

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 JEANENE HARLICK ) Case No. C 08-3651-SC  
11 Plaintiff, )  
12 v. ) ORDER GRANTING MOTION FOR  
13 ) ENTRY OF JUDGMENT AND FOR  
14 BLUE SHIELD OF CALIFORNIA, ) ATTORNEY FEES AND COSTS  
15 Defendant. )  
16 \_\_\_\_\_)

17 **I. INTRODUCTION**

18 Now before the Court is Plaintiff Jeanene Harlick's  
19 ("Harlick") motion for entry of judgment and for attorney fees and  
20 costs. ECF No. 104 ("Mot."). Defendant Blue Shield of California  
21 ("Blue Shield") has opposed the Motion and Plaintiff has filed a  
22 reply in support of the Motion. ECF Nos. 105 ("Opp'n"), 107  
23 ("Reply"). Pursuant to Civil Local Rule 7-1(b), this matter is  
24 appropriate for determination without oral argument. For the  
25 reasons set forth below, Harlick's Motion is GRANTED.

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1        **II. BACKGROUND**

2            Harlick suffers from anorexia nervosa and, in 2006, was  
3 admitted to the Castlewood Treatment Center ("Castlewood"), which  
4 specializes in eating disorders. Harlick remained at Castlewood  
5 for 191 days. Blue Shield, the administrator of Harlick's ERISA  
6 Plan, paid for Harlick's first eleven days at Castlewood, but then  
7 refused to pay for the rest of her treatment.

8            Harlick filed this action against Blue Shield in October 2008,  
9 seeking payment of healthcare benefits. On March 4, 2010, the  
10 Court granted Blue Shield's motion for summary judgment. Harlick  
11 v. Blue Shield of Cal., CIV 08-3651 SC, 2010 WL 760484 (N.D. Cal.  
12 Mar. 4, 2010). The Court concluded that Castlewood provided  
13 residential care to Harlick and found that Harlick's plan  
14 unambiguously excluded coverage for such care. The Court also  
15 found that, while the plan provided coverage for Skilled Nursing  
16 Facilities ("SNF"), Castlewood was not an SNF. The Court declined  
17 to reach the issue of whether California's Mental Health Parity Act  
18 (the "Parity Act") required coverage of Harlick's treatment at  
19 Castlewood.

20           Harlick subsequently appealed. The Ninth Circuit held that  
21 the plan did not require coverage for Harlick's residential care,  
22 but found that coverage was mandated by the Parity Act, which  
23 requires coverage for "medically necessary treatment" of "severe  
24 mental illnesses." Harlick v. Blue Shield of Cal., 686 F.3d 699,  
25 721 (9th Cir. 2012). Blue Shield filed a petition for certiorari  
26 to the Supreme Court, and the Supreme Court asked Harlick to file  
27 an opposition to that petition. On March 4, 2013, the Supreme  
28 Court denied Blue Shield's cert petition.

1        **III. DISCUSSION**

2        **A. Judgment Amount**

3            Harlick now seeks entry of judgment in the amount of  
4        \$218,749.44, which includes prejudgment interest. Harlick's  
5        mother, Robin Watson ("Watson"), has filed a declaration setting  
6        forth how Harlick arrived at this amount. ECF No. 104-12 ("Watson  
7        Decl."). Watson declares that she paid Castlewood \$146,290 for  
8        Harlick's treatment. Id. ¶ 9. Watson also declares that she had  
9        to draw down from a home equity line and twice refinance her home  
10      to finance Harlick's care at Castlewood. Id. ¶¶ 4-7. Watson  
11      incurred \$61,523 in interest payments. Id. ¶ 9. She also incurred  
12      \$10,936.44 in points (prepaid interest) and fees in refinancing her  
13      home loans. Id.

14            Blue Shield does not object to the entry of judgment in the  
15      amount of \$146,290, or to the award of prejudgment interest in the  
16      amount of \$61,523.00. Opp'n at 3. However, it does oppose  
17      Harlick's attempt to include in the judgment the \$10,936.44 that  
18      Watson spent on points and fees in connection with the two  
19      refinances of her home mortgage. Id. Harlick responds that Blue  
20      Shield benefitted from Watson's refinancing because the refinancing  
21      lowered the prejudgment interest that Blue Shield must now pay.  
22      Reply at 1.

23            In ERISA cases like this one, district courts have the  
24      discretion to award prejudgment interest. Blankenship v. Liberty  
25      Life Assur. Co. of Boston, 486 F.3d 620, 627 (9th Cir. 2007). The  
26      award of prejudgment interest is intended to compensate the  
27      plaintiff for losses incurred as a result of an insurer's  
28      nonpayment of benefits. See Dishman v. UNUM Life Ins. Co. of Am.,

1 269 F.3d 974, 988 (9th Cir. 2001). "Generally, the interest rate  
2 prescribed for post-judgment interest under 28 U.S.C. § 1961 is  
3 appropriate for fixing the rate of pre-judgment interest unless the  
4 trial judge finds, on substantial evidence, that the equities of  
5 that particular case require a different rate." Blankenship, 486  
6 F.3d at 628 (quotations and citations omitted). In this case, the  
7 rate set by 28 U.S.C. § 1961, the Treasury bill rate, is  
8 substantially lower than the interest rate Watson paid. The Court  
9 finds that deviating from this rate is an appropriate and equitable  
10 means of compensating Harlick for the interest payments her mother  
11 incurred in funding her treatment.

12 However, the Court declines to compensate Harlick for the  
13 points and fees associated with Watson's refinancing. While it is  
14 true that Blue Shield benefitted from the refinancing, Watson also  
15 benefitted. The lower interest rate affects Watson's entire home  
16 loan, not just that portion she borrowed to pay for Harlick's  
17 treatment. Further, Harlick has cited no authority indicating that  
18 the award of prejudgment interest should include the costs a party  
19 incurs in securing a more favorable interest rate.

20 For these reasons, the Court finds that judgment in the amount  
21 of \$207,813, inclusive of prejudgment interest, is appropriate.

22 **B. Attorney Fees**

23 The Court considers whether Harlick is entitled to attorney  
24 fees. Concluding that she is, the Court next determines the  
25 appropriate lodestar amount and whether that amount should be  
26 enhanced by a multiplier.

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i. Attorney fees under 29 U.S.C. § 1132(g)

2        The ERISA statute provides that "the court in its discretion  
3 may [award] a reasonable attorney's fee and costs of action to  
4 either party" in an action involving delinquent contributions. 29  
5 U.S.C. § 1132(g)(1). The Supreme Court has held that courts may  
6 only award fees to a party that has achieved "some degree of  
7 success on the merits." Hardt v. Reliance Standard Life Ins. Co.,  
8 130 S. Ct. 2149, 2158 (2010). Additionally, the Ninth Circuit has  
9 stated that a plan participant who prevails in an action to collect  
10 benefits under the plan "should ordinarily recover an attorney's  
11 fee unless special circumstances would render such an award  
12 unjust." Smith v. CMTA-IAM Pension Trust, 746 F.2d 587, 589 (9th  
13 Cir. 1984) (quotations omitted).

14 The Ninth Circuit has also set forth a number of factors to  
15 consider in determining whether attorney fees are appropriate:

17 (1) the degree of the opposing parties' culpability or  
18 bad faith; (2) the ability of the opposing parties to  
19 satisfy an award of fees; (3) whether an award of fees  
20 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.

22 Hummell v. S. E. Rykoff & Co., 634 F.2d 446, 453 (9th Cir. 1980).  
23 "No one of the Hummell factors . . . is necessarily decisive, and  
24 some may not be pertinent in a given case." Carpenters S. Cal.  
25 Admin. Corp. v. Russell, 726 F.2d 1410, 1416 (9th Cir. 1984). The  
26 Hummell factors are generally construed in favor of protecting  
27 participants in employee benefit plans. McElwaine v. US W., Inc.,  
28 176 F.3d 1167, 1172 (9th Cir. 1999).

1       Blue Shield does not appear to dispute that Harlick achieved  
2 at least some degree of success on the merits, but it argues that  
3 four of the five Hummell factors do not apply here. The Court  
4 addresses the parties' arguments on the Hummell factors below.

5       The Court agrees that the first Hummell factor does not favor  
6 the award of attorney fees. Harlick argues that Blue Shield is  
7 culpable because the Ninth Circuit rejected its interpretation of  
8 the Parity Act. Mot. at 7. But the Ninth Circuit's decision was  
9 ultimately premised on an argument that the court raised for the  
10 first time at oral argument -- that all medically necessary  
11 treatment for listed conditions must be covered. The Ninth Circuit  
12 rejected Harlick's interpretation of the plan and did not adopt her  
13 initial theory of the Parity Act. Nevertheless, this factor alone  
14 is not dispositive. See Russell, 726 F.2d at 1416.

15       As to the second Hummell factor, Blue Shield does not dispute  
16 that it is able to satisfy an award of attorney fees. The Ninth  
17 Circuit has held that, "[b]ased on this factor alone, absent  
18 special circumstances, a prevailing ERISA employee plaintiff should  
19 ordinarily receive attorney's fees from the defendant." Smith, 746  
20 F.2d at 590. The court reasoned that, absent fee shifting, it is  
21 generally difficult for an individual plan participant to carry the  
22 heavy burden of litigating a denial of benefits. Id.

23       With respect to the third Hummell factor concerning  
24 deterrence, Harlick argues that an attorney fee award will send a  
25 message to other California health insurers that they must follow  
26 California laws and regulations. Mot. at 7. Blue Shield responds  
27 that it was trying to follow California law in the first instance,  
28 but the law on the issue was uncertain. Opp'n at 8. Blue Shield

1 contends that, following the Ninth Circuit's decision in this case,  
2 it is unlikely that any other ERISA plan operating within the Ninth  
3 Circuit will attempt to enforce an exclusion for residential care  
4 for severe mental illness. Id. The Court finds that this factor  
5 is neutral. While a closer reading of the Parity Act may have  
6 obviated the need for this litigation, many of the legal issues  
7 raised by this case were uncertain prior to the Ninth Circuit's  
8 opinion.

9 The fourth Hummell factor favors the award of attorney fees.  
10 While Harlick did not seek to benefit all participants and  
11 beneficiaries of an ERISA plan, her lawsuit did resolve a  
12 significant question regarding ERISA. Specifically, it resolved  
13 the issue of whether the Parity Act prevents ERISA plans from  
14 excluding coverage for residential treatment of severe mental  
15 disorders. Blue Shield argues that this is an issue of state law,  
16 and that "ERISA was merely the vehicle for [Harlick] to bring her  
17 complaints about coverage to federal court." Opp'n at 9. This  
18 argument is unpersuasive, since in this case, state law had a  
19 significant impact on the scope of ERISA coverage. As a result of  
20 Harlick's litigation, persons living with serious mental health  
21 conditions in California are now entitled to additional protections  
22 under ERISA.

23 The fifth Hummell factor -- the relative merits of the  
24 parties' positions -- also favors the award of attorney fees. The  
25 Ninth Circuit ultimately held for Harlick, concluding that the  
26 Parity Act required Blue Shield to provide coverage for Harlick's  
27 treatment at Castlewood. Blue Shield argues that the Ninth Circuit  
28 rejected Harlick's interpretation of the Plan's language, as well

1 as her initial interpretation of the Parity Act. Opp'n at 9-10.  
2 But the fact remains that the Ninth Circuit ultimately held that  
3 Harlick was entitled to the relief that she requested.<sup>1</sup>

4 Since the second, fourth, and fifth Hummell factors favor an  
5 award of attorney fees, the Court finds that this case does not  
6 present the kind of special circumstances that would warrant  
7 denying attorney fees. The crux of Blue Shield's argument is that  
8 Blue Shield could not have reasonably anticipated that its denial  
9 of benefits was wrong. Opp'n at 11. However, the fact that the  
10 Ninth Circuit ultimately held for Harlick suggests otherwise.

11 **ii. Fee calculation**

12 Harlick seeks attorney fees of \$714,271.40, which includes a  
13 lodestar amount of \$476,181 and a lodestar multiplier of 1.5. Mot.  
14 at 2. The parties dispute the reasonableness of the lodestar  
15 amount and whether the application of a lodestar multiplier is  
16 appropriate.

17 **a. Lodestar**

18 The first dispute concerning the lodestar amount arises out of  
19 Harlick's request to have all of her fees paid at her counsel's  
20 current hourly rates. Blue Shield points out that Harlick's  
21 counsel performed most of their work years ago, when their hourly  
22 rates were significantly lower, and asks the court to follow an  
23 unpublished opinion by Judge Lew in Dine v. Metropolitan Life  
24 Insurance Co, No. CV-05-03773 RSWL (C.D. Cal. Dec. 9, 2011). Opp'n

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25 <sup>1</sup> Blue Shield also argues that a Los Angeles Superior Court  
26 rejected the Ninth Circuit's interpretation of the Parity Act.  
27 Opp'n at 10 (citing Rea v. Blue Shield of Cal., 2012 WL 2377405  
28 (Cal. Super. Ct. June 13, 2012)). But an appeal is pending in that  
case. In any event, the Court's analysis is based on the Ninth  
Circuit's decision on the merits in this case, not a state court's  
ruling in another action.

1 at 12 (citing ECF No. 104-2 ("Kantor Decl.") Ex. C ("Dine")).  
2 However, contrary to Blue Shield's argument, Dine does not suggest  
3 that Court should apply historical rates here. Rather, Judge Lew  
4 noted that a district court has the discretion to compensate a  
5 prevailing party for a delay in payment of attorney fees in two  
6 ways: "(1) by applying the attorneys' current rates to all hours  
7 billed during the course of the litigation, or (2) by using the  
8 attorneys' historical rates and adding a prime rate enhancement."  
9 Dine at 5 (citing In re Wash. Pub. Power Supply Sys. Sec. Litig.,  
10 19 F.3d 1291, 1305 (9th Cir. 1994)). Judge Lew found that using a  
11 prime rate enhancement was more appropriate in that case. In the  
12 instant action, Harlick's counsel should be compensated for delay  
13 in payment of their fees. They filed the action nearly five years  
14 ago and have yet to receive any form of remuneration for their  
15 services. Kantor Decl. ¶ 17. Since Blue Shield has offered no  
16 reason why the Court should apply a prime rate enhancement, the  
17 Court finds that Harlick's counsel should be compensated at their  
18 current rates.

19 Next, Blue Shield argues that Harlick should not be reimbursed  
20 for the time spent responding to Blue Shield's motion to dismiss.  
21 In that motion, Blue Shield argued that, under Ford v. MCI  
22 Communications Corp Health and Welfare Plan, 399 F.3d 1076 (9th  
23 Cir. 2005), Harlick had failed to sue a necessary defendant. ECF  
24 No. 8. Harlick's counsel spent 17.8 hours (\$10,680) researching  
25 the motion and drafting a response, but never actually filed an  
26 opposition. Instead, Harlick filed an amended complaint. ECF No.  
27 18. As Harlick points out, Ford was later overruled in Cyr v.  
28 Reliance Standard Life Insurance Co., 642 F.2d 1202 (2011).

1 Nevertheless, the Court finds that Harlick's counsel spent an  
2 excessive amount of time researching and drafting an opposition  
3 brief that was never filed. Accordingly, the Court reduces  
4 Harlick's lodestar amount by \$5,340.

5 Blue Shield also takes issue with the 39.3 hours (\$19,310)  
6 Harlick's counsel billed in connection with an attempt to force  
7 Blue Shield to respond to written discovery. Some of this time was  
8 spent drafting and researching a motion to compel that was  
9 withdrawn after Blue Shield filed an amended privilege log. Blue  
10 Shield argues that there was no basis for Harlick's discovery  
11 demands, while Harlick contends ERISA allowed for the requested  
12 discovery. The Court is reluctant to adjudicate discovery matters  
13 that were not fully briefed. However, based on a review of the  
14 record, the Court finds that additional meet-and-confer efforts  
15 would have obviated the need for Harlick to file a discovery motion  
16 that she eventually withdrew. It appears that Harlick's counsel  
17 spent about 9.5 hours on this motion at a rate of \$500 per hour.  
18 Accordingly, the Court reduces Harlick's lodestar by an additional  
19 \$4,750.

20 The next dispute concerns legal assistance provided by Allison  
21 M. Zieve, an attorney at Public Citizen Litigation Group ("Public  
22 Citizen"), in connection with Blue Shield's cert petition to the  
23 Supreme Court. Public Citizen offers pro bono legal assistance by  
24 opposing petitions for cert in order to protect what it perceives  
25 to be public interest victories in lower courts. ECF No. 104-21  
26 ("Zieve Decl.") ¶ 2. In this case, Public Citizen contacted  
27 Harlick's counsel to offer assistance opposing Blue Shield's  
28 petition. Id. ¶ 3. Harlick accepted Public Citizen's offer, and

1 Zieve spent 7.6 hours, at a rate of \$640 per hour, reviewing and  
2 commenting on Harlick's opposition brief. Id. ¶¶ 3, 9, Ex. 1.<sup>2</sup>  
3 Blue Shield argues that it should not have to pay for Zieve's  
4 services because they were offered on a pro bono basis. Opp'n at  
5 13. The Court disagrees. The fact that legal services are  
6 provided pro bono does not render a fee award inappropriate, and  
7 withholding a fee award in such circumstances could discourage pro  
8 bono representation. See Cuellar v. Joyce, 603 F.3d 1142, 1143  
9 (9th Cir. 2010).

10 Blue Shield also argues that Harlick's counsel included  
11 excessive charges for minor tasks, including 1.2 hours (\$720) for  
12 reviewing a two-page form order that the parties previously  
13 submitted, 7.9 hours (\$4,740) for reviewing Blue Shield's nine-  
14 page mediation brief, and 1.7 hours (\$1,105) for responding to  
15 multiple media requests and interviews and for reviewing and  
16 revising a press release. Opp'n at 13-14. Harlick characterizes  
17 these objections as "nitpicks," but does not otherwise respond,  
18 except to suggest that the time spent reviewing Blue Shield's  
19 mediation brief was necessary because that brief articulated Blue  
20 Shield's position on various issues for the first time. Reply at  
21 6. The Court agrees that some of the time spent on these matters  
22 was excessive and therefore reduces Harlick's lodestar by an  
23 additional \$4,000.

24 For the reasons stated above, the Court reduces Harlick's  
25 requested lodestar by \$14,282, leaving a total lodestar of

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26 <sup>2</sup> In her declaration, Zieve asserts that she spent 7.9 hours  
27 working on the opposition to the Blue Shield cert petition, but the  
28 records attached to her declaration show that she only devoted 7.6  
hours to the matter. Accordingly, the Court reduces Zieve's  
requested lodestar by \$192, to \$4,864.

1 \$461,899.

2                   **b. Lodestar multiplier**

3                   In ERISA cases, "a court may adjust the lodestar upward or  
4 downward using a 'multiplier' based on factors not subsumed in the  
5 initial calculation of the lodestar." Van Gerwen v. Guarantee Mut.  
6 Life Co., 214 F.3d 1041, 1045 (9th Cir. 2000). "The lodestar  
7 amount is presumptively the reasonable fee amount, and thus a  
8 multiplier may be used . . . only in rare and exceptional cases,  
9 supported by both specific evidence on the record and detailed  
10 findings . . . that the lodestar amount is unreasonably low or  
11 unreasonably high." Id. (quotations omitted). Here, Harlick asks  
12 the Court to adjust her lodestar upward with a multiplier of 1.5.  
13 Mot. at 9-15.

14                   The quality of an attorney's performance should generally not  
15 be used to adjust the lodestar, because considerations concerning  
16 quality are reflected in counsel's hourly rate. Perdue v. Kenny A.  
17 ex rel. Winn, 130 S. Ct. 1662, 1673 (2010). However, "an  
18 enhancement may be appropriate where the method used in determining  
19 the hourly rate employed in the lodestar calculation does not  
20 adequately measure the attorney's true market value, as  
21 demonstrated in part during the litigation." Id. at 1674. An  
22 enhancement may also be appropriate where "the attorney's  
23 performance includes an extraordinary outlay of expenses and the  
24 litigation is exceptionally protracted" or "an attorney's  
25 performance involves exceptional delay in the payment of fees."  
26 Id. at 1674-75.

27                   The Court finds that this case does not present the kind of  
28 rare or exceptional circumstances that would justify an enhancement

1 of attorney fees. Harlick argues that this case is unique because  
2 it involved difficult and untested issues of insurance coverage,  
3 because Blue Shield did not believe that Harlick would succeed, and  
4 because the Ninth Circuit's decision was groundbreaking for every  
5 insured in California suffering from severe mental illness. Mot.  
6 at 11-12. However, there is no indication that these factors were  
7 not incorporated into the rates charged by Harlick's counsel.  
8 Further, Blue Shield's perception of Harlick's likelihood of  
9 success is hardly dispositive.

10 Accordingly, the Court declines to apply a lodestar multiplier  
11 and awards Harlick attorney fees in the amount of \$461,899.

12 **C. Costs**

13 Finally, Harlick seeks non-statutory costs in the amount of  
14 \$10,663.15. Harlick has provided documentation of her costs,  
15 Kantor Decl. ¶ 19, Ex. H, and Blue Shield does not object to the  
16 amount requested. Having reviewed the evidence and the arguments  
17 and for good cause shown, the Court awards Harlick \$10,663.15 in  
18 costs.

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1        **V. CONCLUSION**

2        For the foregoing reasons, Plaintiff Jeanene Harlick's motion  
3 for entry of judgment and for attorney fees and costs is GRANTED.  
4 The Court finds that Harlick is entitled to judgment in the amount  
5 of \$207,813 and awards Harlick attorney fees in the amount of  
6 \$461,899 and non-statutory costs in the amount of \$10,663.15. The  
7 Court will enter judgment in a separate Order.

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9        IT IS SO ORDERED.

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11      Dated: June 3, 2013

  
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UNITED STATES DISTRICT JUDGE

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