

1 UNITED STATES DISTRICT COURT  
2 FOR THE EASTERN DISTRICT OF CALIFORNIA  
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6 C.B., a minor,

7 Plaintiff,

8 v.

9 SONORA SCHOOL DISTRICT; KAREN  
10 SINCLAIR; CITY OF SONORA; CHIEF OF  
11 POLICE MACE MCINTOSH; OFFICER HAL  
12 PROCK; DOES 1-10,

13 Defendants

1:09-cv-00285-OWW-SMS

MEMORANDUM DECISION RE  
PLAINTIFF'S MOTION FOR  
ATTORNEYS' FEES AND COSTS

(DOC. 176).

14 I. INTRODUCTION

15 Before the court is Plaintiff C.B.'s ("Plaintiff") Motion  
16 for Attorneys' Fees and Costs (Mot. Fees, ECF No. 176) and  
17 Supplemental Request for Attorneys' Fees (Supp. Mot. Fees, ECF  
18 No. 192). Defendants City of Sonora, Chief Mace McIntosh and  
19 Officer Hal Prock (collectively, "Defendants") oppose the motion.  
20 (Def. Opp'n, ECF No. 191.)  
21

22 II. FACTUAL BACKGROUND

23 This civil rights action arises from Officers McIntosh and  
24 Prock's (together, "Defendant Officers") September 29, 2008  
25 arrest of Plaintiff, then an eleven year-old student, at Sonora  
26 Elementary School. The case was tried before a jury beginning on  
27 August 23, 2011. On September 1, 2011, the jury returned a  
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1 verdict against Defendants on Plaintiff's Fourth Amendment claims  
2 for unlawful seizure and excessive force and pendant state law  
3 claims, and awarded Plaintiff \$285,000 in damages against  
4 Defendants. (Verdict, ECF No. 174.) Defendants filed a Motion for  
5 Judgment as a Matter of Law (Mot. JMOL, ECF No. 177) and Motion  
6 for New Trial (Mot NT, ECF No. 178), which were denied (Order,  
7 ECF No. 194.). Judgment was entered in favor of Plaintiff.  
8 (Judgment, ECF No. 195.) Plaintiff now moves for attorney's fees  
9 and costs pursuant to 42 U.S.C. § 1988 for violation of his  
10 federal civil rights.  
11

### 12 III. LEGAL STANDARD

13 Litigants "are required to bear the expenses of their  
14 litigation unless a statute or private agreement provides  
15 otherwise." *Carbonell v. INS*, 429 F.3d 894, 897-98 (9th Cir.  
16 2005). The Civil Rights Attorney's Fees Awards Act of 1976  
17 permits the award of attorney's fees in civil rights actions,  
18 providing:  
19

20 In any action or proceeding to enforce a provision of  
21 section ... 1983 of this title, ... the court, in its  
22 discretion, may allow the prevailing party ... a reasonable  
attorney's fee as part of the costs...."

23 42 U.S.C. § 1988. "The fee applicant bears the burden of  
24 establishing entitlement to an award and documenting the  
25 appropriate hours expended and hourly rates." *Hensley v.*  
26 *Eckerhart*, 461 U.S. 424, 437, 103 S. Ct. 1933 (1983).

27 A plaintiff must be a "prevailing party" to recover  
28

1 attorney's fees under 42 U.S.C. § 1988. *Id.* at 432. Once a  
2 determination is made that a plaintiff is a "prevailing party"  
3 and an award of attorney's fees is appropriate, the court must  
4 determine what fee is "reasonable." *Id.* at 433. This  
5 determination involves a two-step process. First, the court  
6 calculates a "lodestar" by multiplying (i) the number of hours  
7 the prevailing party reasonably expended on the litigation by  
8 (ii) a reasonable hourly rate. *Id.* Second, the lodestar may be  
9 adjusted upward or downward based on an evaluation of the *Kerr v.*  
10 *Screen Extras Guild, Inc.*, 526 F.2d 67-69-70 (9<sup>th</sup> Cir. 1975),  
11 factors which are relevant and not already subsumed in the  
12 initial lodestar calculation.<sup>1</sup> *McGrath v. Cnty. of Nevada*, 67  
13 F.3d 248, 252 (9<sup>th</sup> Cir. 1994).

#### 16 IV. DISCUSSION

17 Plaintiff requests an award of attorney's fees and costs  
18 under 42 U.S.C. § 1988.<sup>2</sup> Plaintiff seeks a total of \$194,025.13

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20 <sup>1</sup> The *Kerr* factors to consider in determining a reasonable attorney's fees  
21 award are:

22 (1) the time and labor required, (2) the novelty and difficulty of the  
23 questions involved, (3) the skill requisite to perform the legal service  
24 properly, (4) the preclusion of other employment by the attorney due to  
25 acceptance of the case, (5) the customary fee, (6) whether the fee is  
26 fixed or contingent, (7) time limitations imposed by the client or the  
27 circumstances, (8) the amount involved and the results obtained, (9) the  
28 experience, reputation, and ability of the attorneys, (10) the  
"undesirability" of the case, (11) the nature and length of the  
professional relationship with the client, and (12) awards in similar  
cases.

27 *Kerr*, 526 F.2d at 70; *McGrath*, 67 F.3d at 252 n.4.

28 <sup>2</sup> Plaintiff may seek attorney's fees and costs on his pendant state law claims

1 in attorneys' fees based on 544.25 hours of work and an hourly  
2 rate of \$356.50 per hour (which includes a 1.15 multiplier).  
3 Plaintiff also seeks \$26,382.85 in litigation expenses.

4 A. Prevailing Party

5 Defendants contend that Plaintiff's motion for attorney's  
6 fees is premature because Plaintiff is not a "prevailing party"  
7 under 42 U.S.C. § 1988 with a final judgment on the merits or an  
8 enforceable court order. Defendants assert that their motions for  
9 judgment as a matter of law and for new trial are still pending.

11 The term "prevailing party," as it is used in the attorney's  
12 fee statute, requires a "material alteration of the legal  
13 relationship of the parties." *Bennett v. Yoshida*, 259 F.3d 1097,  
14 1100 (9<sup>th</sup> Cir. 2001) (quoting *Buckannon Bd. & Care Home v. W. Va.*  
15 *Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001)).

17 The jury found in Plaintiff's favor on all the Section 1983  
18 claims and pendant state law claims asserted against Defendants  
19 and awarded damages totaling \$285,000. The jury's verdict altered  
20 the legal relationship of the parties. Defendants' motions for  
21 judgment as a matter of law and for new trial were denied.

22 (Order, ECF No. 194.). Judgment was entered in favor of  
23 Plaintiff. (Judgment, ECF No. 195.) Plaintiff is a "prevailing  
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25  
26 asserted against Defendants because the state law claims are based on a common  
27 nucleus of operative facts with Plaintiff's Fourth Amendment claims asserted  
28 under 42 U.S. § 1983. *Carreras v. Anaheim*, 768 F.2d 1039, 1050 (9<sup>th</sup> Cir. 1985)  
("When the plaintiff in a civil rights action prevails on a pendent state claim  
based on a common nucleus of operative fact with a substantial federal claim,  
fees may be awarded under § 1988.")

1 party" within the meaning of 42 U.S.C. §1988.

2 B. Attorney's Fees

3 1. Lodestar

4 a) Number of Hours

5 In submitting a fee request, counsel for the prevailing  
6 party should make a good faith effort to exclude hours that are  
7 "excessive, redundant or otherwise unnecessary from the fee  
8 request, just as he is obligated to exclude such hours from his  
9 fee submission." *Hensley*, 461 U.S. at 434. The district court  
10 should exclude hours that were not "reasonably expended." *McGrath*  
11 *v. Cnty. of Nev.*, 67 F.3d 248, 252 (9th Cir. 1995).

12 Plaintiff requests attorneys' fees for 544.25 hours.  
13 Plaintiff contends that Defendants vigorously litigated the case  
14 for over two and a half years through: (i) two Motions to  
15 Dismiss; (ii) a Motion for Summary Judgment (with fifty-six  
16 separate and allegedly undisputed facts presented by Defendants  
17 for Plaintiff's response); (iii) eight Motions in Limine; (iv)  
18 discovery that included Rule 26 reports and depositions of four  
19 expert witnesses and six lay witnesses; and (v) a trial over  
20 seven court days that included ten witnesses, time spent in  
21 chambers on jury instruction and verdict form conferences, and  
22 disputes over jury instructions, verdict forms, and admissibility  
23 of exhibits. (Hopkins Decl. ¶ 11, ECF No. 176-1.).

24 Defendants raise three objections to Plaintiff's hours.  
25 First, Defendants argue that Plaintiff's counsel failed to  
26  
27  
28

1 adequately document their hours and characterize their bills as  
2 devoid of "any detail whatsoever." (Def. Opp. 6:22, ECF No. 191.)  
3 The billing records have been reviewed in detail, and, contrary  
4 to Defendants' assertion, the level of detail is adequate. There  
5 is a delineation of services performed and hours expended for  
6 each service described.  
7

8         Second, Defendants contend that the amount awarded should be  
9 reduced for the performance of tasks that Defendants characterize  
10 as "duplicative, redundant, unnecessary." (Def. Opp. 7:4, ECF No.  
11 191.) Defendants argue that with the exception of mutual document  
12 productions, no written discovery was performed, but Plaintiff  
13 billed 5.3 hours over four days to the preparation, review, and  
14 service of written discovery. Discovery preparation and review  
15 are standard and expected part of every litigation. Even if  
16 Defendants did not respond to Plaintiff's written discovery  
17 requests, it is reasonable for Plaintiff's counsel to bill for  
18 its preparation. Defendants also contend that Plaintiff's counsel  
19 expended an excessive amount of hours on items that should have  
20 reasonably only taken a fraction of time to perform, such as  
21 legal research and drafting motions. After a detailed review of  
22 the billing records, it is concluded that the hours billed were  
23 reasonable under the circumstances for legal research what is  
24 described and the motions that were drafted and not excessive.  
25  
26

27         Third, Defendants contest the number of hours Plaintiff  
28

1 expended litigating the case against Defendants between October  
2 10, 2008 and November 6, 2009. Plaintiff litigated the case  
3 against Defendant School District and Coach Sinclair (together,  
4 "School District Defendants"), as well as Defendants, from  
5 October 10, 2008, but successfully mediated and settled his  
6 claims against School District Defendants on November 6, 2009.  
7 (Hopkins Decl. ¶ 7, ECF No. 176-1.) Plaintiff reduced the hours  
8 expended from October 10, 2008 to November 6, 2009 by 50%, i.e.,  
9 126.70 hours reduced to 63.35 hours. After reviewing the billing  
10 records from October 10, 2008 to November 6, 2009, the 50%  
11 reduction is a reasonable apportionment of the hours expended  
12 between School District Defendants' portion of the case and the  
13 remaining Defendants.  
14

15  
16 Plaintiff's request for attorney's fees based on 544.25  
17 hours is GRANTED.

18 b) Hourly Rate

19 In granting attorney's fees, the district court "must strike  
20 a balance between granting sufficient fees to attract qualified  
21 counsel to civil rights cases and avoiding a windfall to  
22 counsel." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9<sup>th</sup>  
23 Cir. 2008) (citations omitted). "The way to do so is to  
24 compensate counsel at the prevailing rate in the community for  
25 similar work; no more, no less." *Id.*  
26

27 Plaintiff requests attorney's fees based on a rate of  
28

1     \$356.50 per hour, which adds 15% to the \$310 per hour 2008-2011  
2 rate of the Law Offices of John F. Martin, P.C., which is based  
3 in Walnut Creek, California. Plaintiff contends that \$356.50 is  
4 the prevailing market hourly rate for Plaintiff's attorneys in  
5 Fresno, California. It is not.

6  
7             Plaintiff was primarily represented by Christine Hopkins,  
8 who has been practicing law for five years since 2005. (Hopkins  
9 Decl. ¶ 1, ECF No. 176-1.) Plaintiff was also represented by John  
10 Martin, who has 39 years of legal experience. (*Id.*) Based on the  
11 court's experience and knowledge of the prevailing market rate in  
12 Fresno, California for a plaintiff's civil rights attorney with  
13 the time in practice and trial experience of Plaintiff's primary  
14 counsel (first jury trial) is \$300 per hour. This assessment is  
15 supported by Plaintiff's counsel's declaration and supporting  
16 exhibits:  
17

- 18         • Rayma Church, Esq. of Emerson, Corey, Sorenson, Church &  
19         Libke [a 1991 law school graduate] stated that she charges  
20         a rate of \$300 per hour for Plaintiff's civil rights cases  
21         in the Fresno area and her Senior Partner charges \$350 per  
22         hour. She last did a survey of Plaintiff's civil rights  
23         attorney billing rates in 2003 and at that time the fees  
24         in the Fresno area ranged from \$300 to \$400. (Hopkins  
25         Decl. ¶ 12, ECF No. 176-1.)
- 26         • Dean Gordon sent me copies of declarations filed in  
27         attorney fees motions in 2006 in Fresno courts which  
28         reflected his rates of \$250 to \$300 per hour in civil  
29         rights litigation (employment) at that time. (Hopkins  
30         Decl. ¶ 12, ECF No. 176-1.)
- 31         • Mark Coleman, who practices plaintiff's civil litigation  
32         (including civil rights matters) in the Fresno area, and  
33         who stated that he was familiar with the fee range being



1 charged by civil rights plaintiff's counsel in that local  
2 market . . . informed me that rates ranged between \$150.00  
3 per hour to \$450.00 per hour, depending upon the skill,  
4 experience, and reputation of the individual attorney.  
(Wilson Decl. ¶ 8, June 16, 2009, Ex. E to Hopkins Decl.,  
ECF No. 176-3.)

- 5 • Scott Quinlan, who [has been practicing] both plaintiff's  
6 and defense civil rights litigation in the Fresno area . .  
7 . since 1986 . . . quotes a fee rate of \$225.00 per hour.  
(Wilson Decl. ¶ 9, June 16, 2009, Ex. E to Hopkins Decl.,  
ECF No. 176-3.)

- 8 • Patience Mildred, who [has been practicing] Plaintiff's  
9 civil rights litigation in the Fresno area . . . since  
10 1983 . . . quotes a fee rate of \$350. (Wilson Decl. ¶ 10,  
June 16, 2009, Ex. E to Hopkins Decl., ECF No. 176-3.)

11 Plaintiff's submission of the United States Consumer Law  
12 Attorney Fee Survey is not helpful. That Survey shows the average  
13 legal rates for California as a whole, not the Fresno District of  
14 the Eastern District of California in particular. Plaintiff's  
15 submission of the Laffey Matrix is similarly not helpful. The  
16 Laffey Matrix surveys firms in Washington D.C. Plaintiff does not  
17 offer any evidence to justify his estimation that the Laffey  
18 Matrix numbers would only be reduced by 2% to reflect the Fresno  
19 market.  
20

21 Plaintiff's request for attorney's fees based on a rate of  
22 \$356.50 per hour is DENIED. Plaintiff's award of attorney's fees  
23 shall be calculated using a rate of \$300 per hour.  
24

## 25 2. Multiplier

26 If Plaintiff's attorney's fees request based on a rate of  
27 \$356.50 per hour is denied, Plaintiff asks that his hourly fee  
28 rate be increased by a 1.15 multiplier under the *Kerr* factors.

1 Plaintiff asks the court to take into account: (i) the results  
2 obtained as compared to Defendants' valuation of the case and  
3 Rule 68 Offer of Judgment; (ii) the novelty of legal questions  
4 involved in this case; and (iii) the skill, time and labor  
5 required to prevail on these novel issues.  
6

7 The award of attorney's fees, calculated at \$300 per hour  
8 for 544.25 hours, is reasonable and does not require an increase.  
9 Although Plaintiff obtained a favorable result, the case did not  
10 present any novel legal questions. Plaintiff asserted standard  
11 Fourth Amendment claims against Defendants for unlawful seizure  
12 and excessive force and pendant state law claims for battery,  
13 unlawful imprisonment, and intentional infliction of emotional  
14 distress. These claims did not require any particular skill,  
15 time, or labor to prevail.  
16

17 Plaintiff's request to enhance the lodestar fee by a  
18 multiplier of 1.15 is DENIED.

19 C. Expenses

20 Plaintiff seeks reimbursement for \$26,382.85 in expenses in  
21 addition to the \$11,063.08 requested in the Bill of Costs. These  
22 additional costs include: (i) \$19,249.64 in expert witness fees  
23 paid to Plaintiff's expert witnesses above the \$40 witness fee  
24 and mileage; (ii) \$2,902.50 in fees charged to Plaintiff by  
25 Defendants' expert witnesses for their time at depositions; and  
26 (iii) \$4,230.71 in postage, facsimile, travel, mileage, and  
27 attorney lodging during trial.  
28

1 Defendant protests that there is no legal basis to grant  
2 Plaintiff's request for expenses above the Bill of Costs.  
3 Plaintiff cites a Ninth Circuit case that permit recovery under  
4 42 U.S.C. § 1988 for out of pocket expenses that "would normally  
5 be charged to a fee paying client." *Harris v. Marhoefer*, 24 F.3d  
6 16, 19 (9th Cir. 1994). Reasonable attorney's fees, however, do  
7 not include costs that, like expert fees, have by tradition and  
8 statute been treated as a category of expenses distinct from  
9 attorney's fees. *Trs. Of the Constr. Indus. & Laborers Health &  
10 Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1258 (9<sup>th</sup> Cir.  
11 2006). Plaintiff may request reimbursement for postage,  
12 facsimile, travel, mileage, and attorney lodging as permitted by  
13 law with the Bill of Costs.

14 Plaintiff's request for \$26,382.85 in expenses is not  
15 permissible and is DENIED under 42 U.S.C. § 1988.

17 V. CONCLUSION

18 For the reasons stated:

19 1. Plaintiff's Motion for Attorney's Fees GRANTED in part and  
20 DENIED in part, as follows:

21 a. Plaintiff is GRANTED attorney's fees for 544.25 hours  
22 at a rate of \$300 per hour, for an attorney's fees  
23 award of \$163,275.

24 b. Plaintiff's request for \$26,382.85 in expenses is  
25 DENIED.  
26

27 //

