UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID BARBOZA,

Plaintiff,

v.

CALIFORNIA ASSOCIATION OF PROFESSIONAL FIREFIGHTERS, et al.,

Defendants.

No. 2:08-cv-0519-KJM-EFB

ORDER

David Barboza brought this action under the Employees Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq*. Judgment was recently entered following a third round of dispositive cross-motions. Barboza now seeks attorneys' fees. As explained below, the motion is GRANTED IN PART.

I. BACKGROUND

The parties do not dispute the basic factual and procedural underpinnings of this case. *See* Mot. Fees 2–6, ECF No. 177; Opp'n 1 & n.1, ECF No. 180. The following summary is drawn from the court's previous orders. ECF Nos. 103,[1] 172.[2]

[1] This order is reported at *Barboza v. California Association of Professional Firefighters*, No. 08-0519, 2012 WL 4490981 (E.D. Cal. Sept. 30, 2012), *aff'd in part, vacated in part, rev'd in part*, 594 F. App'x 903 (9th Cir. 2014).

David Barboza was a firefighter for the City of Tracy, California. In 2006, the City placed him on disability retirement as a result of a back injury and peripheral neuropathy in his legs. A few months later, he filed a claim for disability benefits under the California Association of Professional Firefighters (CAPF) Long Term Disability Plan (the Plan), which claim was eventually denied in 2007 because the Plan had no documentation of his disability. Barboza filed an administrative appeal, and the Plan's administrative body held a hearing. Two weeks after the hearing, before the appeal was decided, Barboza filed his complaint in this case.

About six weeks after Barboza's complaint was filed, his administrative appeal was decided. CAPF reversed the previous denial of benefits but reduced Barboza's award by an amount equal to one year of his pay. In reaching this decision, it cited Plan provisions that impose "offsets" or deductions on benefits when the participant waives or forfeits pay that he or she would otherwise have been eligible to receive from a third-party source. In Barboza's case, CAPF found Barboza had waived or forfeited pay he was entitled to receive under section 4850 of the California Labor Code.[3]

After the Plan issued its decision on appeal, Barboza settled a workers' compensation claim with the City of Tracy and received $18,000. He did not notify the defendants of this settlement. Neither did he notify the defendants he owned an alpaca ranch, worked intermittently for a digital media company and a railroad, and had other self-employment income.

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[2] This order is reported at *Barboza v. California Association of Professional Firefighters*, ___ F. Supp. 3d ___, 2015 WL 7273215 (E.D. Cal. Nov. 17, 2015), *appeal filed*, No. 15-17300 (9th Cir. Nov. 23, 2015).

[3] That section provides in relevant part as follows: "Whenever any person listed in subdivision (b), who is employed on a regular, full-time basis, and is disabled, whether temporarily or permanently, by injury or illness arising out of and in the course of his or her duties, he or she shall become entitled, regardless of his or her period of service with the city, county, or district, to a leave of absence while so disabled without loss of salary in lieu of temporary disability payments or maintenance allowance payments, if any, that would be payable under this chapter, for the period of the disability, but not exceeding one year, or until that earlier date as he or she is retired on permanent disability pension, and is actually receiving disability pension payments, or advanced disability pension payments pursuant to Section 4850.3. . . . The persons eligible under subdivision (a) include all of the following: . . . (2) City, county, or district firefighters." Cal. Lab. Code § 4850(a), (b)(2).

The defendants answered Barboza's federal complaint, and the parties filed cross motions for judgment on the administrative record. The defendants advanced four principal arguments. First, they argued Barboza had not exhausted his administrative remedies. Second, they argued that should the case nonetheless go forward, the correct standard of review was for abuse of discretion. Third, the defendants argued they had discretion to reduce or offset Barboza's benefits by the amounts he would have received under section 4850. And fourth, the defendants argued they were entitled to reduce Barboza's award by the $18,000 he received in the settlement of his workers' compensation claim.

In mid-2009, the court granted the defendants' motion and denied Barboza's motion. The court found Barboza had not exhausted his administrative remedies and therefore did not reach the merits of his case. Barboza appealed the order to the Ninth Circuit, and in mid-2011, the circuit court reversed in a published opinion, concluding Barboza's administrative remedies were deemed exhausted. *See generally Barboza v. Cal. Ass'n Prof'l, Firefighters*, 651 F.3d 1073 (9th Cir. 2011). The case was remanded for litigation on the merits.

The parties undertook discovery, and in January 2012, the defendants requested leave to file an amended counterclaim. They had learned about Barboza's alpaca ranch, self-employment income, and income from the media company and railroad during discovery, and sought leave to assert claims for equitable relief. *See* 29 U.S.C. § 1132(a)(3)(B). The court granted the motion. The counterclaim asserted the defendants' right to an equitable lien on Barboza's self-employment and other undisclosed earnings.

Following discovery, in April 2012, the parties filed cross-motions for summary judgment. With the exception of the defendants' counterclaim, these motions addressed substantially the same points and arguments as in the parties' pre-appeal motions. After a hearing, in September 2012, the court granted and denied the motions in part. First, the court held that the correct standard of review was abuse of discretion. Second, the court held that CAPF had not abused its discretion by reducing Barboza's benefits by the amount of pay he could have received under section 4850, had he applied for it. The court also reduced Barboza's award by the $18,000 he had received in the settlement of his workers' compensation claim. Third, the

court rejected the defendants' argument that they were entitled to an equitable lien on the entirety of Barboza's gross self-employment income, but granted an equitable lien on the approximately $1,200 he had earned during his employment with the media company and railroad. Fourth, the court denied Barboza's motion for statutory penalties under ERISA. Fifth, the court granted Barboza's motion for injunctive relief and ordered Barboza to comply with the Ninth Circuit's 2011 opinion. The parties filed cross-appeals.

The parties also both requested attorneys' fees. The court denied the motions, finding that although the parties had each achieved some degree of success on the merits of their claims, neither had acted in bad faith, neither had enjoyed significantly greater success than the other, and an award of fees would not properly deter any future wrong. Later, in addition to requesting fees, defendants asked the court to reconsider its decision to grant Barboza injunctive relief and requested the judgment be amended accordingly. They argued injunctive relief was unnecessary because the Plan had brought its practices within the bounds of the Ninth Circuit's 2011 opinion. The court denied the motion on the absence of admissible evidence showing injunctive relief was unnecessary. Both parties appealed the court's decision on fees, and the defendants appealed the decision on injunctive relief.

The Ninth Circuit issued a memorandum disposition in late 2014. *See Barboza v. California Ass'n of Prof'l Firefighters*, 594 F. App'x 903 (9th Cir. 2014). First, the circuit court found this court had not erred by reviewing the administrative decision for an abuse of discretion. Second, it held this court had "erred in holding that the Plan was entitled to set off a full year of section 4850 benefits against Barboza's benefit award." *Id.* at 906. It identified an unresolved question of fact "as to whether the Plan required Barboza to retire in a manner that would entitle him to a full year of section 4850 benefits," *id.*; however, the circuit court affirmed this court's finding that the defendants had not abused their discretion by offsetting Barboza's benefits by the amount of his workers' compensation settlement. Third, the circuit found this court had not erred by holding Barboza's other income could offset his benefits only in the amount of his net earnings, not his gross earnings. Fourth, the circuit affirmed this court's decision not to award statutory penalties under ERISA. Fifth, the circuit court vacated this court's injunction, finding

its 2011 decision rendered that relief moot. And finally, the circuit court found this court had not abused its discretion in denying both parties' motions for attorneys' fees.

The case was remanded to this court on two issues: (1) "whether the Plan required Barboza to retire in a manner that would entitle him to a full year of section 4850 benefits"; and (2) whether Barboza's request for prejudgment interest would be granted and in what amount. The parties filed cross-motions for summary judgment on these issues, and the court issued an order in late 2015. First, the court found the parties agreed that the Plan instruments neither directly nor impliedly required Barboza to retire in a manner that would entitle him to a full year of pay under section 4850. The court therefore found that the defendant's decision to offset this pay was an abuse of discretion and granted Barboza summary judgment to that extent. Second, the court awarded Barboza prejudgment interest at a rate of 5 percent, the rate he requested, in light of the fact that the interest rates he actually paid on a home equity line of credit to cover his expenses were significantly higher than the rate prescribed by 28 U.S.C. § 1961. The defendants appealed this decision, and the appeal remains pending.

Barboza filed this motion for attorneys' fees on December 15, 2015. Mot. Fees, ECF No. 177. The defendants opposed the motion, ECF No. 180, and Barboza replied, ECF No. 184. The matter was submitted for decision without a hearing. After Barboza's reply brief was filed, the defendants filed evidentiary objections and moved to strike portions of the declarations attached to the plaintiffs' reply brief. Mot. Strike, ECF No. 185. Barboza responded. Opp'n Strike, ECF No. 186. Neither party suggests the court should delay its order on this motion until the appeal of its November 2015 order is resolved.

II. SUCCESS ON THE MERITS

In most ERISA cases, the court may award a reasonable attorney's fee and costs to either party. 29 U.S.C. § 1132(g)(1); *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 244 (2010). One who claims a fee under § 1132(g)(1) need not be the prevailing party; rather, "some degree of success on the merits" will do. *Hardt*, 560 U.S. at 255. A litigant achieves this goal "if the court can fairly call the outcome of the litigation some success on the merits without conducting a 'lengthy inquir[y] into the question whether a particular party's success was

substantial or occurred on a central issue.'" *Id.* (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 688 (1983)) (alterations in *Hardt*). "Trivial" successes and "purely procedural" victories fall short of the mark. *Id.*

The defendants read *Hardt* incorrectly to hold that a fee may be awarded only if Barboza's success was undeniably substantial or central. *See* Opp'n at 2 ("[I]n order for a plaintiff to recover attorney fees in an ERISA action, it must be so obvious that his 'success was substantial or occurred on a central issue' that 'the court can fairly call the outcome of the litigation . . . without conducting a lengthy inquiry' to make such determinations." (quoting 560 U.S. at 255)). Rather, in *Ruckelshaus v. Sierra Club*,[4] the Court explained that by allowing attorneys' fees in an "appropriate" case, "Congress meant merely to avoid the necessity for lengthy inquiries into the question whether a particular party's success was 'substantial' or occurred on a 'central issue.'" 463 U.S. at 688 & n.9. This language is "meant to expand the class of parties eligible for fee awards from prevailing parties to *partially prevailing* parties—parties achieving *some success*, even if not major success." *Id.* at 688 (emphasis in original).

Here, Barboza identifies four successes as the basis for a fee award. First, he argues that the very filing of this lawsuit pressured the defendants into recognizing his disability and eligibility for benefits. Mot. Fees at 7. The connection between the defendants' decision to issue a decision in the administrative process and Barboza's lawsuit is a weak one at best. It is undisputed the defendants alerted Barboza that they intended to address section 4850 in early 2008, before he filed his federal complaint. If Barboza were correct that the defendants reversed course on his disability and eligibility only after this lawsuit was filed, they would have had no reason to address section 4850 at the administrative hearing. The resolution of his administrative appeal and his early-case practice therefore does not support this motion.

Second, Barboza argues he achieved success when the Ninth Circuit held his administrative remedies should be deemed exhausted in its 2011 opinion. Mot. Fees at 7. In

[4] The *Hardt* Court expressly adopted the rule of *Ruckelshaus* for claims under § 1132(g)(1). *See* 560 U.S. at 255 ("*Ruckelshaus* lays down the proper markers to guide a court in exercising the discretion that § 1132(g)(1) grants.").

response, the defendants point out that the parties already negotiated a fee award for time spent litigating that issue, and Barboza received compensation in line with those negotiations. *See* Begley Decl. ¶ 4, ECF No. 83-2. In reply, Barboza does not dispute this characterization. The court therefore finds this success cannot serve as a basis for an award now.

Third, Barboza argues he successfully persuaded both this court and the Ninth Circuit that only his net earnings, rather than his gross earnings, may be offset against his disability benefits. Mot. Fees at 7–8. This success cannot support his motion here. He raised the same argument in his previous motion for attorneys' fees, *see* Prev. Mot. Fees 6, ECF No. 114, this court declined to award any fees on this basis, Order Aug. 6, 2013, at 6, ECF No. 132, and the Ninth Circuit affirmed that decision, 594 F. App'x at 906–07. The relevant law and evidence have not changed since then. The court declines to reconsider its decision on that award now, which remains undisturbed in this respect. By the same reasoning, the court declines to grant any award on the basis of Barboza's success in obtaining injunctive relief.

Lastly, Barboza argues he successfully appealed this court's decision denying his motion for summary judgment on the question of pay under section 4850. Similarly, he argues that he succeeded on the merits of his post-remand motion for summary judgment late last year, when this court found that no Plan provisions expressly or impliedly required him to retire in a particular manner. He also argues he succeeded in securing five percent prejudgment interest, the full amount he requested. The defendants do not seriously dispute that these dispositions represent "some degree of success on the merits." The court agrees the Ninth Circuit's reversal and this court's order granting summary judgment and prejudgment interest are sufficient successes on the merits to support a request for attorneys' fees under 29 U.S.C. § 1132(g)(1).

III. *HUMMELL* FACTORS

After an ERISA litigant shows it has achieved some degree of success on the merits, the court's discretion to award a fee is guided by five considerations commonly referred to as the *Hummell* factors, after the Ninth Circuit's decision in *Hummell v. S.E. Rykoff & Co.*:

> (1) the degree of the opposing parties' culpability or bad faith;
> (2) the ability of the opposing parties to satisfy an award of fees;
> (3) whether an award of fees against the opposing parties would

> deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions.

Simonia v. Glendale Nissan/Infiniti Disability Plan, 608 F.3d 1118, 1121 (9th Cir. 2010) (quoting *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980)). No single factor of the five is decisive, and some may even be irrelevant, depending on the case. *Id.* at 1122. Moreover, when a plaintiffs' success is evident on the face of the previous order, "it is unnecessary for the court to engage in a discussion of the factors enumerated in *Hummell*." *Nelson v. EG & G Energy Measurements Grp., Inc.*, 37 F.3d 1384, 1392 (9th Cir. 1994). This is true, for example, should the plaintiff prevail on summary judgment. *United Steelworkers of Am. v. Ret. Income Plan For Hourly-Rated Employees of ASARCO, Inc.*, 512 F.3d 555, 564 (9th Cir. 2008). The court nevertheless addresses these factors in the interest of clarity and completeness.

A. Application of *Hummell* Factors Generally; "Special Circumstances" Test

When applying the *Hummell* factors, the court must bear in mind the underlying purpose of ERISA: "to protect the interests of participants in employee benefit plans." *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir. 1984). The Ninth Circuit has regularly confirmed this rule. *See, e.g.*, *LeGras v. AETNA Life Ins. Co.*, 786 F.3d 1233, 1236 (9th Cir. 2015); *Resilient Floor Covering Pension Fund v. M&M Installation, Inc.*, 630 F.3d 848, 854 (9th Cir. 2010). And in several decisions, the Ninth Circuit has held that ERISA plan beneficiaries should recover their attorneys' fees unless "special circumstances" would render such an award unjust. *See, e.g.*, *Lasheen v. Embassy of The Arab Republic of Egypt*, 625 F. App'x 338, 341, (9th Cir. 2015); *United Steelworkers*, 512 F.3d at 564; *McElwaine v. US W., Inc.*, 176 F.3d 1167, 1172 (9th Cir. 1999); *Smith*, 746 F.2d at 589.

In light of this authority, the court disagrees with defendants that the "special circumstances" test wrongly appends a "sixth factor" to the *Hummell* list, Opp'n at 4, although the test may at first seem in discord with a second line of ERISA-fee decisions, *see, e.g.*, *Reilly v. Charles M. Brewer Ltd. Money Purchase Pension Plan & Trust*, 349 F. App'x 155, 158 (9th Cir. 2009); *Cline v. Indus. Maint. Eng'g & Contracting Co.*, 200 F.3d 1223, 1236 (9th Cir. 2000);

Estate of Shockley v. Alyeska Pipeline Serv. Co., 130 F.3d 403, 408 (9th Cir. 1997). The Ninth Circuit's decision in *Shockley v. Alyeska Pipeline* is the progenitor of this second line. *See* 130 F.3d at 408. In that case, the circuit court considered an appeal from the district court's decision to award an ERISA fiduciary ten percent of its fees against the plaintiff-participant. *Id.* The district court had inferred from previous Ninth Circuit decisions that awards against ERISA plaintiffs are disfavored. *Id.*; *cf. Corder v. Howard Johnson & Co.*, 53 F.3d 225, 231 (9th Cir. 1994) ("We have frequently expressed our disfavor of awards of attorney's fees against individual ERISA plaintiffs who seek pension benefits to which they believe they are entitled."). The *Shockley* court therefore clarified that a court considering an ERISA fee petition "must focus only on the *Hummell* factors, without favoring one side or the other." *Id.* The fee-petition playing field is level. *Id.*

In a 2003 opinion, the Ninth Circuit confirmed the applicability of both the "special circumstances" rule of *Smith* and *Shockley's* level-playing-field maxim. *See Honolulu Joint Apprenticeship & Training Comm. of United Ass'n Local Union No. 675 v. Foster*, 332 F.3d 1234, 1240 (9th Cir. 2003). These rules are "not inconsistent." *Id.* Rather, they "reflect a recognition of both the remedial purpose of ERISA on behalf of beneficiaries and participants, as well as the clear statutory language that makes fees available to 'either party.'" *Id.* (quoting 29 U.S.C. § 1132(g)(1)). That is, an ERISA plaintiff who enjoys a degree of success on the merits of his case should recover his attorneys' fees, absent special circumstances and injustice, but ERISA-plan defendants may also recover their fees, and in this respect the statute favors neither party.

B. Neutral, Irrelevant, or Negative *Hummell* Factors

Turning now to the *Hummell* list, in some respects, the factors in the context of this case are neutral, irrelevant, or weigh against an award. The first, third and fourth factors fall into this zone.

1. Culpability or Bad Faith (First Factor)

As described in this court's previous order, this litigation was hard-fought and concerned knotty questions of law and fact. The defendants litigated aggressively but within the

bounds of good faith. The questions resolved in the court's recent order on summary judgment were winnowed after discovery, three series of dispositive motions, and two trips to the appellate court. A third appeal is now pending. Contrary to Barboza's suggestion, the defendants' renewed appeal does not exemplify bad-faith litigation tactics, but a good-faith attempt to assert interests on the horns of a dilemma.

Neither does the defendants' culpability support an award here. The cases Barboza cites in this regard are readily distinguishable. In *Pomerleau v. Health Net of California, Inc.*, the plaintiff established the defendant had reversed course after the plaintiff's attorney generated adverse publicity and filed a federal complaint, despite the fact that nothing about her claim had changed. No. 11-1654, 2012 WL 5829850, *3 (C.D. Cal. Nov. 15, 2012). In *Werb v. ReliaStar Life Insurance Co,* the plaintiff demonstrated the defendant had repeatedly denied benefits only to reverse its decision later on. *See* 847 F. Supp. 2d 1140, 1155 (D. Minn. 2012). And in *Caplan v. CAN Financial Corp.*, the plaintiff showed the defendant had exhibited "total disregard" for the conclusions of his treating physicians, had "discounted a wealth of evidence that [he] was not able to perform the duties of his occupation," and had "arbitrarily refuse[d] to credit . . . reliable evidence" he submitted. *See* 573 F. Supp. 2d 1244, 1248 (N.D. Cal. 2008) (order on fees); 544 F. Supp. 2d 984, 992–93 (N.D. Cal. 2008) (order on judgment).[5] Here, by contrast, Barboza has presented no evidence showing the defendants reversed course only in the face of negative publicity and a federal lawsuit, no evidence they repeatedly denied him benefits only to inexplicably change their tune, and no evidence they exhibited total and arbitrary disregard for his factual submissions. Rather, the defendants held consistently to their position that the Plan could deduct pay Barboza was entitled to receive under section 4850 but waived, a position this court originally endorsed. *See* Order Sept. 30, 2012, at 10–15, ECF No. 103.

[5] If the *Caplan* court's order on attorneys' fees is read without reference to its prior order on judgment, such a reading may suggest the first *Hummell* factor weighs in favor of any ERISA claimant who obtains some success on the merits. *See* 573 F. Supp. 2d at 1248 ("[F]rom a legal perspective, Defendants are 'culpable' in that they were found to owe Plaintiff a legal duty that they were not fulfilling."). Because *Hummell* refers to the "degree" rather than the mere existence of an opposing party's culpability or bad faith, the court concludes this isolated reading was not the *Caplan* court's intent.

2. Deterrence and Broader Benefit (Third and Fourth Factors)

The third and fourth *Hummell* factors also are either neutral or weigh slightly against an award here. Barboza's case and claims were factually unique, as was the defendants' theory of his waiver of benefits under Labor Code section 4850. *See, e.g.*, Defs.' Mem. P. & A. Summ. J. 4–7, 10–14, ECF No. 162-1; Pl.'s Mot. Summ. J. 5–7, ECF No. 158. He asserts in general terms that in light of the court's order, the Plan will not be permitted to deny others benefits on the ground that they waived pay under section 4850. That interpretation misreads the issue on which he succeeded: the defendants found Barboza had waived benefits under section 4850 by taking a disability retirement, but no plan provision required him to retire in a particular manner, so the administrative decision was an abuse of discretion. *See* Order Nov. 17, 2015, at 6. Assuming this court's order on summary judgment is generalizable beyond the facts of this case, it is unclear what its net effect will be, although a former Plan administrator certainly believes that on balance plan participants will be harmed. *See* Floyd Decl. ¶¶ 4–7, ECF No. 180-2.

C. *Hummell* Factors that Favor an Award

In any event, the remaining factors outweigh the first three and favor an award as discussed below.

1. Defendants' Ability to Satisfy Award (Second Factor)

Although the parties dispute the factual specifics of the Plan's net assets, the court finds the defendants have greater capacity to absorb the costs of this litigation than does Barboza. This finding squares with the Ninth Circuit's admonition in *Smith* that individual ERISA claimants fight uphill battles, and "[w]ithout counsel fees the grant of federal jurisdiction is but a gesture for few [plaintiffs] could avail themselves of it." 746 F.2d at 590 (quoting *Hall v. Cole*, 412 U.S. 1, 13 (1973) (addressing the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 *et seq.*)).

2. Relative Merits of Parties' Positions (Fifth Factor)

The relative merits of the parties' positions strongly favor an award. As summarized above, Barboza obtained an order reversing summary judgment in part and remanding the case to this court for further proceedings on two questions: (1) "whether the Plan

required Barboza to retire in a manner that would entitle him to a full year of section 4850 benefits"; and (2) "whether Barboza's request for prejudgment interest on his benefits award is warranted." 594 F. App'x at 906. After remand, Barboza succeeded handily on both issues. The parties agreed the Plan instrument "does not expressly dictate the manner in which a participant must retire from fire service in order to be eligible for [long-term disability] benefits" and they agreed the Plan "does not explicitly require a participant to retire in a manner that would entitle him to a full year of [section] 4850 pay in order to be eligible for [long-term disability] benefits." Order Nov. 17, 2015, at 6. In addition, neither party "identified portions of the record to show the Plan instrument impliedly or indirectly requires Barboza's retirement in a manner that would entitle him to a year of section 4850 pay, and the court is aware of none." *Id.* Summary judgment was therefore granted in Barboza's favor. Barboza also obtained prejudgment interest at a rate significantly higher than that ordinarily prescribed by statute. *Id.* at 9–10. This success contrasts with the situation before the court on the parties' previous fee applications, where "neither party had significantly greater success on the merits than the other." Order Aug. 6, 2013, at 6, ECF No. 132.

3. Special Circumstances Test

Finally, the court is aware of no "special circumstances" that suggest an award of attorneys' fees would be unjust.

D. Conclusion

In summary, Barboza has established his entitlement to an award. In light of the parties' differing capacities to bear the costs of this litigation and Barboza's clear successes in obtaining partial reversal on appeal, followed by summary judgment in his favor and prejudgment interest, an award of reasonable attorneys' fees would advance ERISA's remedial purpose and secure his "ready access to the Federal courts." 29 U.S.C. § 1001(b); *Smith*, 746 F.2d at 590.

IV. LODESTAR AND MULTIPLIER

When an ERISA litigant is entitled to an award of attorneys' fees, the court begins by multiplying the number of hours reasonably expended in the litigation by a reasonable hourly rate, i.e., by calculating the "lodestar" fee. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983);

Welch v. Metro. Life Ins. Co., 480 F.3d 942, 945 (9th Cir. 2007). The fee applicant bears the burden to document these hours and submit evidence showing the requested hourly rate is reasonable. *Welch*, 480 F.3d at 945–46. Second, after determining the lodestar fee, the court must decide whether to adjust that fee upward or downward based on any facts that escaped consideration in the initial lodestar calculation. *Id.* at 946. This second-step adjustment is appropriate in only "rare and exceptional cases" when supported by "specific evidence" and "detailed findings." *Id.*; *Van Gerwen v. Guar. Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000).

A. Hourly Rate

A reasonable hourly rate takes account of an attorney's experience, skill, and reputation. *Welch*, 480 F.3d at 946. To determine this rate, the court does not refer simply to the rates the attorney actually charged, but determines what rate is paid to attorneys of comparable ability and reputation for similarly complex work in the relevant community. *Id.*; *United Steelworkers*, 512 F.3d at 564. A fee applicant may carry his burden to show a particular rate is reasonable by submitting rate determinations in other cases litigated by the same firm or "declarations from comparable ERISA lawyers" attesting that the market would sustain the requested rate. *Welch*, 480 F.3d at 947.

Barboza requests fees for the time of three attorneys: Geoffrey White, Cassie Springer Ayeni, and Michelle Roberts. Geoffrey White is a 1975 law graduate of Boalt Hall School of Law at the University of California, Berkeley. White Decl. Ex. 1, ECF No. 177-1. Since the beginning of his practice he has worked predominantly on ERISA, labor and employment, and employment benefits matters. Prev. White Decl. ¶ 2, ECF No. 114-1. In 1991 he opened his own law office, and has since then litigated dozens of ERISA and similar cases. *Id.* ¶ 3. Barboza has submitted declarations from ERISA attorneys describing White as "one of the most experienced and respected ERISA litigators in the nation," Cretiz Decl. ¶ 11, ECF No. 177-3, "highly regarded in the ERISA litigation community," Grey Decl. ¶ 11, ECF No. 177-5, and "among the most experienced and talented ERISA attorneys in Northern California," Kantor Decl. ¶ 19, ECF No. 177-6.

Cassie Springer Ayeni and Michelle Roberts are the founding partners of Springer & Roberts LLP, a firm formed in 2008 to focus on ERISA matters, including disability, health, and pension benefit matters. Roberts Decl. ¶¶ 1, 3, ECF No. 177-2. Springer Ayeni is a 2002 law graduate of the Boalt Hall School of Law at the University of California, Berkeley. *Id.* Ex. A. Roberts is a 2005 graduate of the same school. *Id.* Ex. B. Both have practiced exclusively in the ERISA and employee benefits arenas since graduation. Other ERISA attorneys who know Springer Ayeni and Roberts attest to their excellent reputations and abilities in ERISA litigation. *See* Creitz Decl. ¶ 11; Grey Decl. ¶ 11; Kantor Decl. ¶ 19; Dean Decl. ¶ 14, ECF No. 177-4.

In addition to the three attorneys, Barboza also requests compensation for time spent by Susan Foley, who supported Springer Ayeni and Roberts as a paralegal. Roberts Decl. ¶ 4. Foley earned a law degree from Gonzaga University in 1996 and is a member of the California bar. *Id.*

Barboza requests an hourly rate of $650 for White, $625 for Springer Ayeni, $600 per hour for Roberts, and $175 per hour for Foley. In support of these requests, Barboza cites declarations from the three attorneys quoted above, who believe hourly rates in these amounts would fit the prevailing market. *See* Creitz Decl. ¶¶ 12–14; Dean Decl. ¶ 14; Grey Decl. ¶¶ 11–12; Kantor Decl. ¶ 20. These attorneys also attest that in the Central and Northern Districts of California, they have recently charged or have been awarded hourly rates between $500 and $750. *See* Creitz Decl. ¶ 6; Kantor Decl. ¶¶ 6–8; Dean Decl. ¶¶ 5–6; Grey Decl. ¶ 10. Barboza also cites ERISA decisions from the Central and Northern Districts of California in which similar rates were awarded. *See* Mot. Fees at 14–15. Barboza and his attorneys argue these rates reflect those charged in the relevant community, which they believe is California at large, if not the United States as a whole. *See* Reply at 8–9. Springer Ayeni and Roberts have also submitted evidence that they were compensated at rates of $450 and $400 per hour, respectively, for their efforts in an ERISA case litigated in 2013 in the Northern District of California.

In opposition to these proposed rates, the defendants argue competent ERISA attorneys in Sacramento charge rates much lower than $600 per hour. *See* Opp'n at 15–18. Defense counsel Brendan Begley lists several Sacramento lawyers he believes are capable and

reputable within the sphere of ERISA litigation, including in the representation of ERISA plaintiffs. *See* Begley Decl. ¶ 13, ECF No. 180-5. The defendants have also submitted the declarations of other attorneys who believe competent ERISA and employment attorneys in Sacramento charge less than $400 per hour. *See* Green Decl. ¶¶ 4, 7, ECF No. 180-1; Cooper Decl. ¶ 28, ECF No. 180-4. Begley himself, a 1998 law graduate of the King Hall School of Law at the University of California, Davis, charged between $300 and $400 per hour in this case. *See* Begley Decl. ¶¶ 2, 17. The defendants have also submitted the declaration of Brand Cooper, whom they retained as an expert to survey the availability of employment litigators in Sacramento and the prevailing Sacramento rate. *See* Cooper Decl. ¶ 1.[6] Cooper believes White would be reasonably compensated at $425 per hour, Roberts at $275 per hour, and Springer Ayeni at $325 per hour. *Id.* ¶ 36. The defendants do not challenge the hourly rate requested for Foley's time.

After considering the parties' evidence and citations, the court concludes based on the current record that ERISA litigation is often a state-wide practice, although probably not nationwide. The defendants' evidence itself suggests this is true, *see* Green Decl. ¶ 3, and California district courts in this and the Southern District have reached a similar conclusion, *see, e.g.*, *McAfee v. Metro. Life Ins. Co.*, 625 F. Supp. 2d 956, 975 (E.D. Cal. 2008), *aff'd*, 368 F. App'x 771 (9th Cir. 2010); *Mogck v. Unum Life Ins. Co. of Am.*, 289 F. Supp. 2d 1181, 1191 (S.D. Cal. 2003). At a minimum it may fairly be said that the geographical boundaries of the "relevant community" here blend into neighboring California districts. Fee awards in ERISA cases in the Central and Northern Districts of California often exceed $500 per hour for reputable attorneys. *See, e.g.*, *Harlick v. Blue Shield of Cal.*, No. 08-3651, 2013 WL 2422900, at *5 (N.D. Cal. June 3, 2013); *Dine v. Metro. Life Ins. Co.*, No. 05-3773, 2011 WL 6131312, at *3 (C.D. Cal. Dec. 9, 2011); *Langston v. N. Am. Asset Dev. Corp. Grp. Disability Plan*, No. 08-02560, 2010 WL 1460201, at *2 (N.D. Cal. Apr. 12, 2010); *Caplan*, 573 F. Supp. 2d at 1249–50. Judges

[6] A substantial portion of Cooper's declaration is not an opinion but legal argument. *See id.* ¶¶ 6–27. Legal arguments should be presented in a party's moving and opposition briefing, not in its supporting declarations. *See United States v. Sierra Pac. Indus.*, No. 09-2445, 2012 WL 175071, at *1 (E.D. Cal. Jan. 20, 2012). The court has accordingly disregarded these sections of Cooper's declaration as well as any responsive argument in Barboza's reply briefing.

in this district have approved almost comparable rates in ERISA cases. *See, e.g.*, *McAffee*, 625 F. Supp. 2d at 975 ($400 per hour in 2008 for plaintiff's attorney with thirty years' experience); *Aguilar v. Melkonian Enterprises, Inc.*, No. 05-00032, 2007 WL 201180, at *8 (E.D. Cal. Jan. 24, 2007) (awarding $495 per hour in a common-fund ERISA settlement). Paralegal hours are also regularly compensated at rates approximating the $175 requested for Foley's time. *See, e.g.*, *Aguilar*, 2007 WL 201180, at *8.

In consideration of this evidence and the parties' arguments, the court concludes White's time will be reasonably compensated at $550 per hour, Springer Ayeni's time at $525 per hour, Robert's time at $500 per hour, and Foley's time at $175 per hour.

B. Hours Expended

The court next determines whether the hours submitted in support of Barboza's fee application are compensable. Many are not, as explained below.

1. Time Spent on Matters for which the Motion is Denied

The court concluded above that Barboza achieved a degree of success on the merits by securing the partial remand and summary judgment, and that as a matter of discretion, an award of his fees incurred to achieve that success is justified under 29 U.S.C. § 1132(g)(1). In addition, time spent preparing the pending motion for attorneys' fees may be compensable. *See D'Emanuele v. Montgomery Ward & Co.*, 904 F.2d 1379, 1387 (9th Cir. 1990), *overruled on other grounds*, *City of Burlington v. Dague*, 505 U.S. 557 (1992). But Barboza has not borne his burden to establish he is entitled to fees incurred in the administrative appeal, in the early stages of this litigation, in his 2011 appeal on administrative exhaustion, in arguing to this court and on appeal that the defendants could offset only his net earnings, or in obtaining injunctive relief from this court in 2012. Hours expended on these tasks are therefore excluded.

2. Hours Spent Litigating the Most Recent Appeal

The defendants argue Barboza is jurisdictionally barred in this court from obtaining any fee award for time expended in the 2013–2014 appeal, including time related to the offset for pay under section 4850. Opp'n at 12–13. Under Ninth Circuit Rule 39-1.8, "[a]ny party who is or may be eligible for attorneys fees on appeal to [the Circuit] Court may, within the

time permitted in Circuit Rule 39-1.6, file a motion to transfer consideration of attorneys' fees on appeal to the district court or administrative agency from which the appeal was taken." Ninth Circuit Rule 39-1.6 sets a time limit of "14 days after the expiration of the period within which a petition for rehearing may be filed, unless a timely petition for rehearing is filed."

If a litigant is eligible for fees incurred in an appeal but requests neither a fee award under Rule 39-1.6 nor a post-appeal transfer under Rule 39-1.8, the district court is not authorized to rule on a post-remand request for attorneys' fees incurred on the appeal. *Cummings v. Connell*, 402 F.3d 936, 948 (9th Cir. 2005). The Ninth Circuit reluctantly confirmed last year that this rule is jurisdictional, finding it was "bound" by *Cummings* despite a logically appealing decision to the contrary in the Eighth Circuit. *See Yamada v. Snipes*, 786 F.3d 1182, 1210 n.21 (9th Cir.) (citing *Little Rock Sch. Dist. v. State of Ark.*, 127 F.3d 693, 696 (8th Cir. 1997)),[7] *cert. denied sub nom. Yamada v. Shoda*, 136 S. Ct. 569 (2015). In light of *Yamada*, the jurisdictional effect of Ninth Circuit Rule 39-1.8 does not remain uncertain. *See* Reply at 6–7 (citing *Twentieth Century Fox Film Corp. v. Entmt. Distrib.*, 429 F.3d 869 (9th Cir. 2005), and *Young v. C.I.R.*, 92 T.C.M. (CCH) 228 (2006)).

Here, the parties do not dispute that Barboza filed no request to transfer under Rule 39-1.8 within the time required by Rule 39-1.6 and filed no motion for fees before the circuit court. As explained above, 29 U.S.C. § 1132(g)(1) allows an ERISA claimant to request a fee award upon achieving "some degree of success on the merits." *Hardt*, 560 U.S. at 255. Status as a "prevailing party" is unnecessary. *Id.* Because the Ninth Circuit held that this court "erred in holding that the Plan was entitled to set off a full year of section 4850 benefits against Barboza's benefit award" and remanded for consideration of another issue, the court finds Barboza achieved some degree of success on the merits at the appellate level, regardless of the interlocutory nature of the remanded questions. Barboza argues as much in his opening brief here. *See* Mot. Fees at 2. Any other conclusion would also conflict with this court's recent order on summary

[7] In *Little Rock School District*, the Eighth Circuit held that despite a rule analogous to Ninth Circuit Rule 39-1.6, "district courts retain jurisdiction to decide attorneys' fees issues" the appellate court does not itself undertake to decide. 127 F.3d at 696.

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judgment. *See* Order Nov. 17, 2015, at 6, 8. This court therefore lacks authority to consider his request for fees incurred during the most recent appeal.

3. Excessive, Redundant, or Otherwise Unnecessary Time

"In determining the appropriate lodestar amount, the district court may exclude from the fee request any hours that are 'excessive, redundant, or otherwise unnecessary.'" *Welch*, 480 F.3d at 948 (quoting *Hensley*, 461 U.S. at 433). As noted above, the fee applicant bears the burden to document the time for which compensation is requested. *Id.* at 945–46. A district court may therefore impose reductions if it is unable to attribute hours to one or another task, i.e., for block billing. *See, e.g.*, *id.* at 948 ("[B]lock billing makes it more difficult to determine how much time was spent on particular activities."). But "attorneys are 'not required to record in great detail how each minute of [their] time was expended.'" *United Steelworkers*, 512 F.3d at 565 (quoting *Hensley*, 461 U.S. at 437 n.12) (alteration in *United Steelworkers*). Attorneys "need only 'keep records in sufficient detail that a neutral judge can make a fair evaluation of the time expended, the nature and need for the service, and the reasonable fees to be allowed.'" *Id.* (quoting *Hensley*, 461 U.S. at 441 (Burger, C.J., concurring)).

Here, the court has reviewed the declarations submitted by Barboza's attorneys, including with regard to Foley, and finds the tasks documented were sufficiently necessary and recorded with appropriate detail, with one exception. White documented 21.5 hours preparing a declaration in support of Barboza's reply brief. The court first questions whether it was necessary for White himself to create this declaration rather than a less experienced attorney or paralegal. *See* White Suppl. Decl. ¶¶ 4–5 & Exs. 1–7, ECF No. 184-1 (collecting the results of PACER searches). Second, a great deal of his declaration is argument that should have been included in the reply brief itself. *See* White Suppl. Reply ¶¶ 3–8; *see also* note 6 *supra*. Because White has not clarified how his time was divided in the preparation of his reply declaration, the court applies a general reduction of 15 hours, for a net of 6.5 compensable hours for this task.

C. Multiplier

Barboza requests no multiplier. The defendants suggest a reduction is warranted because Barboza obtained only "razor-thin success on a solitary claim." Opp'n at 10. The court disagrees that Barboza's success here was "razor-thin." Any further reduction would also duplicate the hourly reductions and exclusions imposed above. This is simply not the "rare and exceptional" case where a reduction is appropriate. *Welch*, 480 F.3d at 946.

D. Summary

The court awards $80,137.50 in fees as follows:

- Geoffrey White – 43.1 hours between December 12, 2014 and September 15, 2015 on the matters remanded to this court by the Ninth Circuit, 15 hours preparing the motion for attorneys' fees, and 6.5 hours preparing a reply declaration, compensated at $550 per hour, in total $35,530.00.
- Cassie Springer Ayeni – 1.8 hours between December 8, 2015 and March 25, 2015 on the matters remanded to this court by the Ninth Circuit, compensated at $525 per hour, in total $945.00.
- Michelle Roberts – 56.2 hours between December 8, 2014 and July 24, 2015 on the matters remanded to this court by the Ninth Circuit, 15.7 hours preparing the motion for attorneys' fees, and 13.5 hours preparing the reply brief, compensated at $500 per hour, in total $42,700.00.
- Susan Foley – 4.7 hours between June 15, 2015 and July 24, 2015 on matters remanded to this court by the Ninth Circuit and 0.8 hours preparing the motion for attorneys' fees, compensated at $175 per hour, in total $962.50.

V. COSTS

Barboza also requests compensation for his costs. Section 1132(g)(1) allows the court to award an ERISA litigant any "costs of action" of the type permitted under 28 U.S.C. § 1920.[8] *Agredano v. Mut. of Omaha Cos.*, 75 F.3d 541, 544 (9th Cir. 1996). However,

[8] That section provides as follows: "A judge or clerk of any court of the United States may tax as costs the following: (1) Fees of the clerk and marshal; (2) Fees for printed or electronically

interpreting an analogous clause in § 1132(g)(2), the Ninth Circuit has held that the court may also award an ERISA litigant its non-taxable costs as attorneys' fees, provided those costs are ordinarily billed separately to clients in the relevant community. *Trustees of Constr. Indus. & Laborers' Health & Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1258 (9th Cir. 2006) (interpreting 29 U.S.C. § 1132(g)(2)(D), which allows the court to award an ERISA plan its "reasonable attorney's fees and costs of the action, to be paid by the defendant").[9]

The court has reviewed plaintiff's declarations and concludes the following non-taxable costs may reasonably be compensated as attorneys' fees on post-remand matters between December 2014 and September 2015: $524.12 in legal research fees; $86.21 for printing, photocopying, and postage; $4.72 in telephone expenses; and $237.40 in travel costs; in total $852.45. *See* White Decl. Ex. 3, at 1–7; Roberts Decl. Ex. G.

VI. EVIDENTIARY OBJECTIONS AND MOTION TO STRIKE

The defendants move to strike most of the declarations submitted in support of Barboza's reply briefing. *See* Mot. Strike, ECF No. 185. Because the court disregards most of the material in question, to a great degree the motion may be denied as moot. To the extent the court has considered any of the information in these declarations, the court overrules the defendants' evidentiary objections and finds they suffer no prejudice as a result.

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recorded transcripts necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case; (5) Docket fees under section 1923 of this title; (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title. A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

[9] The court notes the defendants' protests that *Redland Insurance* was wrongly decided and overlooked binding Circuit precedent. *See* Opp'n at 18–19 (arguing the *Redland Insurance* panel unintentionally and incorrectly departed from the rule adopted in *Agredano*, 75 F.3d at 544). Be that as it may, *Redland Insurance* binds this court.

VII. CONCLUSION

The motion for attorneys' fees and non-taxable costs is GRANTED IN PART as follows: The court awards $35,530 for White's time, $945 for Springer Ayeni's time, $42,700 for Roberts's time, $962.50 for Foley's time, and $852.45 in costs.

The motion to strike is DENIED IN PART AS MOOT and otherwise DENIED.

This order resolves ECF Nos. 177 and 185.

IT IS SO ORDERED.

DATED: June 2, 2016.

UNITED STATES DISTRICT JUDGE