Meer graduated as an
24 Honorable Paul J. Liacos Scholar in the Law from Boston University Law School in 1989. *See*
25 Declaration of Jon Meer at 5. Mr. Meer works for DLA Piper Rudnick Gray Cary, US LLP., a
26 firm with over 3000 lawyers worldwide and one of the ten largest law firms in California. *Id.* at
27 4. Mr. Meer has set forth evidence that he is considered a leading practitioner in his field. *See*
28 *Id.* at 6. Throughout the case, the billing rate for Mr. Meer has been \$485.00 per hour.

1 commensurate with our competitors.” Supplemental Declaration of Jon Meer at 2.

2 Plaintiff argues that the hourly rates “...are nearly two half times the going rate [sic] that
3 have been judicially recognized in similar cases.” Opposition at 19. Plaintiff does not provide
4 citation for this assertion. See Opposition at 18. Plaintiff instead makes conclusory objections
5 to the hourly rates of the persons involved in the litigation and generally objects by providing a
6 list of cases where a lower rate of approximately \$250 per hour was awarded. See Opposition at
7 19. None of these cases, however, arise in this District and are therefore distinguishable on the
8 basis of geographic disparity. See *Cancio v. Fin. Credit Network, Inc.*, 2005 U.S. Dist. LEXIS
9 13626 (N.D. Cal. 2005). Plaintiff does not offer any information regarding the prevailing rate in
10 this District.
11

12 In *Jordan v. Multnomah County*, 815 F.2d 1258(9th Cir. 1987), the Ninth Circuit held:

13 The fee applicant has the burden of producing satisfactory evidence,
14 in addition to the affidavits of its counsel, that the requested rates
15 are in line with those prevailing in the community for similar
16 services of lawyers of reasonably comparable skill and reputation.

17 *Id.* at 1263(emphasis added). Because the Defendants had not provided the Court with any
18 evidence in addition to the affidavits of counsel, the Court granted Defendants leave to file a
19 “supplemental brief” to submit satisfactory evidence.

20 On May 11, 1006, Defendants submitted additional evidence regarding their hourly rates.
21 Defendants submitted, among other things, a Declaration establishing that Mr. Meer has been
22 rated as a “Super Lawyer” by Los Angeles Magazine, peer review ratings from Martindale-
23 Hubble, several exhibits referencing lawyers in San Diego making comparable or higher rates in
24 various types of litigation, and references to higher hourly rates in listings prepared by
25 organizations such as JAMS/Endispute and the American Arbitration Association. Defendants
26 also filed the Declaration of Defendant’s Senior Vice President and General Counsel, Freya R.
27 Brier, setting forth that Ms. Brier regularly monitored the billing statements of outside counsel in
28 this case, and authorized payment of all of the legal fees sought in the pending Motion for Legal

1 Fees. Defendants also submitted the Declaration of Mr. Andrew H. Friedman. Mr. Friedman
2 sets forth that he is a lawyer in the same field within this District, that he has personally observed
3 the Mr. Meer and Mr. Manfredi, and that he believes that the sought hourly rate is comparable to
4 others in the community.

5 In the supplemental briefing, Plaintiff again sets forth conclusory arguments opposing the
6 hourly rates. Plaintiff argues that the comparison to JAMS attorneys is "enlightening" and has
7 no bearing on this case. Plaintiff also argues that "[a]lthough Henry's defense firm may be a
8 global player, it clearly needs lessons in efficiency and basic economics." See Plaintiff's
9 Supplemental Briefing at 3. Plaintiff also cites to an Order from a case in this District reducing
10 Mr. Hubbard's hourly rates from \$300.00 to \$250.00. However, despite being given an
11 additional opportunity to do so, Plaintiff does not specifically dispute the qualifications of
12 Defendants' counsel. Plaintiff simply makes sweeping allegations and conclusory arguments
13 regarding the amount of fees sought in general.

14 Plaintiff also submitted the Declaration of Attorney Gary L. Wilmot. In his Declaration,
15 Mr. Wilmot states that he has worked as a defense attorney in "many cases" involving the
16 Americans with Disabilities Act and that his hourly rate is \$295.00 an hour. See Wilmot
17 Declaration at 2. However, Mr. Wilmot does not provide any information regarding his
18 credentials or how long he has practiced law. Thus, the Court cannot use Mr. Wilmot's
19 Declaration as evidence of what is reasonable in the community.

20 The Court finds that Plaintiff's arguments regarding the hourly rate are conclusory and
21 not supported by evidence. However, the Court finds that the reasonable hourly rate for
22 Defendants' counsel given the circumstances of this case is \$325.00.

23 The Court has considered the specifics of the case, including the complexity of the issues
24 and the fact that the matter was resolved by way of summary judgment in determining the
25 reasonable rate. While the Court finds that the hourly rate set forth in Defendant's affidavits
26 may be reasonable in some circumstances, the novelty and difficulty of the questions involved,
27
28

1 and the time and labor required in this case warrant a rate of \$325.00 an hour. Put another way,
2 while Defendants' evidence shows that counsel may very well be worth \$485.00 an hour, the
3 specifics issues and complexity of this case warrant a finding that \$325.00 an hour is reasonable.
4 The Court has also considered the experience, reputation, and ability of the attorneys, the nature
5 of their professional relationship with the client, and awards in similar cases in making this
6 determination.

7
8 Accordingly, the Court will require Defendants to submit a proposed order reflecting the
9 total number of hours spent recalculated at a rate of \$325.00 per hour.

10 **B. Use of Multiple Lawyers**

11 Plaintiff also complains of the Defendant's use of three lawyers in its Response, and of
12 "10!" individuals in its Supplemental Briefing. As a preliminary matter, the Court notes that
13 Plaintiff used three lawyers in litigating this case. In addition, of the ten individuals that Plaintiff
14 suggests it was "outrageous" to use, several are support staff.

15
16 Regarding the use of multiple attorneys, the Ninth Circuit has recognized that "the
17 participation of more than one attorney does not necessarily constitute an unnecessary
18 duplication of effort." *McGrath v. County of Nev.*, 67 F.3d 248, 255 (9th Cir. 1995) (quoting
19 *Kim v. Fujikawa*, 871 F.2d 1427, 1435 n. 9 (9th Cir. 1989)). Instead, "[a] reduction of fees 'is
20 warranted only if the attorneys are *unreasonably* doing the *same* work. An award for time spent
21 by two or more attorneys is proper as long as it reflects the distinct contribution of each lawyer
22 to the case and the customary practice of multiple-lawyer litigation.'" *Noyes v. Grossmont Union*
23 *High School Dist.*, 331 F. Supp. 2d 1233, 1250 (S.D. Cal. 2004) (emphasis in original) (quoting
24 *Johnson v. Univ. College*, 706 F.2d 1205, 1208 (11th Cir. 1983), and citing *Probe v. State*
25 *Teachers' Ret. Sys.*, 780 F.2d 776, 785 (9th Cir. 1986)). The Court finds that Defendant has
26 sufficiently shown that the use of three attorneys in this matter did not result in higher costs, and
27 in fact, resulted in lower costs due to tasks performed by associates at lower rates.
28

1 paralegal rate, regardless of who performs them." *Missouri v. Jenkins*, 491 U.S. 274, 288, 109
2 S. Ct. 2463, 105 L. Ed.2d 229 (1989). Time spent on "filing, document organization and other
3 clerical matters" should instead be accounted for by a law firm's overhead and deemed to be
4 included in the attorney's hourly rate. *See Keith v. Volpe*, 644 F. Supp. 1312, 1316 (1986).

5 On Exhibit page J212, Defendants list work by K. Early, a paralegal, as "Copied
6 Plaintiff's Summary judgment materials to be included in hearing binder." Defendants bill 1.50
7 hours at a total of \$270.00 for this task. On Exhibit page J213, Defendants list work by K. Early,
8 a paralegal, as "Created binders for hearing...". Defendants bill 4.50 hours at a total of \$810.00
9 for this task. The Court determines that each of these tasks is clerical in nature and shall be
10 accounted for by the law firm's overhead and deemed to be included in the attorney's hourly
11 rate. *See Keith v. Volpe*, 644 F. Supp. 1312, 1316 (1986). Thus, the Court will subtract a total of
12 \$1080.00 from the amount of fees sought.

14 IV. Costs

15 Plaintiffs make no mention on the amount of litigation expenses sought by the
16 Defendants. Thus, the court will award the entire amount of litigation expenses sought.
17 However, Defendants shall contact the Clerk's Office regarding a bill of costs hearing for
18 taxable costs sought.⁴

20 V. Supplemental Briefing

21 Defendants seek \$11,155.00 in fees in conjunction with preparing their supplemental
22 brief. Because supplemental briefing was required due to Defendants' failure to provide the
23 Court with adequate information in its original Motion, the Court will deny fees sought in
24 conjunction with preparation of the supplemental brief.

26 CONCLUSION & ORDER

27 The Court finds that of the five issues in dispute at the time of summary judgment, two

28 _____
⁴While Defendants initially contacted the Clerks office for a bill of costs hearing, the hearing was continued pending a determination by the Court on the fees issue.

1 lacked an arguable basis in fact or law and were frivolous. Thus, the Court finds that
2 Defendants are entitled to 40% of their fees and costs sought in conjunction with their ADA
3 claims, and 100% of their fees and costs sought in conjunction with their state law claims. The
4 Court will award Defendants the total amount of their fees sought, subject to a reduction of the
5 hourly rate, the number of hours spent, and a subtraction of \$1080.00 for fees sought in
6 conjunction with clerical tasks. The Court will also deny the request for fees sought in
7 conjunction with preparation of the supplemental brief.
8

9 Defendants request both an amount of \$282,737.45 *See* Motion page 22, and
10 \$287,737.45 *See* Motion page 24. The Court will require Defendants to submit a Proposed
11 Order awarding fees and litigation expenses. The Proposed Order shall include the accurate
12 amount of fees sought in the Motion calculated at a rate of \$325.00 per hour. However, the
13 amount shall reflect a reduction in the total number of hours by 1/3, a deduction of \$1080.00 for
14 clerical tasks performed, and shall not include any fees associated with preparation of the
15 supplemental briefing.

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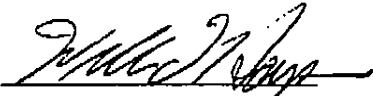
1 Accordingly,

2 **IT IS ORDERED** Defendants' Motion for Costs and Fees is **GRANTED** in part and
3 **DENIED** in part.

4 **IT IS FURTHER ORDERED** on or before July 21, 2006, Defendants shall submit a
5 Proposed Order awarding fees and litigation expenses. The Proposed Order shall include the
6 accurate amount of fees sought in the Motion calculated at a rate of \$325.00 per hour. The
7 amount shall also reflect a deduction of \$1080.00 for clerical tasks performed and shall not
8 include any fees associated with preparation of the supplemental briefing. The amount shall
9 reflect a 33% reduction in the total number of hours.

11 **IT IS SO ORDERED.**

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13
14
15
16 Dated: 7/6/06


WILLIAM Q. HAYES
United States District Judge

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19 cc: All Counsel of Record
20 Magistrate Judge McCurine
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