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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

STEPHAN BREWINGTON,
Plaintiff,
v.
UNITED STATES OF AMERICA,
Defendant.

Case No. CV 13-07672-DMG (CWx)

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

This matter is before the Court following a bench trial which took place on June 30, 2015 through July 2, 2015. John F. DeNove, Diane M. Corwin, and Alicia S. Curran appeared on behalf of Plaintiff Stephan Brewington. Garrett Coyle and Julie Zatz appeared on behalf of Defendant United States of America.

Having carefully reviewed the evidence and the arguments of counsel, as presented at trial and in their written submissions, the Court makes the following findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

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I.

FINDINGS OF FACT

On August 12, 2011, Stephan Brewington went to the Department of Veteran Affairs Greater Los Angeles hospital (the “VA”) for treatment of a branch retinal vein occlusion that affected the vision in his left eye. The prescribed treatment was an injection into his left eye of Avastin, a drug used to treat conditions like macular edema. (Final PreTrial Conference Order (“PTO”) 5a, b [Doc. # 45].) Instead of injecting Avastin, the VA injected Mr. Brewington’s left eye with Velcade, a chemotherapy drug, causing irreversible blindness in Mr. Brewington’s left eye. (PTO 5c, d.) There was no evidence presented as to any approved or medically indicated intraocular use of Velcade. To the contrary, whether directly or indirectly, Velcade caused serious injury to Mr. Brewington, including blindness in the left eye, mild chemical meningitis, left hemisensory deficits, chronic daily headache of a migrainous nature, rebound headaches, neuropathic orbital pain syndrome, depression, and anxiety. (Trial Declaration of H. Ronald Fisk, M.D. (“Fisk Decl.”) ¶ 8 [Doc. # 56]; Trial Declaration of Raghu C. Murthy, M.D. (“Murthy Decl.”) ¶¶ 14-15 [Doc. # 50].)

Mr. Brewington maintains 20/20 vision in his right eye. (PTO 5g.) At the time of the Velcade injection, Mr. Brewington was 42 years of age. (PTO 5h.)

The Velcade injection initially caused significant ocular inflammation in Mr. Brewington’s left eye. Ocular inflammation can cause pain in the inflamed area as well as around the eye. This inflammation triggered Mr. Brewington’s orbital pain and migraine-type headache. (Trial Declaration of Pradeep Prasad, M.D. (“Prasad Decl.”) ¶ 8 [Doc. # 53].) By at least March 12, 2013, however, the ocular inflammation was fully resolved. (Prasad Decl. ¶ 8; Defendant’s Exhibit 101 at 724-25.) The results of an October 14, 2011 MRI of Mr. Brewington’s left orbit showed resolution of the globe enhancement, no abnormal orbital enhancement, normal appearance of the optic nerve,

1 and resolution of prior swelling of the soft tissues of the eyelid. (Prasad Decl. ¶ 9;
2 Defendant’s Exhibit 101 at 44.) These results, as well as Dr. Prasad’s examination of Mr.
3 Brewington’s left eye, confirmed the absence of objective signs of orbital inflammation.
4 (Prasad Decl. ¶ 9.) Thus, a little after a month following the Velcade injection, signs of
5 the inflammation associated with the injection had abated. (*Id.*) Nonetheless, Mr.
6 Brewington reported that he continued to experience pain around his left eye radiating to
7 the back of his head. (*Id.*)

8 **A. Treatment Since the Injury**

9 Since the injection, Mr. Brewington has continued to receive treatment at the VA.
10 (PTO 5e.) He has seen medical providers in a variety of specialties, including neurology,
11 ophthalmology, pain management, and psychiatry. (*See* Defendant’s Exhibit 101.) Mr.
12 Brewington has also been prescribed increasing doses of opiates, such as Methadone,
13 Dilaudid, Fentanyl, and OxyContin, to address his complaints of pain. He has also been
14 taking anti-inflammatory medication and anti-anxiety medication. (*See id.*)

15 Mr. Brewington was offered but declined the opportunity to participate in the
16 Comprehensive Pain Management and Rehabilitation Programs at the VA hospital.
17 (Trial Testimony of Quynh Pham and Hyung Kim; Defendant’s Exhibit 101 at 834 (note
18 in record stated “discussed comprehensive pain and rehab program, but patient declined
19 at this time”).) He also turned down the VA’s offer to attend a non-VA pain management
20 program of his choice, which the VA would subsidize. (*Id.*; Defendant’s Exhibit 101 at
21 740-42 (“Pt was once again reminded that he has been approved by the administration to
22 seek outside expertise for the management of his pain.”); 746 (“Pt has been approved by
23 the VA Administration to seek outside pain providers, should he wishes [sic] to seek this
24 option. Pt has previously declined this option because he feels that, this being a VA-
25 initiated issue, he would like the VA to address his concerns.”); 759 (“Of note, pt has
26 been approved by the VA Administration to seek outside pain providers, and this option
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1 was presented to the patient as well, especially given the time associated with his travel
2 from his residence in Pasadena to WLA.”.)

3 **B. Medical Conditions**

4 1. *Pain*

5 The parties’ experts disagree as to whether Mr. Brewington suffers from Central
6 Pain Syndrome, which is an irreversible condition, or from Centralized or Centralization
7 of Pain syndrome, which may potentially be reversed with proper care and treatment.
8 (Trial Declaration of Laura Audell (“Audell Decl.”) ¶ 14; Fisk Decl. ¶ 17e.) The Court
9 cannot determine by a preponderance of the evidence which of these syndromes actually
10 applies to Mr. Brewington. What the experts *can* agree upon, and which the Court does
11 find, is that Mr. Brewington suffers from chronic pain, resulting from the Velcade
12 injection. Without applying any labels to it, the experts appear to agree that due to
13 neuroplasticity, the severity or persistence of pain alters the central nervous system
14 pathways of pain processing, increasing the number and excitability of the nociceptors
15 that allow pain signals to travel through the sensory nerve fibers. (Audell Decl. ¶ 14; Fisk
16 Decl. ¶¶ 13-14.) Generally, once these changes occur, a person may experience
17 hyperalgesia, an increased response to a normally painful stimulus, and allodynia, a pain
18 response to a stimulus that does not normally produce pain. (*Id.* ¶ 15.)

19
20 According to the National Institute of Neurological Disorders and Stroke, Central
21 Pain Syndrome is distinct: it is a “neurological condition caused by physical damage to
22 or dysfunction of the central nervous system (CNS),” which is typically the result of
23 “stroke, multiple sclerosis, tumors, epilepsy, brain or spinal cord trauma, or Parkinson’s
24 Disease. . . .” (Audell Decl. ¶ 22.)

25 Although Mr. Brewington posits that he has Central Pain Syndrome, there is little
26 support in the record that Mr. Brewington suffers from that condition as it has been
27 defined by the National Institute of Neurological Disorders and Stroke. First, Mr.
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1 Brewington has not experienced any of the typical causes of the syndrome, such as
2 stroke, multiple sclerosis, tumors, epilepsy, brain or spinal cord trauma, or Parkinson’s
3 Disease. (*See* Defendant’s Exhibit 101.) Moreover, two MRIs of Mr. Brewington’s
4 brain have not revealed any evidence of physical damage to the central nervous system.
5 (Trial Declaration of Edwin Amos, M.D. (“Amos Decl.”) ¶ 17 [Doc. # 65].)

6 Defendant, on the other hand, asserts that Mr. Brewington has Opioid-Induced
7 Hyperalgesia (“OIH”), which Defendant argues is also closely associated with altered
8 central pain processing. OIH is a condition caused by exposure to opioids whereby a
9 patient receiving opioids for the treatment of pain paradoxically becomes more sensitive
10 to painful stimuli. (Fisk Decl. ¶ 19; Plaintiff’s Exhibit 22 (“A Comprehensive Review of
11 Opioid-Induced Hyperalgesia”).)

12 The evidence does not establish that Mr. Brewington has OIH. One of the
13 hallmarks of OIH is the worsening of pain at the original site or the appearance of distant
14 and more diffuse pain throughout the body. (*Id.*) First, with respect to worsening pain,
15 the record does not reflect definitive instances where Mr. Brewington’s pain increased
16 after taking opioids or decreased after ceasing to use opioids, which would be consistent
17 with OIH. Instead, Mr. Brewington has generally experienced some relief after taking
18 opioids. (*See, e.g.*, Fisk Decl. ¶ 6(13), (15), (16), (20), (30), (31) (summary of notes in
19 medical record); ¶ 19.)

20 Second, with respect to distant or diffuse pain, Mr. Brewington has reported pain
21 in areas as disparate as his left leg and buttock and thigh areas. (*See* Fisk Decl. ¶ 6(28)
22 (summary of September 26, 2012 note in medical record).) The parties disagree as to
23 whether pain in these areas constitutes “diffuse” pain. Plaintiff asserts that diffuse pain
24 would be distributed more evenly across the body and would radiate outward from a
25 location on the body. Defendant, on the other hand, argues that discrete pockets of pain,
26 so long as they are located other than in the left eye, indicate diffuse pain. The Court
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1 declines to resolve this issue in light of the conflicting medical testimony presented at
2 trial.

3 Although there are instances in Mr. Brewington’s medical record where OIH is
4 mentioned as a possible concern, he was never diagnosed with OIH. (Defendant’s
5 Exhibit 101 at 44, 357, 362, 577, 702, 745, 759.) Nor did Mr. Brewington’s doctors at
6 the VA prescribe treatment—namely, cessation of opioid use—that would be appropriate
7 for an OIH diagnosis. Instead, the VA continued to prescribe opioids at ever-increasing
8 dosages to Mr. Brewington. (*See* Defendant’s Exhibit 101.)

9 In short, it has not been shown by a preponderance of the evidence in the record
10 that Mr. Brewington has OIH.

11 Although the Court cannot find by a preponderance of the evidence that Mr.
12 Brewington has Central Pain Syndrome, Centralization of Pain Syndrome, or OIH, the
13 record is clear that Mr. Brewington has chronic pain resulting from the Velcade injection.
14 As a result of the chronic pain, Mr. Brewington has taken increasing dosages of opioids
15 and, in the process, developed opioid tolerance. (*See* Fisk Decl. ¶ 6(32) (“Mr.
16 Brewington is thinking about going off meds for a while as he believes he is developing a
17 tolerance to it – in the past, this seems to have worked for him.”).) A person with opioid
18 tolerance requires more opioids to achieve the same pain-dampening effect. Moreover,
19 Mr. Brewington’s prolonged opioid use has exacerbated other problems, such as
20 hypogonadism and sleep apnea. (*See* Fisk Decl. ¶ 6(28) (medical record noted secondary
21 hypogonadism from pain medication use); (30) (note in medical record indicated
22 concerns with prolonged regimen of high dose opioids on Mr. Brewington’s endocrine
23 function, immune system function, and central sleep apnea).)

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25 2. Medication Overuse / Rebound Headaches

26 Mr. Brewington has Medication Overuse Headaches (“MOH”). The International
27 Classification of Headache Disorders (3rd edition) has defined MOH as a chronic
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1 headache disorder in which the headache occurs for more than three months on 15 or
2 more days per month due to regular overuse of medication. Medications most implicated
3 in MOH include opioids such as methadone and dilaudid, triptans, combination
4 analgesics, and anti-inflammatories. (Audell Decl. ¶ 16.)

5 3. Depression and Anxiety

6 Mr. Brewington has depression and anxiety, which were caused by the Velcade
7 injection. Both can worsen pain. (Fisk Decl. ¶ 25i, j.) Although the Court does not find
8 that Mr. Brewington has OIH, his increasing tolerance to opioids has heightened his use
9 of opioids. The prolonged use of opioids has affected his wellness in other areas, such as
10 his libido and ability to sleep, deepening his depression and anxiety. This in turn has
11 negatively impacted his experience of pain, propelling him to seek higher dosages of
12 opioids to address the pain.

13 4. Cognitive Dysfunction

14 Absent a structural brain problem or chemical meningitis, neither of which Mr.
15 Brewington demonstrated he has, Mr. Brewington's cognitive dysfunction is likely due to
16 incompletely treated depression and narcotic medication side effects. (Amos Decl. ¶¶ 17,
17 24.) Any cognitive dysfunction is thus not directly attributable to the Velcade injection
18 and is potentially remediable. (Amos Decl. ¶ 21.)

19 5. Summary Prognosis

20 Mr. Brewington suffered an injury to his left eye caused by an injection of
21 Velcade, which caused inflammation to the orbit of the eye and the optic nerve, acute
22 pain, and irreversible blindness in that eye. Although the orbital inflammation has
23 subsided, the severity or duration of the acute pain Mr. Brewington experienced changed
24 the central nervous system pathways that process painful stimuli. Mr. Brewington now
25 experiences chronic pain. Because of his complaints of chronic pain, Mr. Brewington
26 was prescribed opioids at increasing dosages, eventually developing opioid tolerance.
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1 Nothing is preventing Mr. Brewington, however, from participating in a comprehensive
2 pain management and rehabilitation program. (Fisk Decl. ¶ 16.)

3 The Velcade injection also led to depression and anxiety, for which he also takes
4 medication. He has been or is prescribed medication for other conditions, such as sleep
5 apnea, low testosterone, and hypertension. As a result of his heavy use of medication,
6 Mr. Brewington experiences Medication Overuse Headaches. Mr. Brewington also
7 exhibits mild cognitive dysfunction, but it is not directly attributable to the injection.

8 Mr. Brewington has retained normal sight in his right eye. Furthermore, he does
9 not have deep vein thrombosis, significant cardiac disease, endocrine disease (except low
10 testosterone), urologic disease (except low libido), or gastrointestinal disease. (*See*
11 Defendant's Exhibit 101.) Mr. Brewington also drives an unmodified car, albeit on a
12 limited basis. (PTO ¶ 6b.)

13 Mr. Brewington's life expectancy as an African American 46.4-year-old male is
14 28.61 years. (Declaration of Jerald Udinsky ("Udinsky Decl.") ¶ 12.)

15 In light of the factual findings above, the Court concludes that, even were he to
16 learn to manage his pain without heavy dependence on opioid medication, Mr.
17 Brewington will not be able to return to work because of his chronic pain, depression,
18 and anxiety, which were caused by the injection. Given the nature and range of Mr.
19 Brewington's ailments, the prognosis for his recovery to the point where he can regain
20 his ability to work is poor.

21 **C. Award of Damages**

22 1. Future Health Care and Life Plan Needs

23 Mr. Brewington has incurred no medical expenses up to the point of trial because
24 all of his care has been provided and paid for by the VA. (PTO 5e, f.) With respect to
25 future medical benefits, should Mr. Brewington choose not to continue receiving medical
26 care at the VA, the Affordable Care Act ("ACA") ensures that Mr. Brewington will have
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1 access to insurance covering his future medical care needs as a result of the Velcade
2 injection. (Pub.L. No. 111, 148, 124 Stat. 119 (Mar. 23, 2010).) Mr. Brewington has
3 access to health insurance plans on California’s health benefit exchanges. (*See* California
4 Health Benefit Exchange, <http://hbex.coveredca.com/> (last visited July 16, 2015).)

5 Based upon the Court’s factual findings, described *supra*, a review of the relevant
6 health care services provided for in the parties’ respective life care plans, and Mr.
7 Brewington’s access to ACA coverage, the Court finds by a preponderance of the
8 evidence that \$725,147.25 is a reasonable amount to award Mr. Brewington for his future
9 health care expenses.

10 2. Back and Front Pay

11 For 10 months prior to the Velcade injection, Mr. Brewington had not been
12 employed as a production scheduler. (PTO ¶ 6a.) Based upon his earning history and the
13 published wage data for production schedulers in Los Angeles County, Mr. Brewington’s
14 earning capacity in the last year that he worked prior to his injury as a contract production
15 scheduler was about \$42,000 per year. (Declaration of Roger Thrush, Ph.D. (“Thrush
16 Decl.”) ¶ 6 [Doc. # 62].) Given Mr. Brewington’s lack of any documented earning
17 history as a personal trainer and the absence of any reliable data on wages of self-
18 employed personal trainers, it is too speculative to conclude what Mr. Brewington would
19 have earned had he become a self-employed part-time personal trainer. (*Id.*)

20 As of June 30, 2015, the present cash value of Mr. Brewington’s past and future
21 lost earnings as a result of the Velcade injection is \$632,536.

22 3. Pain and Suffering Damages

23 Based on the totality of the circumstances, and having considered the evidence and
24 all of the relevant factors, the Court finds that \$250,000 is reasonable compensation for
25 Mr. Brewington’s past and future pain and suffering.

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II.

CONCLUSIONS OF LAW

A. California Law Applies Under the Federal Tort Claims Act

In an action brought pursuant to the Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 2671 *et seq.*, the law of the place where the allegedly negligent act or omission occurred governs the substantive law applied. 28 U.S.C. § 1346(b); *Richards v. United States*, 369 U.S. 1, 9, 82 S. Ct. 585, 591, 7 L. Ed. 2d 492 (1962). To have a cognizable claim, the claim must arise from the negligent or wrongful act of a government employee acting within the scope of his employment under circumstances where the United States, if it were a private individual, would be liable under the law of the state where the claim arose. 28 U.S.C. § 1346(b)(1); *Firebaugh Canal Water Dist. v. United States*, 712 F.3d 1296, 1303 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1300, 188 L. Ed. 2d 303 (2014). California law is applicable because the accident occurred in California.

B. Plaintiff Must Prove His Claimed Damages Were Caused by the United States’ Acts

In California, plaintiffs must prove by a preponderance of the evidence that their claimed damages were caused by the negligent acts or omissions of an employee of the United States. *See* 28 U.S.C. § 2674; Cal. Evid. Code § 115. Defendant admits liability for injecting Velcade into Mr. Brewington’s left eye, causing irreversible blindness. Therefore, the only element of his negligence claim is the resulting loss or damage. *See Johnson v. Super. Ct.*, 143 Cal. App. 4th 297, 305 (2006).

C. Plaintiff’s Recovery

1. *Economic Damages: Future Medical Expenses*

To recover damages for future medical expenses, Mr. Brewington must prove by a preponderance of the evidence: (1) the reasonable value of each of the expected future medical expenses; (2) that the future medical care, services, and supplies are reasonably certain to be needed and given in treatment of the injury; and (3) that the condition

1 requiring the future medical care is causally connected to the injuries inflicted by the
2 United States. *Dimmick v. Alvarez*, 196 Cal. App. 2d 211, 216, 16 Cal. Rptr. 308 (1961).
3 Future medical expenses may not be awarded if they are deemed speculative. *See*
4 *Scognamillo v. Herrick*, 106 Cal. App. 4th 1139, 1150-51, 131 Cal. Rptr. 2d 393 (2003).

5 Defendant asserts an affirmative defense of offset for collateral sources under
6 California’s Medical Injury Compensation Reform Act of 1975 (“MICRA”). In
7 particular, Defendant seeks to introduce evidence of Affordable Care Act coverage as a
8 collateral source of future medical care expenses. Under Section 3333.1(a) of the
9 California Civil Code, medical malpractice defendants may introduce evidence of “any
10 amount payable as a benefit to the plaintiff as a result of the personal injury” under “any
11 health, sickness or income-disability insurance, accident insurance that provides health
12 benefits or income-disability coverage, and any contract or agreement of any group,
13 organization, partnership, or corporation to provide, pay for, or reimburse the cost of
14 medical, hospital, dental, or other health care services.” Cal. Civ. Code § 3333.1(a).
15 “[S]ection 3333.1 does not preclude recovery of such damages, but rather, it allows the
16 trier of fact to decide how to apply the evidence in calculation of damages.” *S.H. ex rel.*
17 *Holt v. United States*, No. 2:11-CV-01963-MCE, 2014 WL 5501005, at *3 (E.D. Cal.
18 Oct. 30, 2014) (quoting *Hernandez v. Cal. Hosp. Med. Ctr.*, 78 Cal. App. 4th 498, 506,
19 93 Cal. Rptr. 2d 97 (2000)) (internal quotation marks and brackets omitted).

20 Although the Ninth Circuit determined in *Taylor v. United States*, 821 F.2d 1428,
21 1431-32 (9th Cir. 1987), that Section 3333.2 applies to FTCA actions, it has not explicitly
22 held yet that Section 3333.1(a) applies to an FTCA action. *S.H.*, 2014 WL 5501005, at
23 *4. Nor has it decided whether Section 3333.1(a) allows introduction of future collateral
24 source benefits. Other district courts have taken future insurance benefits into
25 consideration. *See Silong v. United States*, 2007 WL 2580543, at *13-18 (E.D. Cal. Sept.
26 5, 2007) (finding that Section 3333.1 allows the trier of fact to determine how to apply
27 future insurance benefits to damages calculation.); *Leung v. Verdugo Hills Hosp.*, 2013
28 WL 221654, at *4 (Jan. 22, 2013) (assuming without deciding that “the statute permits a

1 defendant to introduce evidence of future insurance benefits that the plaintiff is
2 reasonably certain to receive”). Thus, this Court finds it appropriate to take insurance
3 benefits available under the ACA into consideration in calculating reasonable future life
4 care plan needs.

5 2. Economic Damages: Lost Earnings

6 To recover damages for lost earnings, Mr. Brewington must prove by a
7 preponderance of the evidence the reasonable amount of the earnings lost on account of
8 his injuries from the injection. CACI No. 3903C (Sept. 2003). To recover damages for
9 future loss of earnings or earning capacity, Mr. Brewington must prove by a
10 preponderance of the evidence the following: (1) the reasonable amount of the expected
11 future income, earnings, salary, or wages; (2) that Mr. Brewington is reasonably certain
12 to lose such future income, earnings, salary, or wages; and (3) that the future lost income,
13 earnings, salary, or wages is causally connected to the injuries inflicted by the United
14 States. CACI No. 3903C (Sept. 2003).

15 3. Noneconomic Damages: Pain and Suffering

16 There is no fixed standard to calculate the amount a plaintiff is entitled to for pain
17 and suffering. Any damages awarded for pain and suffering, however, must be
18 reasonable and based on the evidence and factfinder’s common sense. CACI No. 3905A
19 (Dec. 2009). In addition, any award of pain and suffering damages must be causally
20 connected to the tortious act. *Miller v. San Diego Gas & Elec. Co.*, 212 Cal. App. 2d
21 555, 558, 28 Cal. Rptr. 126 (1963).

22 MICRA caps a plaintiff’s recovery of noneconomic damages for pain and suffering
23 at \$250,000. Cal. Civ. Code § 3333.2b; *Taylor*, 821 F.2d at 1431-32 (MICRA applies to
24 medical malpractice cases brought under the FTCA).

25 4. The Duty to Mitigate

26 The above findings of fact were made in recognition of California law, which has
27 long required plaintiffs to “take reasonable steps to mitigate [their] damages” and bars
28 “recover[y] for any losses which could have been thus avoided.” *Shaffer v. Debbas*, 17

1 Cal. App. 4th 33, 41, 21 Cal. Rptr. 2d 110 (1993). Mr. Brewington's future medical
2 expenses and pain and suffering damages have been caused at least in part by his failure
3 to mitigate damages by accepting the VA's repeated offers of a comprehensive pain
4 management and rehabilitation program. Although its conclusion is tempered by the fact
5 that successful completion of such a program depends in large part on an individual's
6 motivation to reduce opioid dependence and manage one's pain using alternative
7 techniques, the Court concludes that Mr. Brewington could have avoided some of his
8 future medical expenses and pain and suffering (both as a direct result of the injection
9 and as a side effect of his medication use) by agreeing to attend a comprehensive pain
10 management and rehabilitation program whether at the VA or elsewhere. Accordingly,
11 the Court took Plaintiff's failure to mitigate into account in calculating damages.

12 5. Attorney's Fees

13 Attorney's fees are limited to a maximum of 25% of any recovery. 28 U.S.C. §
14 2678.

15 **III.**

16 **CONCLUSION**

17 In light of the foregoing, the Court awards Plaintiff Stephan Brewington
18 \$725,147.25 in future medical expenses; \$632,536 in past and future lost earnings; and
19 \$250,000 in noneconomic damages. Plaintiff's counsel may submit a motion for
20 reasonable attorney's fees within 30 days from the date of this Order.

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22 DATED: July 24, 2015

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25 _____
26 DOLLY M. GEE
27 UNITED STATES DISTRICT JUDGE
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