



1 I. PROCEDURAL BACKGROUND & FACTUAL ALLEGATIONS

2 Plaintiff sued Defendants alleging civil rights violations  
3 and state tort violations (Doc. #1). After Defendants filed a  
4 Motion to Dismiss (Doc. #6), Plaintiff filed her First Amended  
5 Complaint (Doc. #12). Defendants again filed their Motion to  
6 Dismiss (Doc. #17), which the Court granted but allowed Plaintiff  
7 leave to amend four of her claims (Doc. #22). Once Plaintiff  
8 filed her Second Amended Complaint (Doc. #23), Defendants moved  
9 once more to dismiss (Doc. #24). The Court issued an order on  
10 July 9, 2012, dismissing all of Plaintiff's remaining claims  
11 (Doc. #29). The Court, however, did not reach the merits on  
12 Plaintiff's related state law claims for slander and invasion of  
13 privacy because it declined to exercise jurisdiction over those  
14 claims, and they were dismissed without prejudice.

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16 II. OPINION

17 A. Legal Standard for Award Pursuant to 42 U.S.C. § 1988

18 Normally, "a district court may in its discretion award  
19 attorney's fees to a prevailing defendant [pursuant to 42 U.S.C.  
20 § 1988] upon a finding that the plaintiff's action was frivolous,  
21 unreasonable, or without foundation, even though not brought in  
22 subjective bad faith." Christiansburg Garment Co. v. Equal  
23 Employment Opportunity Comm'n, 434 U.S. 412, 421 (1978). "[T]he  
24 bringing of cases with no foundation in law or facts at the  
25 outset" can give rise to an award of fees to a prevailing  
26 defendant under § 1988. Mitchell v. Office of L.A. Cnty.  
27 Superintendent of Sch., 805 F.2d 844, 847 (9th Cir. 1986).

1 A defendant seeking fees has the burden to "establish that  
2 fees are attributable solely to the frivolous claims," which "is  
3 from a practical standpoint extremely difficult to carry."  
4 Braunstein v. Ariz. Dep't of Transp., 683 F.3d 1177, 1189 (9th  
5 Cir. 2012) (quoting Harris v. Maricopa Cnty. Superior Court, 631  
6 F.3d 963, 972 (9th Cir. 2011)).

7 B. Discussion

8 Defendants contend that they are entitled to fees under  
9 § 1988 because all the claims were dismissed and because the  
10 claims were frivolous. Plaintiff argues that attorney's fees are  
11 unwarranted because there was no bad faith as required under 28  
12 U.S.C. § 1927. In Defendants' reply, they clarify that they are  
13 not seeking attorney's fees under § 1927, and therefore, bad  
14 faith is not required.

15 For purposes of this present motion, Defendants have not met  
16 their burden to show that the fees requested arise solely from  
17 Plaintiff's dismissed civil rights claim, and it is probably  
18 impossible for them to do so. See Harris, 631 F.3d at 968.  
19 Defendants moved for and achieved a dismissal with prejudice of  
20 all claims except the slander and invasion of privacy claims,  
21 which were dismissed without prejudice. Moreover, the slander  
22 and invasion of privacy claims were dismissed in an earlier  
23 order, but with leave to amend, which means the claims could have  
24 been saved by amendment. Thus, it is unclear whether those  
25 claims were meritorious. Additionally, Plaintiff's civil rights  
26 claim and state tort claims are intertwined because the state law  
27 claims are based on the conduct that Plaintiff alleges was  
28 retaliatory in her § 1983 claim. Therefore, a fee award would be

1 inappropriate. See Braunstein, 683 F.3d at 118 (holding that a  
2 fee award is not available for frivolous claims intertwined with  
3 non-frivolous claims).

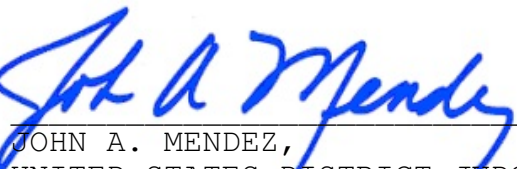
4 Further, even if the claims could be separated, the  
5 declaration submitted in support of the present motion makes no  
6 distinction between the fees expended on the civil rights claims  
7 and the fees expended on the slander and invasion of privacy  
8 claims. Dividing the fees by the hours each attorney worked on  
9 each motion is not enough to satisfy Defendants' burden. See  
10 Harris, 631 F.3d at 971. It is also impossible to adequately  
11 distinguish the different claims from the statement of the  
12 services rendered because in the statement, the hours expended  
13 are not separated by claim. Statement, Exhibit A to the  
14 Declaration of Kristina M. Hall, Doc #31.

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16 III. ORDER

17 For the foregoing reasons, a fee award under § 1988 is  
18 inappropriate. Defendants' motion is therefore DENIED.

19 IT IS SO ORDERED.

20 Dated: October 22, 2012

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23 JOHN A. MENDEZ,  
24 UNITED STATES DISTRICT JUDGE  
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