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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Scott Douglas Nordstrom,  
10 Plaintiff,  
11 v.  
12 Charles Ryan, et al.,  
13 Defendants.  
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No. CV-15-02176-PHX-DGC (JZB)

**ORDER**

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16 Plaintiff Scott Nordstrom filed a complaint against Defendants Charles Ryan,  
17 James O’Neil, and Staci Fay, alleging deprivations of his Eighth and Fourteenth  
18 Amendment rights in violation of 42 U.S.C. § 1983. Doc. 1. After more than a year of  
19 litigation, the parties reached a settlement that called for changes in Defendants’  
20 procedures concerning death-row inmates. Docs. 39, 45. Plaintiff has now filed a motion  
21 for attorneys’ fees and non-taxable expenses. Doc. 46. The motion is fully briefed and  
22 oral argument will not aid in the Court’s decision. Fed. R. Civ. P. 78(b); LRCiv 7.2(f).  
23 The Court will grant the motion in part.

24 **I. Legal Standards.**

25 A party requesting an award of attorneys’ fees and non-taxable expenses must  
26 show that it is (a) eligible for an award, (b) entitled to an award, and (c) requesting a  
27 reasonable amount. *See* LRCiv 54.2(c). Under the general fee-shifting provision for  
28 federal civil rights cases, “the court, in its discretion, may allow the prevailing party . . . a

1 reasonable attorney’s fee as part of the costs.” 42 U.S.C. § 1988(b). “[A] court’s  
2 discretion to deny fees under § 1988 is very narrow and . . . fee awards should be the rule  
3 rather than the exception.” *Herrington v. Cty. of Sonoma*, 883 F.2d 739, 743 (9th  
4 Cir. 1989) (internal quotation marks omitted).

5 To determine the reasonableness of requested attorneys’ fees, federal courts  
6 generally use the “lodestar” method. *See Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989);  
7 *United States v. \$186,416.00 in U.S. Currency*, 642 F.3d 753, 755 (9th Cir. 2011). The  
8 Court must first determine the initial lodestar figure by taking a reasonable hourly rate  
9 and multiplying it by the number of hours reasonably expended on the litigation.  
10 *Blanchard*, 489 U.S. at 94 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). The  
11 Court next “determines whether to modify the lodestar figure, upward or downward,  
12 based on factors not subsumed in the lodestar figure.” *Kelly v. Wengler*, 822  
13 F.3d 1085, 1099 (9th Cir. 2016). “These factors are known as the *Kerr* factors.” *Stetson*  
14 *v. Grissom*, 821 F.3d 1157, 1166-67 (9th Cir. 2016) (citing *Kerr v. Screen Extras Guild,*  
15 *Inc.*, 526 F.2d 67, 70 (9th Cir. 1975)). Such an adjustment is appropriate “only in rare or  
16 exceptional circumstances.” *Cunningham v. City of L.A.*, 879 F.2d 481, 488 (9th  
17 Cir. 1988).

## 18 **II. Discussion.**

### 19 **A. Attorneys’ Fees.**

20 Section 1988(b) permits a prevailing party to recover reasonable attorneys’ fees in  
21 a § 1983 action. Defendants contend that Plaintiff is not entitled to recover fees.  
22 Doc. 53.

#### 23 **1. Prevailing Party.**

24 Plaintiff argues that he is the prevailing party because he secured a judicially  
25 enforceable settlement agreement that materially changed the legal relationship of the  
26 parties. Doc. 46 at 2-4. The Court’s order of dismissal incorporated the terms of that  
27 settlement agreement and “retain[ed] jurisdiction to enforce” it. Doc. 45 ¶¶ 1-2. The  
28 settlement agreement required Defendants to take several actions within 120 days of

1 March 3, 2017: (1) amend policies that mandate maximum custody confinement for  
2 death-row inmates, (2) permit death-row inmates to seek reclassification to close custody  
3 status, (3) ensure that the conditions of close custody for death-row inmates are  
4 “equivalent” to that of non-death row inmates, (4) “provide adequate space for  
5 confidential communication with legal counsel” in the close custody facilities for death-  
6 row inmates, and (5) reclassify and transfer Plaintiff to close custody confinement.  
7 Doc. 39 ¶¶ 1-6.

8 Because this case concluded without a judgment on the merits, Defendants argue  
9 that Plaintiff must satisfy the requirements of the “catalyst theory.” Doc. 53 at 2 (citing  
10 *Sablan v. Dep’t of Fin. of Com. of N. Mariana Islands*, 856 F.2d 1317, 1324-25 (9th  
11 Cir. 1988)). Under that test, Defendants argue, Plaintiff has “the burden to establish that  
12 the lawsuit accomplished at least in part, what it sought to accomplish and that there was  
13 a ‘clear, *causal relationship* between the litigation brought and the practical outcome  
14 realized.’” *Id.* (quoting *Sablan*, 856 F.2d at 1324 (emphasis in original)). Defendants  
15 contend that Plaintiff cannot meet this standard. Doc. 53 at 2-7.

16 Plaintiff need not meet this standard to qualify as a prevailing party. The Supreme  
17 Court abrogated the catalyst theory approximately seventeen years ago. *Labotest, Inc. v.*  
18 *Bonta*, 297 F.3d 892, 895 (9th Cir. 2002) (citing *Buckhannon Bd. & Care Home v. W. Va.*  
19 *Dep’t of Health and Human Res.*, 532 U.S. 598 (2001)). The Ninth Circuit explained:

20 the *Buckhannon* Court announced that recovery of attorney’s fees requires a  
21 court-ordered change in the legal relationship between the parties, in which  
22 the legal change that the plaintiff claims to have caused is judicially  
23 sanctioned. *Buckhannon* made clear that a defendant’s voluntary change in  
24 conduct, sufficient for fees recovery under a catalyst theory, lacks the  
necessary judicial imprimatur to qualify a plaintiff as prevailing party.

25 *Labotest*, 297 F.3d at 895 (internal quotation marks and citations omitted). Following  
26 *Buckhannon*, the Ninth Circuit held that the catalyst theory no longer applied to fee  
27 awards under 42 U.S.C. § 1988(b). *Bennett v. Yoshina*, 259 F.3d 1097, 1101 (9th  
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1 Cir. 2001) (“The catalyst theory no longer applies to [§ 1988], and any of our precedents  
2 to the contrary are overturned.”).

3 Defendants do not cite this authority which clearly forecloses their argument. *See*  
4 Doc. 53. Nor do they withdraw the argument in their motion to strike portions of  
5 Plaintiff’s reply brief that respond to catalyst theory. Doc. 55. Defendants instead  
6 represent to the Court that the catalyst theory remains viable for purposes of § 1988(b)  
7 because 65 decisions have cited it for “various principles.” Doc. 55 at 2 n.2; Doc. 57 at 4  
8 n.2. But the only two cases Defendants specifically cite concern fee awards for the  
9 Endangered Species Act, not § 1988(b). Doc. 55 at 2 n.2 (citing *Idaho Watersheds*  
10 *Project v. Jones*, 253 F. App’x 684, 685-86 (9th Cir. 2007); *All. for Wild Rockies v. U.S.*  
11 *Dep’t of Agric.*, No. CV 11-76-M-CCL, 2016 WL 4766234, at \*3-4 (D. Mont. Sept.  
12 13, 2016)).<sup>1</sup>

13 The Ninth Circuit has held that “a plaintiff who obtains a court order incorporating  
14 an agreement that includes relief the plaintiff sought in the lawsuit is a prevailing party  
15 entitled to attorney’s fees under 42 U.S.C. § 1988.” *Labotest*, 297 F.3d at 895. Plaintiff  
16 clearly is the prevailing party under this standard. The complaint sought a change in  
17 Plaintiff’s confinement status. Doc. 1 at 14-15 (seeking order to halt alleged  
18 constitutional violations caused by Plaintiff’s confinement). Among other things, the  
19 settlement required Defendants to change the conditions of Plaintiff’s confinement.  
20 Doc. 39 ¶ 6. This agreement is binding and enforceable (*id.* ¶ 7), and the Court retains  
21 jurisdiction to enforce it. Doc. 45 ¶¶ 1-2. Plaintiff is the prevailing party in this case.

## 22 2. Lodestar Amount.

23 Plaintiff sets the initial lodestar amount at \$51,393.60 for the Arizona Capital  
24 Representation Project (“ACRP”) and \$24,628.75 for Jackson & Oden. Doc. 46 at 5;

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26 <sup>1</sup> In their reply in support of the motion to strike, Defendants acknowledge that  
27 “Plaintiff may be technically correct” about the catalyst theory. Doc. 57 at 4. But  
28 Defendants nonetheless assert that (1) Plaintiff must still satisfy *Sablan* to show that  
Defendants’ concession was involuntary and (2) the catalyst test remains “a central part  
of determining the reasonableness of a fee request.” *Id.* at 2, 4. The Court will not  
consider arguments Defendants did not raise in its opposition brief. *See Gadda v. State*  
*Bar of Cal.*, 511 F.3d 933, 937 n.2 (9th Cir. 2007).

1 Doc. 46-1 at 13 (Jackson & Oden); Doc. 46-2 at 5 (ACRP). Plaintiff argues that this  
2 lodestar amount reflects (1) hourly rates at or below market rates, (2) the novelty and  
3 complexity of the issues, and (3) counsel’s work without expectation of compensation.  
4 Doc. 46 at 5. Defendants do not oppose the hourly rates Plaintiff requests. Doc. 53  
5 at 7-17. Defendants instead offer four general objections to the time expended on this  
6 litigation. *Id.*

7 Defendants first contend that Plaintiff’s counsel billed for a “tremendous amount  
8 of work . . . for very little substantive result.” Doc. 53 at 7. Defendants characterize this  
9 case as a purely legal issue that required no factual development or expert testimony.  
10 Doc. 53 at 8-9. Plaintiff’s counsel devoted 360 hours, Defendants argue, “to do nothing  
11 more than draft a complaint, send out basic discovery, consult on a Rule 16, work on  
12 stipulated facts, get ready for a deposition that never occurred, work with an expert that  
13 had no relevance, and discuss settlement that was memorialized in less than two pages.”  
14 *Id.* at 8.

15 Plaintiff counters that fact development and expert testimony were necessary to  
16 establish the two alleged constitutional violations. Doc. 54 at 13-14; *see also* Doc. 1  
17 ¶¶ 73-85. To prevail on his procedural due process claim, Plaintiff would need to show  
18 “(1) a deprivation of a constitutionally protected liberty . . . interest, and (2) a denial of  
19 adequate procedural protections.” *Roybal v. Toppenish Sch. Dist.*, 871 F.3d 927, 931 (9th  
20 Cir. 2017) (quoting *Brewster v. Bd. of Educ.*, 149 F.3d 971, 982 (9th Cir. 1998)); *see also*  
21 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (adequacy of procedures evaluated in  
22 light of the private interest at stake; the risk of erroneous deprivation of liberty, and the  
23 probable value of different safeguards; and administrative interests). To prevail on his  
24 cruel and unusual punishment claim, Plaintiff would need to show that the conditions of  
25 his confinement involved the “wanton and unnecessary infliction of pain” or were  
26 “devoid of legitimate penological purpose.” *Morgan v. Morgensen*, 465 F.3d 1041, 1045  
27 (9th Cir. 2006) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). To apply these  
28 standards, the Court would need facts and expert opinion regarding the nature and effect

1 of Plaintiff's confinement, the State's interest in its conditions, and the procedures  
2 afforded Plaintiff in determining his confinement status.

3 Plaintiff further argues that the timing of the parties' settlement required his  
4 counsel to expend significant time and resources on fact development and expert  
5 testimony. Doc. 54 at 11-12. Plaintiff sent Defendants a settlement offer on  
6 November 29, 2016, which included many of the substantive terms reflected in the final  
7 settlement. Doc. 54-1. Yet the parties did not reach an agreement until March 3, 2017,  
8 after the February 24, 2017, fact and expert discovery deadline. Docs. 33, 39. Although  
9 the settlement concluded the case before the Court considered fact and opinion evidence,  
10 the timing of the settlement required Plaintiff's counsel to work in anticipation of a ruling  
11 on the merits. The Court cannot agree that factual development and expert testimony  
12 were unnecessary.

13 Defendants next argue that Plaintiff's counsel impermissibly grouped legal tasks  
14 in 16 separate billing entries. Doc. 53 at 9-17. The local rules require itemized billing  
15 statements that reflect the "time devoted to each individual unrelated task performed."  
16 LRCiv 54.2(e)(1)(B). Plaintiff argues that the tasks identified in the 16 entries are all  
17 related. Doc. 54 at 17. Plaintiff further contends that the entries satisfy the minimum  
18 requirements set forth in *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000).  
19 *Id.* But *Fischer* does not hold that an attorney can bill for unrelated tasks in a single entry  
20 in violation of this Court's local rules. *See Fischer*, 214 F.3d at 1121. The Court finds  
21 that Plaintiff's counsel impermissibly grouped unrelated tasks or provided insufficient  
22 detail to identify related tasks in 12 of the 16 entries. The Court will subtract the  
23 following entries from Plaintiff's fee request for Jackson & Oden, P.C.: billing ID 36138  
24 (\$251.55), billing ID 36604 (\$541.80), billing ID 36713 (\$580.50), billing ID 36961  
25 (\$96.75), billing ID 37460 (\$522.45), billing ID 37613 (\$425.70), billing ID 37623  
26 (\$348.30), billing ID 37783 (\$774), billing ID 37896 (\$754.65), billing ID 39452  
27 (\$503.10), and billing ID 39623 (\$38.70). Doc. 46-1 at 7-11. The Court will also  
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1 subtract a February 3, 2017, billing entry by the ACRP for \$503.10 (2.6 hours at a rate of  
2 \$193.50). Doc. 46-2 at 5, 13.

3 Defendants also argue that Plaintiff's legal team unnecessarily included multiple  
4 attorneys from the ACRP and Jackson & Oden. Doc. 53 at 10. The size of Plaintiff's  
5 legal team, Defendants argue, caused excessive and unnecessary inter-office  
6 communication. *Id.* at 11. Defendants identify approximately 140 billing entries that  
7 reflect attorney communication. *Id.* at 11-15. And Defendants cite non-binding  
8 precedent for the proposition that attorney communication can be unreasonable,  
9 disproportionate, or duplicative. *Id.* at 11. Yet Defendants offer no argument that any of  
10 the individual entries represents an unreasonable, disproportionate, or duplicative billing  
11 of communication. The Court finds that the hours of communication Defendants identify  
12 are reasonable in light of the circumstances and length of this litigation.

13 Defendants finally contend that Plaintiff's counsel billed for a "needless" motion  
14 to enforce the settlement stipulation. *Id.* at 16. Defendants argue that the motion was  
15 unnecessary, but present no evidence to show that it was actually unnecessary. *Id.*  
16 Plaintiff counters that the motion was necessary because Defendants did not comply with  
17 the settlement agreement within 120 days. Doc. 54 at 20; *see also* Doc. 41; Doc. 41-1  
18 at 2-4. The fact that Defendants subsequently complied without judicial intervention,  
19 Plaintiff argues, does not render the motion unnecessary. Doc. 54 at 20. The Court  
20 agrees, and finds that the 8.7 hours spent on this motion were reasonable.

### 21 **3. Enhancements.**

22 Plaintiff relies on *Kelly v. Wengler* to request an enhancement multiplier of 1.5 to  
23 compensate counsel for superior performance and attract competent attorneys for prisoner  
24 litigation seeking only declaratory or injunctive relief. Doc. 46 at 5-6 (citing 822  
25 F.3d 1085). Specifically, Plaintiff argues that his counsel recognized a serious civil rights  
26 issue, secured a reform that affects all inmates, and worked without expectation of  
27 compensation. *Id.* The enhancement is appropriate, Plaintiff argues, to reflect counsel's  
28 true market value. *Id.* at 6. Defendants oppose any enhancement, arguing that the

1 circumstances are not so rare or exceptional as to justify an adjustment. Doc. 53  
2 at 15-16. The Court agrees with Defendants.

3 Plaintiff has not established that an enhancement for superior performance is  
4 appropriate. “[T]he district court may enhance the lodestar figure when plaintiff’s  
5 counsel’s ‘superior performance and commitment of resources’ is ‘rare’ and ‘exceptional’  
6 as compared to the run-of-the-mill representation in such cases.” *Kelly*, 822 F.3d at 1103  
7 (quoting *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552-54 (2010)). The *Kelly* court  
8 explained:

9 In *Perdue*, the Supreme Court held, although the lodestar figure typically  
10 subsumes the “novelty and complexity of a case” and “the quality of an  
11 attorney’s performance,” a court may enhance the lodestar in “rare” and  
12 “exceptional” circumstances when the lodestar figure does not adequately  
13 represent counsel’s “superior performance and commitment of resources.”  
14 The Court gave several examples of such circumstances, including one that  
15 is relevant here. A court may enhance the lodestar figure when “the  
16 method used in determining the hourly rate employed in the lodestar  
17 calculation does not adequately measure the attorney’s true market value, as  
18 demonstrated in part during the litigation.”

19 822 F.3d at 1102 (quoting *Perdue*, 559 U.S. at 553-55).

20 *Kelly* granted an enhancement for superior performance where

21 Plaintiffs’ counsel had only twenty-six days to conduct discovery in  
22 preparation for the contempt hearing. During that period, Plaintiffs’ two  
23 attorneys not only engaged in extensive motions practice, writing numerous  
24 pre-trial briefs; they also conducted an extraordinary amount of discovery.  
25 They interviewed, deposed, and prepared numerous witnesses in three  
26 states and obtained and reviewed roughly 7,000 pages of discovery. Most  
27 of the documents were produced for their review only five days before the  
28 beginning of the hearing. Some were even produced for review on the first  
evening of the hearing. Despite these constraints, Plaintiffs’ counsel  
uncovered substantial evidence of noncompliance with the settlement  
agreement. Based on this evidence, they obtained a contempt finding and  
secured significant remedies for their clients.

822 F.3d at 1103. Although Plaintiff’s counsel succeeded in securing prison reforms, his  
motion does not show that they provided the kind of rare or exceptional representation



1 required for an enhancement of the lodestar amount. Doc. 46 at 5-6. The Court therefore  
2 will deny an enhancement for superior performance.

3 Nor has Plaintiff established that an enhancement is necessary to attract competent  
4 counsel for cases such as this. The Ninth Circuit explained the circumstances in which  
5 such an adjustment is appropriate:

6 When a plaintiff demonstrates with *specific evidence* that no competent  
7 attorney is willing to take on a meritorious civil rights case because of  
8 insufficient fees, the district court furthers the PLRA's purpose by  
9 enhancing the lodestar figure by an amount reasonably calculated to induce  
competent lawyers in the relevant community to take such cases.

10 *Kelly*, 822 F.3d at 1104 (emphasis added) (citing *Perdue*, 559 U.S. at 554). *Kelly* granted  
11 an enhancement to attract competent counsel based on four affidavits that attested to and  
12 explained the dearth of attorneys that would take such a case in Idaho. *Id.* at 1104-05.  
13 Plaintiff's motion presents no such evidence. Doc. 46 at 5-6. The Court therefore will  
14 deny an enhancement to attract competent counsel.<sup>2</sup>

15 **B. Non-taxable Expenses.**

16 Plaintiff requests \$11,904.17 in non-taxable expenses. Doc. 46 at 6. This figure  
17 includes \$11,552.97 in expert fees. *Id.*; Doc. 46-2 at 22-32. Plaintiff argues that expert  
18 fees typically are billed separately and are permitted under § 1988. Doc. 46 at 7 (citing  
19 *Trustees et al. v. Redland Ins. Co.*, 460 F.3d 1253, 1259 (9th Cir. 2006) (“If fees for work  
20 performed by non-attorneys are customarily billed separately in the relevant market,  
21 those fees are recoverable as ‘reasonable attorney’s fees’ under 29 U.S.C.  
22 § 1132(g)(2)(D).”)).

23 Section 1988(b) does not permit the recovery of expert fees in § 1983 actions. The  
24 Supreme Court held in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83

25 \_\_\_\_\_  
26 <sup>2</sup> Plaintiff offers new evidence in his reply brief to support his request for these  
27 two enhancements. Doc. 54 at 18-10; Doc. 54-4. This evidence does not contravene  
28 Defendants' opposition, but instead provides further support to arguments Plaintiff made  
in his motion. The Court will not consider evidence presented for the first time in a reply  
brief. *Gadda*, 511 F.3d at 937 n.2; *Cowboy v. Zinke*, No. CV-16-08094-PCT-DGC, 2018  
WL 619722, at \*4 (D. Ariz. Jan. 30, 2018).

1 (1991), that a prior version of § 1988 did not permit the recovery of expert fees. *Id.*  
2 at 102. Congress then amended § 1988 to specifically permit the recovery of expert fees  
3 in cases arising under §§ 1981 and 1981a. Civil Rights Act of 1991, Pub. L.  
4 No. 102-166, § 113(a)(2), 105 Stat. 1071, 1079. Congress could have, but did not,  
5 specify that a prevailing party could recover expert fees in a case arising under § 1983.  
6 *Id.* The *Casey* decision therefore remains binding with respect to claims arising under  
7 § 1983. *E.g.*, *Jenkins ex rel. Jenkins v. Missouri*, 158 F.3d 980, 983 (8th Cir. 1998);  
8 *Vargas v. Howell*, No. 2:14-CV-1942 JCM (CWH), 2018 WL 1077278, at \*6 (D. Nev.  
9 Feb. 27, 2018); *Sanchez v. Cty. of San Bernardino*, No. CV 10-09384 MMM (OPx), 2014  
10 WL 12734756, at \*20 (C.D. Cal. Mar. 10, 2014); *Agster v. Maricopa Cty.*, 486 F.  
11 Supp. 2d 1005, 1019 (D. Ariz. 2007). The Court accordingly will deny Plaintiff’s request  
12 for expert fees.

13 Plaintiff’s request includes \$351.20 in ACRP travel expenses. Doc. 46 at 6;  
14 Doc. 46-2 at 22. Defendants do not challenge this request. Doc. 53 at 17. The Court  
15 finds this request reasonable and will accordingly award \$351.20 to Plaintiff.

16 **III. Motion to Strike.**

17 Defendants ask the Court to strike portions of the Plaintiff’s reply in support of his  
18 motion for fees. Doc. 55. The Court “may strike from a pleading an insufficient defense  
19 or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f).  
20 Motions to strike are generally disfavored and “should not be granted unless it is clear  
21 that the matter to be stricken could have no possible bearing on the subject matter of the  
22 litigation.” *Johnson v. Cal. Med. Facility Health Servs.*, No. 2:14-cv-0580 KJN P, 2015  
23 WL 4508734, at \*6 (E.D. Cal. July 24, 2015).

24 Defendants argue that Plaintiff cannot satisfy the requirements of the catalyst test.  
25 Doc. 53 at 2-7. For reasons explained above, the catalyst test is no longer controlling.  
26 The Court will deny the motion to strike.

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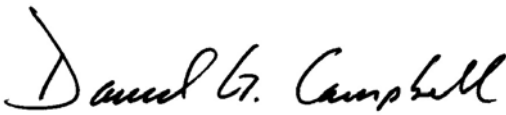
**IV. Conclusion.**

The Court will award Plaintiff attorneys' fees in the amount of \$46,556.10 for the ACRP and \$24,125.65 for Jackson & Oden. The Court finds this award to be reasonable in light of all relevant factors, including the relevant *Kerr* factors. The Court will deny Plaintiff's request for expert fees, but will grant his request for \$351.20 for the ACRP's travel expenses.

**IT IS ORDERED:**

1. Plaintiff's motion for fees and expenses (Doc. 46) is **granted in part** as set forth above.
2. The Clerk is directed to **terminate** this action.

Dated this 2nd day of April, 2018.



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David G. Campbell  
United States District Judge