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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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DAVID F. JADWIN, D.O.,	07-CV-0026-OWW-DLB
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Plaintiff,

v.

COUNTY OF KERN,

Defendant.

MEMORANDUM DECISION AND
ORDER DENYING PLAINTIFF'S
MOTION FOR ADDITIONAL
FINDINGS OF FACT AND
CONCLUSIONS OF LAW (Doc.
399)

I. INTRODUCTION

Before the court is Plaintiff David F. Jadwin, D.O.'s, ("Plaintiff") motion for "additional findings of fact and conclusions of law." Plaintiff requests an award of "liquidated damages" under the Family and Medical Leave Act ("FMLA") and prejudgment interest. The County of Kern ("County") opposes the motion. The following background facts are taken from the parties' submissions in connection with the motion and other documents on file in this case.¹

II. BACKGROUND

A. Procedural Background

In this employment case, Plaintiff submitted several of his claims to a jury. On June 8, 2009, the jury returned verdicts in favor of Plaintiff. By stipulation, certain of Plaintiff's claims were not submitted to the jury for determination. Instead, as to

¹ In connection with his motion, Plaintiff requests judicial notice of various documents on file in this case such as, among others, the operative complaint. (Doc. 400). Judicial notice is taken of the existence of these documents.

1 these claims, the parties agreed that they would be tried by the
2 court sitting without a jury. On August 4, 2009, Findings of Fact
3 and Conclusions of Law were issued on these claims. Subsequently,
4 Plaintiff filed his motion for additional findings of fact and
5 conclusions of law. Because Plaintiff's motion involves
6 determinations made by the jury, the jury findings must be
7 addressed.

8 1. Jury Trial

9 a. Claims

10 At trial, Plaintiff presented five claims to the jury. As to
11 each, for the most part, the jury found in Plaintiff's favor.

12 i. Oppositional Retaliation-FMLA/FEHA

13 The first claim the jury determined was Plaintiff's claim for
14 retaliation under the FMLA and the California Fair Employment and
15 Housing Act ("FEHA") on the theory that Plaintiff engaged in
16 oppositional activity against the County/Kern Medical Center
17 management and, as a consequence, the County retaliated against
18 him. On this claim, the jury found that the County retaliated
19 against Plaintiff for: (a) complaining internally about
20 discrimination, harassment or retaliation; (b) filing a charge with
21 the Department of Fair Employment and Housing; (c) filing a lawsuit
22 containing claims based on the FEHA; (d) filing a lawsuit
23 containing claims based on the California Family Rights Act
24 ("CFRA")²; and (e) filing a lawsuit containing claims based on the
25 FMLA. (Doc. 384 at 2.) On the verdict form, the jury was asked
26 separately whether the retaliation for filing a lawsuit containing

27
28 ² The CFRA is part of the FEHA.

1 claims based on the FMLA was "willful," and the jury answered the
2 question "yes." (*Id.* at 3.) In the jury instructions, "willful"
3 was defined as meaning that the "County failed to act in good faith
4 and lacked reasonable grounds to believe that its actions complied
5 with the FMLA." (Doc. 386 at 17.)

6 As for the acts of retaliation, the jury determined that the
7 County engaged in retaliation by: (a) removing Plaintiff from his
8 position as Chair of the Pathology Department (at Kern Medical
9 Center); (b) creating a hostile work environment for Plaintiff; (c)
10 failing to renew his employment contract; and (d) placing Plaintiff
11 on paid administrative leave on December 7, 2006. (Doc. 384 at 4.)
12 The jury determined that Plaintiff's engagement in oppositional
13 activity was a motivating reason behind the County's retaliatory
14 actions. (*Id.* at 5.) The jury also found that Plaintiff was harmed
15 by the County's retaliatory conduct, and that the County's
16 retaliatory conduct was a substantial factor in causing Plaintiff
17 harm or damage. (*Id.* at 6-7.)

18 ii. Medical Leave Retaliation-FMLA/CFRA

19 On his second claim for retaliation for taking medical leave
20 under the FMLA or CFRA, the jury concluded that the County
21 retaliated against Plaintiff, i.e., took adverse employment action
22 against Plaintiff, by: (a) creating a hostile work environment for
23 Plaintiff; (b) removing him from his position as Chair of Pathology
24 at KMC; and (c) failing to renew his employment contract. (Doc. 384
25 at 8.) The jury was separately asked whether any such retaliation
26 under the FMLA was "willful," and the jury answered "yes." (*Id.*)
27 As to whether Plaintiff's taking of medical leave was a motivating
28 reason "for any of the adverse employment actions" identified

1 above, the jury answered "yes" and found that the County's
2 retaliatory conduct caused Plaintiff harm or damage, and that the
3 County's retaliatory conduct was a substantial factor in causing
4 Plaintiff harm or damage. (*Id.* at 9-11.)

5 iii. Disability Discrimination-FEHA

6 Plaintiff's third claim was for discrimination based on a
7 mental disability (chronic depression). The jury concluded that
8 the County discriminated against Plaintiff based on his mental
9 disability by, among other things, removing him from his position
10 as Chair of the Pathology Department. (Doc. 384 at 14-15.) The
11 jury determined that Plaintiff was harmed by the discrimination,
12 and that such discrimination was a substantial factor in causing
13 Plaintiff harm or damage. (*Id.* at 16-17.)

14 iv. Failure To Make Reasonable Accommodation-FEHA

15 Plaintiff's fourth claim was that the County failed to
16 reasonably accommodate Plaintiff's mental disability (chronic
17 depression). The jury found that the County knew that Plaintiff
18 had a mental condition (chronic depression) that limited his
19 ability to work full time and that County failed to provide
20 Plaintiff with a reasonable accommodation. (Doc. 384 at 18-19.)
21 The jury also determined that Plaintiff was harmed by the County's
22 failure to provide a reasonable accommodation, and that the failure
23 to provide a reasonable accommodation was a substantial factor in
24 causing Plaintiff harm or damage. (*Id.* at 20-21.)

25 v. Failure To Engage In An Interactive Process-FEHA

26 Finally, the jury determined whether the County failed to
27 engage in an interactive process with Plaintiff. The jury
28 concluded that Plaintiff had a mental disability that was known by

1 the County, that Plaintiff was willing to participate in an
2 interactive process, and the County failed to participate in a
3 timely good-faith interactive process with Plaintiff to determine
4 whether a reasonable accommodation could be made for his
5 disability. (Doc. 384 at 22, 24-25.) The jury concluded that the
6 County's failure to participate in an interactive process with
7 Plaintiff harmed Plaintiff and was a substantial factor in causing
8 harm or damage. (*Id.* at 26-27.)³

9 b. Damages

10 As to damages, the jury made the following award:

11 If you have found that any discrimination or retaliation
12 by Kern County was the cause of damage to Dr. Jadwin on
any of his claims, what damages do you award?

13 Mental and emotional distress
14 and suffering. \$0.00

15 Reasonable value of necessary medical
16 care, treatment, and services received to the
present time. \$30,192.00

17 Reasonable value of necessary medical
18 care, treatment and services which with
reasonable probability will be required in
the future. \$0.00

19 Reasonable value of earnings and
20 professional fees lost to the present
time. \$321,285.00

21 Reasonable value of earnings and
22 professional fees which with reasonable
probability will be lost
23 in the future. \$154,080.00

24 Total damages. \$505,457.00

25
26 ³ The jury found against the County on its defense that
27 Plaintiff's employment contract was not renewed by reason of
28 Plaintiff's conduct and alleged violation of the employer's rules
and contract requirements and/or that Plaintiff's behavior was the
cause of the nonrenewal of his contract.

1 (Doc. 384 at 29.) On June 18, 2009, a "Partial Judgment On
2 Verdicts Of Trial Jury" (hereafter "Partial Judgment") was entered
3 in favor of Plaintiff and against the County in the amount of
4 \$505,457. (Doc. 389.)

5 2. Bench Trial

6 On June 19, 2009, after the Partial Judgment was entered, the
7 parties filed their briefing as to claims which the parties agreed
8 were to be tried by the court sitting without a jury. The claims
9 to be decided by the court without a jury included Plaintiff's
10 claim for interference with his rights under the FMLA/CFRA and a
11 deprivation of Plaintiff's due process rights under the Fourteenth
12 Amendment (made actionable via 42 U.S.C. §1983). With respect to
13 his FMLA/CFRA claim, Plaintiff contended that the County interfered
14 with (or violated) his rights under the FMLA/CFRA by: (i) requiring
15 him to take more FMLA/CFRA leave than medically necessary to
16 address the circumstance that precipitated his need for leave
17 (i.e., that the County required Plaintiff to take full-time leave
18 instead of extending Plaintiff's reduced work schedule leave); and
19 (ii) mislabeling some of his medical leave as "personal necessity
20 leave" instead of properly designating it FMLA/CFRA leave. With
21 respect to the Fourteenth Amendment, Plaintiff claimed that his
22 placement on administrative leave with pay deprived him of property
23 without due process in violation of the Fourteenth Amendment.
24 Plaintiff requested injunctive relief with respect to his FMLA/CFRA
25 claim and damages with respect to his due process claim.

26 On August 8, 2009, Findings of Facts and Conclusions of Law
27 were issued on the submitted claims. As to the FMLA/CFRA claim for
28 injunctive relief, it was determined that Plaintiff lacked standing

1 to assert his claim or, assuming standing existed at the time of
2 the operative pleading, the claim had become moot. As to the
3 procedural due process claim, it was determined that Plaintiff's
4 due process rights were violated. However, to avoid double
5 recovery, Plaintiff was awarded only nominal damages.⁴

6 B. Plaintiff's Motion

7 1. Liquidated Damages And Prejudgment Interest

8 On August 10, 2009, Plaintiff filed his motion for additional
9 findings of fact and conclusions of law. In his motion, Plaintiff
10 ultimately requests that the court enter a "judgment for Plaintiff
11 for FMLA liquidated damages in the amount of Plaintiff's economic
12 damages of \$505,457.00 [the total sum of the jury award], plus pre-
13 judgment interest" (Doc. 399 at 9.) To reach this result,
14 Plaintiff requests that certain "additional" findings of fact and
15 conclusions of law be made. As to findings of fact, Plaintiff
16 proposes that the court find as follows:

17 1. Defendant County was at all relevant times aware of
18 the prohibitions against retaliation contained in FMLA.
19 This was established at trial by the testimony of
20 numerous key officers of Kern Medical Center, as well as
21 by deposition testimony excerpts that were read into the
22 record.

23 2. Per the jury's verdicts, Defendant County retaliated
24 against Plaintiff for engaging in certain oppositional
25 activities in violation of FMLA. See Doc. 384, p. 2.

26 3. Per the jury's verdicts, such retaliation was willful.
27 See Doc. 384, p. 3.

28 4. Per the jury's verdicts, Defendant County retaliated

⁴ The jury had already determined, in the jury trial portion of the case, that Plaintiff was harmed by his placement on paid administrative leave. The jury awarded Plaintiff as much damages for this harm as the jury determined was warranted.

1 against Plaintiff for taking medical leave under FMLA.
2 See Doc. 384, p. 8.

3 5. Per the jury's verdicts, such retaliation was willful.
4 See Doc. 384, p. 8.

5

6 As to the conclusions of law, Plaintiff proposes that the court
7 conclude:

8 1. Defendant County's retaliations against Plaintiff, in
9 violation of FMLA, for complaining internally about
10 medical leave retaliation and filing a lawsuit containing
11 claims based on FMLA, were 'willful' within the meaning
12 of FMLA, justifying an award of liquidated damages.
13 Defendant County did not meet its "substantial" burden of
14 proof to show that its violations of FMLA were in good
15 faith and based on reasonable grounds, and therefore
16 failed to overcome the 'strong presumption' in favor of
17 awarding liquidated damages under FMLA.

18 2. Defendant County's retaliations against Plaintiff, in
19 violation of FMLA, for taking medical leave were
20 'willful' within the meaning of FMLA, justifying an award
21 of liquidated damages. Defendant County did not meet its
22 'substantial' burden of proof to show that its violations
23 of FMLA were in good faith and based on reasonable
24 grounds, and therefore failed to overcome the 'strong
25 presumption' in favor of awarding liquidated damages
26 under FMLA.

27 3. Plaintiff is entitled as a matter of law to
28 prejudgment interest from the date the right to recover
vested.

1 4. Plaintiff is entitled to recovery of liquidated
2 damages under FMLA in an amount equal to Plaintiff's
3 economic damages plus pre-judgment interest at the
4 prevailing California rate of 10%.

5 The County objects to Plaintiff's request for liquidated damages
6 under the FMLA on numerous grounds, procedural and substantive. As
7 to the former, the County contends that Plaintiff's motion was
8 untimely filed. As to the latter, the County argues that certain
9 damages awarded by the jury are not eligible for inclusion in an
10 FMLA liquidated damages calculation. The County also argues that
11 no liquidated damages can be awarded in any event under the FMLA

1 because Plaintiff advanced multiple non-FMLA theories of liability
2 and the general jury verdict did not specify which damages were
3 caused by the FMLA violations. The County's opposition does not
4 specifically address Plaintiff's request for prejudgment interest.

5 2. Additional Briefing

6 Plaintiff's motion was unaccompanied by a notice of motion
7 requesting a hearing date, and in his briefing, Plaintiff did not
8 otherwise request a hearing. With no hearing date requested, an
9 opposition deadline was set by minute order. After Plaintiff's
10 motion was received, a minute order was entered that required
11 "[a]ny opposition" to be submitted by August 25, 2009. (Doc. 402.)
12 The County timely filed its opposition on August 25, 2009. That,
13 however, did not end the briefing.

14 Even though the minute order did not authorize or set a
15 deadline for a reply brief, Plaintiff filed a reply on August 31,
16 2009. Believing that Plaintiff's reply brief exposed, "for the
17 first time, an extraordinary and fundamental defect in Plaintiff's
18 case," the County later filed a "Special Supplemental Memorandum In
19 Opposition To Plaintiff's Reply Memorandum." Plaintiff rejoined
20 with a "Sur-Reply To Defendant's Special Supplemental Memorandum In
21 Opposition To Plaintiff's Reply Memorandum." No further briefing
22 was submitted.

23 Although no further briefing beyond an opposition was
24 authorized by the court, given that both parties went beyond what
25 was ordered and neither sought court approval to file their
26 additional briefs, discretion is exercised to consider the entirety
27 of the briefing to the extent it is helpful to resolving the issues
28

1 before the court and in the interests of justice.⁵

2
3 III. DISCUSSION AND ANALYSIS

4 A. Preliminary Procedural Matter - Timeliness

5 In the briefing, Plaintiff claims to be moving under Rule
6 52(b) for additional findings of fact and conclusions of law. At
7 the time Plaintiff's motion was filed, that section provided as
8 follows:

9 On a party's motion filed no later than 10 days after the
10 entry of judgment, the court may amend its findings--or
11 make additional findings--and may amend the judgment
accordingly. The motion may accompany a motion for a new
trial under Rule 59.

12 Fed. R. Civ. P. 52(b). Effective December 1, 2009, Rule 52(b) was
13 amended. The amendment changed only the time by which the motion
14 must be filed from no later than 10 days to "no later than 28 days
15 after the entry of judgment."

16 The County argues that the "judgment" applicable to
17 Plaintiff's motion, i.e., the judgment Plaintiff really seeks to
18 add to or amend, is the Partial Judgment entered on June 18, 2009.
19 According to the County, Plaintiff had until 10 days after entry of
20 the Partial Judgment on the jury's verdicts to file his motion
21 under Rule 52(b).⁶ Plaintiff, however, waited until "seven weeks

22
23 ⁵ In the future, faithful adherence to court orders is
expected.

24
25 ⁶ The County claims that the applicable 10-day deadline to
26 file Plaintiff's 52(b) motion is set forth in "Rule 54(d)." (Doc.
27 403 at 2.) This may be a typo, but if not, the County's contention
28 is plainly erroneous. Rule 52(b), on its face, supplies the
applicable deadline - 10 days under the old version of the rule, 28
days under the new version. Accordingly, there is no need, and it
is improper, to resort to Rule 54(d) to determine the deadline by

1 after" to file his motion, i.e., until August 10, 2009. On the
2 County's reasoning, even if amended Rule 52(b) and its new 28-day
3 time period applied, Plaintiff's motion, having been filed seven
4 weeks after the Partial Judgment, would still be untimely.

5 In response, Plaintiff argues that the time period did not,
6 and cannot, begin to run from the Partial Judgment. According to
7 Plaintiff, the Partial Judgment did not constitute a "judgment"
8 under Rule 52(b) and thus did not trigger Rule 52(b). Plaintiff's
9 argument is confusing because, based on Plaintiff's logic, the
10 Findings of Fact and Conclusions of Law, which adjudicated less
11 than all the claims in the case, would also not constitute a
12 "judgment" and would not trigger Rule 52(b). Apart from this
13 argument and apart from whether Plaintiff's motion was timely under
14 Rule 52(b), a review of the substance of Plaintiff's motion reveals
15 that it cannot be brought under Rule 52(b).

16 Rule 52 applies only to actions tried "without a jury or with
17 an advisory jury." Fed. R. Civ. P. 52(a); see also *Torres v. City*
18 *of Los Angeles*, 548 F.3d 1197, 1205 n.5 (9th Cir. 2008)
19 (concluding, in a civil rights case, that Rule 52 did not apply
20 because the "case was being tried to a jury" and thus the district
21 court should not have issued findings of fact and conclusions of
22 law under Rule 52 in response to a Rule 50(a) motion raising a
23 qualified immunity defense); *Tsai v. Rosenthal*, 297 F.2d 614, 618
24 (8th Cir. 1961) ("Rule 52 applies only to . . . actions tried to a
25 court without jury."). Plaintiff's motion, however, cannot be

26 _____
27 which to file a Rule 52(b) motion. Even if Rule 54(d) had any
28 applicability (which it does not), there is no 10-day time limit
mentioned in Rule 54(d).

1 regarded as requesting a mere addition to or amendment of the
2 Findings of Fact and Conclusions of Law entered in the bench trial
3 portion of this case. To the contrary, Plaintiff's motion is, in
4 substance, an attempt to supplement or augment the judgment entered
5 on the *jury's* verdicts, i.e., to amend the Partial Judgment.

6 The bench trial portion of this case addressed Plaintiff's
7 FMLA/CFRA interference claim for injunctive relief and Plaintiff's
8 procedural due process claim. Only nominal damages were awarded in
9 the bench trial portion of the case, and that was only on
10 Plaintiff's procedural due process claim. Plaintiff's motion for
11 additional findings of fact and conclusions of law, however,
12 requests that the damages the *jury* awarded be augmented pursuant to
13 the FMLA's interest and liquidated damages provisions. In
14 pertinent part, the FMLA provides:

15 Any employer who violates section 2615 of this title
16 shall be liable to any eligible employee affected--

17 (A) for damages equal to--

18 (i) the amount of--

19 (I) any wages, salary, employment
20 benefits, or other compensation
21 denied or lost to such employee by
22 reason of the violation; or

23 (II) in a case in which wages,
24 salary, employment benefits, or
25 other compensation have not been
26 denied or lost to the employee, any
27 actual monetary losses sustained by
28 the employee as a direct result of
the violation, such as the cost of
providing care, up to a sum equal to
12 weeks (or 26 weeks, in a case
involving leave under section
2612(a)(3) of this title) of wages
or salary for the employee;

(ii) *the interest on the amount described in
clause (i) calculated at the prevailing rate;*

1 and

2 (iii) an additional amount as liquidated
3 damages equal to the sum of the amount
4 described in clause (i) and the interest
5 described in clause (ii), except that if an
6 employer who has violated section 2615 of this
7 title proves to the satisfaction of the court
8 that the act or omission which violated
9 section 2615 of this title was in good faith
10 and that the employer had reasonable grounds
11 for believing that the act or omission was not
12 a violation of section 2615 of this title,
13 such court may, in the discretion of the
14 court, reduce the amount of the liability to
15 the amount and interest determined under
16 clauses (i) and (ii), respectively; and

17 (B) for such equitable relief as may be appropriate,
18 including employment, reinstatement, and promotion.

19 29 U.S.C. § 2617(a)(1)(A)-(B) (emphasis added). Plaintiff' request
20 for prejudgment interest and liquidated damages under the FMLA is
21 premised on the theory that the damages the jury (not the court)
22 awarded (\$505,457) are all attributable to the FMLA violations
23 which the jury (not the court) determined the County had committed.
24 Plaintiff, in substance, seeks to supplement or amend the Partial
25 Judgment entered on the jury's verdicts by adding to it interest
26 and liquidated damages under the FMLA. That Plaintiff's Rule 52(b)
27 motion is tied to the jury's verdicts, and not the bench trial
28 portion of this case, is made pellucid by the fact that there are
no FMLA damages in the Findings of Fact and Conclusions of Law from
which to compute interest or liquidated damages under the FMLA.

Apart from the FMLA and its interest and liquidated damages
provisions, Plaintiff seeks prejudgment interest on his
supplemental state law damages claims. (Doc. 399 at 7-8.) However,
these claims were tried to the jury (not the court). The only
state law claim tried to the court sitting without a jury was

1 Plaintiff's claim under the CFRA for equitable relief. No
2 compensatory damages were awarded on this claim on which
3 prejudgment interest can be computed. This further establishes
4 that Plaintiff's Rule 52(b) motion seeks to augment the Partial
5 Judgment entered on the jury's verdicts awarding damages, not the
6 Findings of Fact and Conclusions of Law issued in the bench trial.⁷

7 A review of the substance of Plaintiff's motion reveals that
8 Plaintiff is seeking to augment, with interest and additional
9 damages, the Partial Judgment entered on the jury's verdicts, not
10 the Findings of Fact and Conclusions of Law issued in the bench
11 trial. Because Rule 52 applies only to actions tried without a
12 jury or an advisory jury, Plaintiff cannot use Rule 52(b) to alter
13 or amend the Partial Judgment entered on the jury's verdicts.
14 Plaintiff cannot otherwise use Rule 52 to amend the Findings of
15 Fact and Conclusions of Law because the interest and augmented
16 damages Plaintiff seeks arise out of the jury trial portion of this
17 case and the jury's damage awards, not the bench trial or any bench
18 trial damages. Rule 52(b) does not permit an amendment of the
19 Findings of Fact and Conclusions of Law which adds interest and
20 damages to the jury's (not the court's) damage awards. For all
21 these reasons, Plaintiff's motion is not properly asserted under
22 Rule 52(b).

23
24 ⁷ Plaintiff's motion does not include any request for
25 prejudgment interest on the nominal damages awarded in the bench
26 trial portion of this case on his procedural due process claim.
27 This is understandable. Prejudgment interest is an element of
28 compensatory damages. See *Osterneck v. Ernst & Whinney*, 489 U.S.
169, 175 (1989). Nominal damages, by contrast, are not
compensatory in nature. They are awarded to vindicate rights.
Cummings v. Connell, 402 F.3d 936, 942 (9th Cir. 2005).

1 Despite incorrectly labeling his motion as a Rule 52(b)
2 motion, there is authority suggesting that discretion exists to
3 treat Plaintiff's motion as one made under the appropriate rule or
4 source of authority. See *Credit Suisse First Boston Corp. v.*
5 *Grunwald*, 400 F.3d 1119, 1124 (9th Cir. 2005) (deciding to "look
6 beyond the motion's caption to its substance" to determine whether
7 it should be treated as a motion under Rule 59 or Rule 54)
8 (internal quotation marks omitted); *Craft v. Campbell Soup Co.*, 177
9 F.3d 1083, 1084 n.4 (9th Cir. 1999) (treating a motion for summary
10 judgment as a *de facto* motion to compel arbitration), *abrogated on*
11 *other grounds by Circuit City Stores, Inc. v. Adams*, 532 U.S. 105
12 (2001); *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206
13 n.2 (9th Cir. 1995) (treating a motion to dismiss for lack of
14 jurisdiction as one for failure to state a claim); *Monte Vista*
15 *Lodge v. Guardian Life Ins. Co. of Am.*, 384 F.2d 126, 129 (9th
16 Cir. 1967) ("[A] party should not be bound at his peril to give the
17 proper nomenclature for his motion. . . . So long as he makes a
18 timely motion and states the grounds therefor, the court should
19 grant relief appropriate thereto."). The question remains: under
20 what rule or authority, if any, is Plaintiff's motion properly
21 brought, and is Plaintiff's motion timely?

22 Post-trial motions for prejudgment interest are typically
23 governed by Rule 59(e), whether the prejudgment interest is
24 discretionary, *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175
25 (1989), or mandatory, *McCalla v. Royal MacCabees Life Ins. Co.*, 369
26 F.3d 1128, 1131 (9th Cir. 2004). See also *Adidas Am., Inc. v.*
27 *Payless Shoesource, Inc.*, No. 01-1655-KI, 2009 WL 30226, at *7 (D.
28 Or. Feb. 9, 2009). Similarly, Rule 59(e) has been considered the

1 proper basis of a post-judgment motion for statutory liquidated
2 damages. See., e.g., *Reyher v. Champion*, 975 F.2d 483, 489 (8th
3 Cir. 1992) (concluding that Rule 59(e) applied to a post-judgment
4 motion for mandatory liquidated damages under the ADEA). Applying
5 Rule 59(e) in this case, however, is problematic because there is
6 no "judgment" within the meaning of Rule 59(e) to alter or amend.

7 As explained in *Balla v. Idaho State Board of Corrections*,

8 Rule 59(e) provides: 'A motion to alter or amend the
9 judgment shall be served not later than 10 [now 28] days
10 after entry of the judgment.' Fed. R. Civ. P. 59(e)
11 (emphasis added). Rule 59(e) 'clearly contemplates entry
12 of judgment as a predicate to any motion.' *Stephenson v.*
13 *Calpine Conifers II, Ltd.*, 652 F.2d 808, 812 (9th Cir.
14 1981) (Stephenson), *overruled in part on other grounds,*
15 *In re Washington Public Power Supply System Securities*
16 *Litigation*, 823 F.2d 1349, 1350-52, 1358 (9th Cir. 1987)
17 (en banc).

18 The word 'judgment' as used in the Federal Rules of Civil
19 Procedure is defined in Rule 54(a). A judgment 'includes
20 a decree and any order from which an appeal lies.' Fed.
21 R. Civ. P. 54(a). Thus, the word 'judgment' encompasses
22 final judgments and appealable interlocutory orders.

23 As we stated in *Stephenson*, the requirement of a judgment
24 as a prerequisite to moving for reconsideration under
25 Rule 59(e) protects against the specter of piecemeal
26 review. *Stephenson*, 652 F.2d at 812. This is so because
27 the denial of a Rule 59(e) motion is itself a final,
28 appealable judgment. In *Stephenson*, we observed that
'were we to permit Rule 59(e) motions without entry of
judgment, litigants could obtain appellate review of
partial judgments by simply appealing a Rule 59(e) order,
completely bypassing the requirements of Rule 54(b) and
28 U.S.C. § 1291.' 652 F.2d at 812.

869 F.2d 461, 466-67 (9th Cir. 1989) (citations omitted). Here,
the Partial Judgment entered on the jury's verdicts was not a final
judgment or an appealable interlocutory order. The Partial
Judgement itself states that "final judgment shall be entered"
after the conclusion of the bench trial portion of the case. (Doc.
389 at 2.) Under Rule 54(b):

1 When an action presents more than one claim for
2 relief--whether as a claim, counterclaim, crossclaim, or
3 third-party claim--or when multiple parties are involved,
4 the court may direct entry of a final judgment as to one
5 or more, but fewer than all, claims or parties only if
6 the court expressly determines that there is no just
7 reason for delay. Otherwise, any order or other decision,
8 however designated, that adjudicates fewer than all the
9 claims or the rights and liabilities of fewer than all
10 the parties does not end the action as to any of the
11 claims or parties and may be revised at any time before
12 the entry of a judgment adjudicating all the claims and
13 all the parties' rights and liabilities.

14 No party requested certification of the Partial Judgment under Rule
15 54(b), nor did the court determine that final judgment should be
16 entered under Rule 54(b) or that there was no just reason for
17 delay. Because the Partial Judgment entered on the jury's verdicts
18 was not a final judgment or appealable interlocutory order, it was
19 not a "judgment" under Rule 59(e). Accordingly, Rule 59(e) cannot
20 supply the appropriate basis for Plaintiff's motion.

21 With respect to non-final orders, such as the Partial
22 Judgment, the Ninth Circuit has recognized that "[a]s long as a
23 district court has jurisdiction over the case, then it possesses
24 the inherent procedural power to reconsider, rescind, or *modify* an
25 interlocutory order for cause seen by it to be sufficient." *City of*
26 *Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir.
27 2001) (internal quotation marks omitted) (emphasis removed)
28 (emphasis added). This inherent power is grounded "in the common
law and is not abridged by the Federal Rules of Civil Procedure."
Id. at 887. In addition to the inherent power to modify a non-
final order, Rule 54(b) authorizes a district court to revise a
non-final order "at any time before entry of a judgment
adjudicating all the claims." Fed. R. Civ. P. 54(b); see also *Am.*

1 *Cas. Co. of Reading, Pa. v. Kemper*, 07-CV-1149-PHX-GMS, 2009 WL
2 1651284, at *2 (D. Ariz. June 12, 2009); *Am. Rivers v. NOAA*
3 *Fisheries*, No. CV-04-00061-RE, 2006 WL 1983178, at *2 (D. Or. July
4 14, 2006). Under Rule 54(b) a "district court can modify an
5 interlocutory order at any time before entry of a final judgment."
6 *Grunwald*, 400 F.3d at 1124 (internal quotation marks omitted).

7 The court still has jurisdiction over the case, and a final
8 judgment adjudicating all of Plaintiff's claims has not been
9 entered. Accordingly, whether Plaintiff's motion is treated as
10 appealing to the court's inherent authority to modify a non-final
11 order, or a motion under Rule 54(b), Plaintiff's motion is timely.

12 As to inherent authority, a district court may reconsider and
13 modify an "interlocutory decision for any reason it deems
14 sufficient, even in the absence of new evidence or an intervening
15 change in or clarification of controlling law." *Abada v. Charles*
16 *Schwab & Co., Inc.*, 127 F. Supp. 2d 1101, 1102 (S.D. Cal. 2001);
17 *see also Santa Monica Baykeeper*, 254 F.3d at 885. "But a court
18 should generally leave a previous decision undisturbed absent a
19 showing that it either represented clear error or would work a
20 manifest injustice." *Abada*, 127 F. Supp. 2d at 1102 (citing
21 *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817
22 (1988)).

23 Rule 54(b) does not address the standards which a court should
24 apply when assessing a motion to modify an interlocutory order;
25 however, courts look to the standards under Rule 59(e) and Rule
26 60(b) for guidance. *See Cal. Dept. of Toxic Substances Control v.*
27 *Payless Cleaners*, No. CIV. S-02-2389, 2007 WL 2712172, at *2 (E.D.
28 Cal. Sept. 14, 2007); *Am. Rivers*, 2006 WL 1983178, at *2. "Under

1 Rule 59(e), it is appropriate to alter or amend a judgment if (1)
2 the district court is presented with newly discovered evidence, (2)
3 the district court committed clear error or made an initial
4 decision that was manifestly unjust, or (3) there is an intervening
5 change in controlling law." *United Nat'l Ins. Co. v. Spectrum*
6 *Worldwide, Inc.*, 555 F.3d 772, 780 (9th Cir. 2009) (internal
7 quotation marks omitted). Rule 60(b) permits a district court to
8 provide relief from a final judgment, order or proceeding if the
9 moving party can show: "(1) mistake, inadvertence, surprise, or
10 excusable neglect; (2) newly discovered evidence that, with
11 reasonable diligence, could not have been discovered in time to
12 move for a new trial under Rule 59(b); (3) fraud . . . ,
13 misrepresentation, or misconduct by an opposing party; (4) the
14 judgment is void; (5) the judgment has been satisfied, released, or
15 discharged; it is based on an earlier judgment that has been
16 reversed or vacated; or applying it prospectively is no longer
17 equitable; or (6) any other reason that justifies relief.'" Fed. R.
18 Civ. P. 60(b).

19 The following analysis applies these standards.

20 B. FMLA Liquidated Damages

21 With respect to liquidated damages under the FMLA, Plaintiff's
22 motion presents at least two issues. First, what amount of the
23 damages the jury awarded are potentially eligible for inclusion in
24 a liquidated damages computation under the FMLA? Second, with
25 those damages identified, can Plaintiff lawfully be awarded
26 liquidated damages under the FMLA?

27 1. Eligible Damages

28 Under the FMLA, when an employer violates § 2615, the

1 aggrieved employee can recover damages equal to the amount of
2 either: "(I) any wages, salary, employment benefits, or other
3 compensation denied or lost to such employee by reason of the
4 violation; or (II) in a case in which wages, salary, employment
5 benefits, or other compensation have not been denied or lost to the
6 employee, any actual monetary losses sustained by the employee as
7 a direct result of the violation, such as the cost of providing
8 care, up to a sum equal to 12 weeks (or 26 weeks, in a case
9 involving leave under section 2612(a)(3) of this title) of wages or
10 salary for the employee." 29 U.S.C. § 2617(a)(1)(A)(i)(I)-(II)
11 (emphasis added). The damages figure is then used to compute
12 interest. The employee is entitled to interest "on the amount
13 described in clause (i)," i.e., on the amount described in either
14 (I) or (II), delineated above. § 2617(a)(1)(A)(ii).

15 Next, the damages figure and the interest are then combined to
16 provide the liquidated damages amount. Under the FMLA, the
17 employee is entitled "to an additional amount as liquidated damages
18 equal to the sum of the amount described in clause (i) and the
19 interest described in clause (ii)." § 2617(a)(1)(A)(iii).

20 With respect to damages, as the County correctly argues,
21 Plaintiff claims loss of compensation under § 2617(a)(1)(A)(i)(I).
22 Plaintiff claims that his wrongful demotion and wrongful placement
23 on administrative leave resulted in lost compensation on which he
24 presented evidence at trial. (See Doc. 399 at 2.) Plaintiff claims
25 he is entitled to the "recovery of lost wages and other
26 compensation lost as a result [of the FMLA violations] as well as
27 liquidated damages in an equal amount plus pre-judgment interest."
28 (Doc. 404 at 3.) Because Plaintiff is claiming "wages, salary,

1 employment benefits, or other compensation denied or lost to such
2 employee by reason of the [FMLA] violation" this case falls under
3 § 2617(a)(1)(A)(i)(I). As a result, Plaintiff is not entitled to
4 FMLA damages under § 2617(a)(1)(A)(i)(II), and any damages under
5 this section cannot be used for purposes of computing liquidated
6 damages under the FMLA.

7 At trial, the jury awarded damages in the amount of \$30,192
8 for the "[r]easonable value of necessary medical care, treatment,
9 and services received to the present time." This amount is not
10 eligible for inclusion in a liquidated damages computation under
11 the FMLA. Assuming this damage (\$30,192) resulted from an FMLA
12 violation, this type of damage falls, if at all, under §
13 2617(a)(1)(A)(i)(II), not (I). Because this is a compensation loss
14 case under § 2617(a)(1)(A)(i)(I), the \$30,192 awarded for the
15 "[r]easonable value of necessary medical care, treatment, and
16 services received to the present time" is not recoverable as FMLA
17 damages.

18 This leaves two amounts the jury awarded that are potentially
19 eligible for inclusion in an FMLA liquidated damages computation.
20 The jury awarded \$321,285 for the "[r]easonable value of earnings
21 and professional fees lost to the present time" and \$154,080 for
22 the "[r]easonable value of earnings and professional fees which
23 with reasonable probability will be lost in the future." With
24 respect to the latter amount, these damages also cannot be included
25 in an FMLA liquidated damages computation.

26 In February 2010, during the pendency of Plaintiff's motion,
27 the Ninth Circuit decided *Traxler v. Multnomah County*, __ F.3d __,
28 2010 WL 669251 (9th Cir. Feb. 26, 2010). In *Traxler*, the court

1 concluded that front pay under the FMLA is not a type of damage
2 that falls under § 2617(a)(1)(A)(i)(I) or (II). Rather, an award
3 of front pay is an "equitable remedy" available under §
4 2617(a)(1)(B). *Id.* at *2-5. An equitable award, like front pay,
5 that falls under § 2617(a)(1)(B) is not eligible for inclusion in
6 a liquidated damages computation because liquidated damages under
7 the FMLA can only accrue from an amount awarded under §
8 2617(a)(1)(A)(i)(I) or (II). See 29 U.S.C. § 2617(a)(1)(A)(iii).

9 In his trial brief, Plaintiff stated that he is entitled to
10 "front pay" under the FMLA. (Doc. 325 at 11.) At trial, Plaintiff
11 put on evidence of his future losses through his economist,
12 Stephanie Rizzardi, who testified that she calculated future losses
13 based on the salary and other forms of compensation (such as
14 professional fees) Plaintiff lost by virtue of not having his
15 contract renewed, i.e., what he expected to receive had he remained
16 employed with the County. Plaintiff's damages expert projected
17 this loss out to February 2016, Plaintiff's worklife expectancy.⁸
18 The expert also prepared a damages report, which was submitted into
19 the evidence. (Exhibit No. 451.1-451.6.) Given the nature of
20 Plaintiff's evidence regarding future losses, it is apparent that
21 the \$154,080 the jury awarded for the "[r]easonable value of
22 earnings and professional fees which with reasonable probability
23 will be lost in the future" represents an award of front pay.
24 Accordingly, even assuming it stems from an FMLA violation, the
25 \$154,080 amount is not eligible for inclusion in a liquidated
26

27 ⁸ February 2016 is obviously a point in time well beyond the
28 trial in this case.

1 damages computation under the FMLA.⁹

2 2. Liquidated Damages

3 Under the FMLA, interest and liquidated damages are keyed to
4 the amount of damages under § 2617(a)(1)(A)(i)(I) or (II). Because
5 this is a compensation loss case under § 2617(a)(1)(A)(i)(I),
6 Plaintiff is entitled to interest on "any wages, salary, employment
7 benefits, or other compensation denied or lost to such employee by
8 reason of the violation," § 2617(a)(1)(A)(i)(I) (emphasis added).
9 See § 2617(a)(1)(A)(ii). Plaintiff is also entitled to an
10 additional amount as "liquidated damages" equal to the sum of "any
11 wages, salary, employment benefits, or other compensation denied or
12 lost to such employee by reason of the violation," §
13 2617(a)(1)(A)(i)(I) (emphasis added), and the interest on that
14 amount. See § 2617(a)(1)(A)(iii).

15 When an employee has been damaged by reason of an FMLA
16 violation, "[l]iquidated damages are awarded presumptively to [the]
17 employee . . . unless the employer demonstrates that its violation
18 was in good faith and that it had a reasonable basis for believing
19 that its conduct was not in violation of the FMLA." *Cooper v.*
20 *Fulton County, Ga.*, 458 F.3d 1282, 1287 (11th Cir. 2006); see also
21 *Traxler*, 2010 WL 669251 at *5 (stating that an FMLA violation
22 subjects an employer to liquidated damages unless the employer can
23 prove that its employment action was taken in 'good faith' and that
24 it had 'reasonable grounds for believing that [its action] was not
25 a violation'") (alteration in original) (quoting §

26
27 ⁹ Even if this amount could be included in a liquidated
28 damages computation, this would not change the result.

1 2617(a)(1)(A)(iii)). Under the statute, whether the employer acted
2 in good faith and had a reasonable basis for believing that its
3 conduct was not in violation of the FMLA are determinations made by
4 the court. See § 2617(a)(1)(A)(iii) (providing that liquidated
5 damages are to be awarded except that, when the employer "proves to
6 the satisfaction of the court that the act or omission which
7 violated section 2615 of this title was in good faith and that the
8 employer had reasonable grounds for believing that the act or
9 omission was not a violation of section 2615 of this title, such
10 court may, in the discretion of the court, reduce the amount of the
11 liability") (emphasis added). At trial, however, the jury
12 determined that the County's FMLA violations were "willful,"
13 meaning, for purposes of trial, that the "County failed to act in
14 good faith and lacked reasonable grounds to believe that its
15 actions complied with the FMLA." (Doc. 386 at 17.) It does not
16 appear that the court has any discretion to depart from these jury
17 determinations. See *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d
18 1233, 1282-83 (11th Cir. 2008); *Arban v. West Publ'g Corp.*, 345
19 F.3d 390, 408 (6th Cir. 2003); *Brinkman v. Dep't of Corr.*, 21 F.3d
20 370, 372-73 (10th Cir. 1994). Even if such discretion existed,
21 there is no reason to ignore, or to decline to adopt, the jury's
22 determinations. However, regardless of the "willful" nature of the
23 FMLA violations, the threshold inquiry in this case is whether any
24 damages the jury awarded are damages that occurred "by reason of,"
25 § 2617(a)(1)(A)(i)(I), an FMLA violation.

26 The County contends that Plaintiff is not entitled to
27 liquidated damages under the FMLA because there is no way of
28

1 knowing whether the lost compensation the jury awarded (the
2 \$321,285 and the \$154,080 amounts)¹⁰ represent damages attributable
3 to an FMLA violation. Plaintiff advanced multiple FMLA and non-
4 FMLA theories of liability at trial, and the jury did not
5 differentiate its damages and specify whether the damages it
6 awarded were attributable to an FMLA violation or something else.
7 The County's argument is persuasive.

8 The words "by reason of" are synonymous with "because of." See
9 *Gross v. FBL Fin. Servs., Inc.*, __ U.S.__, 129 S. Ct. 2343, 2350
10 (2009). Reviewing the jury instructions and the jury verdict, it
11 cannot be concluded that the damages the jury awarded were because
12 of an FMLA violation.

13 As to damages, the jury was instructed that "[i]f you find for
14 the plaintiff on any of the plaintiff's claims, you must determine
15 the plaintiff's damages. The plaintiff has the burden of proving
16 damages by a preponderance of the evidence. Damages means the
17 amount of money that will reasonably and fairly compensate the
18 plaintiff for any injury caused by the defendant." (Doc. 386 at 29)
19 (emphasis added.) In the jury verdict form, the question
20 pertaining to damages states: "If you have found that any
21 discrimination or retaliation by Kern County was the cause of
22 damage to Dr. Jadwin on any of his claims, what damages do you
23 award." (Doc. 384 at 29) (emphasis added.) The instructions and
24 the verdict form did not require the jury to specify what amount of
25 damages, if any, was attributable to any FMLA violation. The jury
26

27 ¹⁰ The County appears to include both amounts in its analysis.
28

1 was permitted to award damages on any of Plaintiff's claims based
2 on any discrimination or retaliation - FMLA or non-FMLA - they
3 found caused Plaintiff damage. The use of the general
4 undifferentiated verdict form makes it impossible to determine
5 whether the damages the jury awarded were based on an FMLA
6 violation or some other non-FMLA violation.

7 In *Lilley v. BTM Corp.*, 958 F.2d 746, 753 (6th Cir. 1992) a
8 jury returned a general verdict in favor of the plaintiff on an age
9 discrimination claim and a retaliatory discharge claim. The jury
10 also reached a general verdict on the issue of willfulness. In
11 reviewing the jury verdict regarding willfulness, the court stated:
12 "Since the . . . jury returned a general verdict, it is impossible
13 to determine whether its finding [of willfulness] pertained solely
14 to the retaliatory discharge claim, solely to the discrimination
15 claim, or to both." *Id*; see also *Jones v. Miles*, 656 F.2d 103, 106
16 (5th Cir. 1981) ("Because only a general verdict was returned . .
17 . it is impossible to tell which theory of liability was adopted by
18 the jury . . .").

19 Similarly here, it is impossible to determine from the general
20 damages verdict form whether the damages the jury awarded pertain
21 solely to an FMLA violation, solely to a non-FMLA violation (e.g.,
22 a FEHA violation), or to both. The jury could have believed that
23 the County's failure to engage in an interactive process with
24 Plaintiff (a FEHA violation), its failure to provide Plaintiff with
25 a reasonable accommodation (a FEHA violation), and its
26 discrimination against Plaintiff based on his mental disability
27 (also a FEHA violation), sealed Plaintiff's fate with the County

1 and caused the damages which the jury awarded. Given the general
2 verdict, it cannot be ascertained that the damages the jury awarded
3 were because of an FMLA violation.

4 Plaintiff argues that the failure to specifically allocate the
5 damages "across Plaintiff's claims" is not fatal to his entitlement
6 to liquidated damages. Plaintiff argues that he has

7 asserted various theories of liability arising from the
8 same set of employment actions. These theories of
9 liability are therefore overlapping and redundant as to
10 the same set of damages arising from the same set of
11 adverse employment actions. In other words, the fact that
12 Plaintiff prevailed on his Medical Leave Retaliation
13 claim, disability discrimination claims, and procedural
14 due process violation claim simply means there are
15 alternative theories of liability for recovering the same
16 damages. To require allocation of damages across
17 redundant and overlapping claims, as Defendants suggests,
18 would be reversible error.

19 (Doc. 404 at 2.) For at least a couple of reasons, Plaintiff's
20 argument is unpersuasive.

21 First, an allocation of damages across "redundant and
22 overlapping claims" has been and can be done by asking the jury to
23 specify the claims on which they award damages and the amount. For
24 example, in *Mangold v. California Public Utilities Commission*, 67
25 F.3d 1470, 1477 (9th Cir. 1995), plaintiffs Maurice Crommie and
26 Arthur Mangold pursued redundant and overlapping claims against the
27 California Public Utilities Commission under the ADEA, the FEHA,
28 and California common law. The jury's verdict awarded damages
separately under each claim, as follows:

ADEA Federal Law

Damages:

Mr. Crommie

Loss of earnings

\$63,460

and Benefits:

Liquidated

\$63,460

1	Damages:	
2	Mr. Mangold	
3	Loss of earnings	\$65,462
4	and Benefits:	
5	Liquidated	\$65,462
6	Damages:	
7	<u>FEHA State Law</u>	
8	<u>Damages:</u>	
9	Mr. Crommie	\$63,460
10	Loss of earnings	
11	and Benefits:	
12	Emotional Distress:	\$25,000
13	Mr. Mangold	
14	Loss of earnings	\$68,590
15	and Benefits:	
16	Emotional Distress:	\$30,000
17	<u>California Law, Wrongful</u>	
18	<u>Employment Action in</u>	
19	<u>Violation of Public</u>	
20	<u>Policy:</u>	
21	Mr. Crommie	
22	Loss of earnings	\$63,460
23	and Benefits:	
24	Emotional Distress:	\$25,000
25	Mr. Mangold	
26	Loss of earnings	\$68,590
27	and Benefits:	
28	Emotional Distress:	\$30,000

16 *Id.* at 1477 (emphasis added). In discussing the jury verdict, the
 17 Ninth Circuit noted that "since the Plaintiffs could not obtain
 18 double recovery, the court entered judgment in favor of Mr. Crommie
 19 for \$88,460 (\$63,460 loss of earnings plus \$25,000 emotional
 20 distress under FEHA) and \$63,460 liquidated damages under ADEA.
 21 Similarly, it awarded Mr. Mangold \$98,590 (\$68,590 loss of earnings
 22 plus \$30,000 emotional distress under FEHA) and \$65,462 liquidated
 23 damages under ADEA." *Id.* at 1478-79. The Ninth Circuit raised no
 24 objection to the style of the jury verdict which allocated damages
 25 separately across redundant and overlapping claims.

26 Similarly, in *Farrell v. Tri-County Metropolitan*
 27 *Transportation District*, 530 F.3d 1023, 1024 (9th Cir. 2008),
 28

1 plaintiff Frank Farrell pursued multiple claims under the FMLA and
2 Oregon's Family Leave Act ("OFLA"). Although FMLA and OFLA claims
3 were submitted to the jury, the jury awarded plaintiff \$1,110 in
4 lost wages specifically under the FMLA.

5 Here, Plaintiff submitted redundant and overlapping claims to
6 the jury, but the jury did not award damages specifically under the
7 FMLA or the FEHA (or the CFRA). Contrary to what Plaintiff argues,
8 it would have not been "reversible error" to require the jury to
9 allocate damages across Plaintiff's redundant and overlapping
10 claims. Following Ninth Circuit precedent, Plaintiff could have
11 opted for the approach taken in *Mangold* and *Farrell* and utilized a
12 verdict form which segregated the damages under each of his claims.
13 The verdict form which Plaintiff requested (Doc. 348 at 122; Doc.
14 377 at 109) and the parties ultimately agreed upon,¹¹ however, did
15 not segregate damages between Plaintiff's claims. The court was
16 under no duty, in this civil case, to *sua sponte* recommend a
17 different verdict form.

18 Even though, under the FMLA, there is a presumption in favor
19 of liquidated damages, this presumption only operates when the
20 requisite foundation - an award of damages under the FMLA - exists.
21 Given the general verdict in this case, whether or to what extent
22 the damages the jury awarded were based on an FMLA violation cannot
23 be determined. In addition, without knowing whether or to what
24

25
26 ¹¹ In Plaintiff's Sur-Reply, Plaintiff acknowledges that "the
27 parties had expressly agreed to use of a single verdict question on
28 the damages" and that the County "agree[d]" to the
"undifferentiated jury verdict." (Doc. 406 at 1.)

1 extent the damages the jury awarded were based of an FMLA
2 violation, any award of liquidated damages under the FMLA runs the
3 risk of improperly doubling the amount the jury may have
4 exclusively awarded on Plaintiff's non-FMLA claims. For these
5 reasons, Plaintiff's request for an award of liquidated damages
6 under the FMLA cannot be granted. Whether construed as a motion
7 directed to the court's inherent authority to modify a non-final
8 order or a motion under Rule 54(b), Plaintiff's request for
9 liquidated damages under the FMLA is DENIED.

10 B. Prejudgment Interest

11 Unlike his request for liquidated damages, Plaintiff's request
12 for prejudgment interest applies to all of his claims submitted to
13 the jury. In theory, prejudgment interest is available on
14 Plaintiffs FMLA claims, 29 U.S.C. § 2617(a)(1)(A)(ii), as well as
15 his state law claims under the FEHA and the CFRA, Cal. Civ. Code §
16 3287(a). Because prejudgment interest is theoretically available
17 on all of Plaintiff's claims submitted to the jury, the fact that
18 the jury did not specifically allocate the damages among
19 Plaintiff's various claims does not outright preclude an award to
20 Plaintiff for prejudgment interest. Plaintiff's request for
21 prejudgment interest is, however, problematic.

22 1. Prejudgment Interest

23 a. FMLA

24 Under the FMLA, an employee is entitled to interest,
25 "calculated at the prevailing rate," 29 U.S.C. § 2617(a)(1)(A)(ii),
26 on the amount of "any wages, salary, employment benefits, or other
27 compensation denied or lost to such employee by reason of the
28

1 [FMLA] violation," § 2617(a)(1)(A)(i)(I). See § 2617(a)(1)(A)(ii).
2 The FMLA does not define the term "prevailing rate." Several
3 federal courts have used state law interest rates as the
4 "prevailing rate." *Finnerty v. Wireless Retail, Inc.*, No. 2:04-cv-
5 40247, 2009 WL 256855, at *3 (E.D. Mich. Aug. 18, 2009); *Thom v.*
6 *Am. Standard, Inc.*, No. 3:07 CV 294, 2009 WL 961182, at *6 (N.D.
7 Ohio Apr. 8, 2009); *Hite v. Vermeer Mfg. Co.*, 361 F. Supp. 2d 935,
8 949 (S.D. Iowa 2005), *aff'd*, 446 F.3d 858 (8th Cir. 2006).

9 Here, the jury did not specifically allocate the amount of
10 damages attributable to an FMLA violation, making it impossible to
11 select any amount on which to award prejudgment interest
12 exclusively under the FMLA. The only amount on which prejudgment
13 interest could be theoretically awarded under the FMLA is the
14 \$321.285 the jury awarded for the reasonable value of earnings and
15 professional fees lost to the present time. As to the other
16 amounts, because this is a compensation loss case under §
17 2617(a)(1)(A)(i)(I), the jury's award of \$30,192 for the
18 "[r]easonable value of necessary medical care, treatment, and
19 services received to the present time" is not recoverable as
20 damages under the FMLA and, by extension, interest could not be
21 awarded on this amount under the FMLA. Because the \$154,080 the
22 jury awarded for the "[r]easonable value of earnings and
23 professional fees which with reasonable probability will be lost in
24 the future" represents an award of front pay, this amount falls
25 under § 2617(a)(1)(B) and could not be included in a prejudgment
26 interest computation under § 2617(a)(1)(A)(ii).

27 b. California law

1 With respect to Plaintiff's state law claims, "a federal court
2 exercising supplemental jurisdiction over state law claims is bound
3 to apply the law of the forum state to the same extent as if it
4 were exercising its diversity jurisdiction." *Bass v. First Pac.*
5 *Networks, Inc.*, 219 F.3d 1052, 1055 n.2 (9th Cir. 2000); see also
6 *Mangold*, 67 F.3d at 1478 ("The *Erie* principles apply equally in the
7 context of pendent jurisdiction."). Pursuant to *Erie* principles,
8 (*Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)), "federal
9 courts sitting in diversity apply state substantive law and federal
10 procedural law." *In re Larry's Apartment, L.L.C.*, 249 F.3d 832, 837
11 (9th Cir. 2001) (internal quotation marks omitted). Prejudgment
12 interest is substantive for *Erie* purposes. *In re Exxon Valdez*, 484
13 F.3d 1098, 1101 (9th Cir. 2007). This makes California law
14 applicable to prejudgment interest on Plaintiff's state law claims.

15 As to his state law claims, citing *Currie v. Workers' Comp.*
16 *Appeals Board*, 24 Cal. 4th 1109, 1115 (2001) and California Civil
17 Code § 3287(a), Plaintiff argues that "in an action to recover
18 backpay, interest is recoverable on each salary or pension payment
19 from the date it was due." (Doc. 399 at 8.) *Currie* determined
20 that, pursuant to California Civil Code § 3287, prejudgment
21 interest could be recovered on a backpay amount awarded to a
22 plaintiff who was wrongfully denied reinstatement. There, the
23 employer's refusal to reinstate the plaintiff violated California
24 Labor Code § 132a.

25 California Civil Code § 3287(a) provides:

26 Every person who is entitled to recover damages certain,
27 or capable of being made certain by calculation, and the
28 right to recover which is vested in him upon a particular

1 day, is entitled also to recover interest thereon from
2 that day, except during such time as the debtor is
3 prevented by law, or by the act of the creditor from
4 paying the debt. This section is applicable to recovery
5 of damages and interest from any such debtor, including
6 the state or any county, city, city and county, municipal
7 corporation, public district, public agency, or any
8 political subdivision of the state.

9 *Currie* supports Plaintiff's position that, if any backpay the
10 jury awarded was for a FEHA/CFRA violation, Plaintiff can obtain
11 prejudgment interest on this amount under § 3287(a). Under
12 California law, the applicable prevailing prejudgment interest rate
13 appears to be seven percent per annum. *Pro Value Properties, Inc.*
14 *v. Quality Loan Service Corp.*, 170 Cal. App. 4th 579, 582 (2009);
15 *see also Michelson v. Hamada*, 29 Cal. App. 4th 1566, 1585 (1994).¹²

16 Plaintiff's reliance on *Currie* and California Civil Code §
17 3287(a) is nevertheless problematic because, even assuming any
18 backpay awarded in this case is linked to a FEHA/CFRA violation,
19 the jury awarded backpay in one lump sum - \$321,285 - without
20 specifying which particular adverse employment action(s) caused
21 what amount of backpay damages. Because this case involves
22 multiple adverse employment actions that occurred at different
23 points in time - not just a one-time wrongful denial of
24 reinstatement as in *Currie* - the generalized backpay award makes it
25 difficult to compute prejudgment interest.

26 Under California Civil Code § 3287(a), Plaintiff can, in
27 theory, recover prejudgment interest on backpay awarded to him.
28 This interest runs from the day the right to recover the backpay

¹² Plaintiff cites no authority for the proposition that the prevailing California rate is ten percent per annum.

1 "vested in him." § 3287(a). The jury's verdict does not, however,
2 specify the particular adverse employment action(s) on which they
3 based their backpay award, nor the amount of backpay attributable
4 to any particular adverse employment action(s), making it difficult
5 to determine when Plaintiff's entitlement to any discrete amount of
6 the awarded backpay "vested in" Plaintiff. In this case, at least
7 three adverse employment actions that *could* have lead to an award
8 of backpay are Plaintiff's wrongful removal from his position as
9 Chair of the Pathology Department, his wrongful placement on
10 administrative, and the wrongful non-renewal of his contract, all
11 of which occurred on different dates (July 2006, December 2006, and
12 October 2007 respectively). To the extent the \$321,285 the jury
13 awarded consists of backpay damages caused by these different
14 events, what amount of backpay did the jury attribute to each
15 event? The current state of the briefing does not adequately
16 address these issues and prejudgment interest cannot be computed at
17 this time.

18 Whether construed as a motion directed to the court's inherent
19 authority to modify a non-final order or a motion under Rule 54(b),
20 Plaintiff's request for prejudgment interest is DENIED WITHOUT
21 PREJUDICE.

22 //

23 //

1 IV. CONCLUSION

2 For the reasons stated:

3 1. Plaintiff's motion for liquidated damages under the FMLA
4 is DENIED.

5 2. Plaintiff's motion for prejudgment interest is DENIED
6 WITHOUT PREJUDICE.

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8 SO ORDERED
9 Dated: March 31, 2010

10 /s/ Oliver W. Wanger
11 Oliver W. Wanger
12 United States District Judge
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