

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KERILEI R. OLDOERP,

Plaintiff,

v.

WELLS FARGO AND COMPANY LONG
TERM DISABILITY PLAN;
METROPOLITAN LIFE INSURANCE
COMPANY,

Defendants.

Case No. 3:08-cv-05278 RS

ORDER ON PLAINTIFF’S MOTION FOR
ATTORNEY FEES AND COSTS

I. INTRODUCTION

In this ERISA action, which was closed in February 2014 following a bench trial, plaintiff Kirelei Oldoerp seeks \$441,462 in attorney fees and \$10,831.14 in litigation costs. Defendants Wells Fargo and Co. Long Term Disability Plan and Metropolitan Life Insurance Company (collectively “MetLife”) oppose her motion, arguing she is entitled to few costs and no fees. In the alternative, MetLife seeks a significant reduction in the requested amount, contending counsel for Oldoerp billed an unreasonable number of hours, and at unjustifiably high rates. For the reasons explained below, Oldoerp is entitled to fees and costs, but not quite as much as she requests. Defendants are ordered to pay plaintiff \$406,185 in attorney fees and \$8,213.70 in taxable costs and out-of-pocket expenses, totaling an award of \$414,398.70.

1 II. ATTORNEY FEES

2 A. Oldoerp's Entitlement to Fees

3 As an initial matter, the parties dispute whether fees should be awarded at all. In an
4 ERISA action, fees are discretionary, not mandatory. *See Hummell v. S.E. Rykoff & Co.*, 634
5 F.2d 446, 452 (9th Cir. 1980). “[A] court in its discretion may award fees and costs to either
6 party, as long as the fee claimant has achieved ‘some degree of success on the merits.’” *Hardt v.*
7 *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 245 (2010) (quoting *Ruckelshaus v. Sierra Club*,
8 463 U.S. 680, 694 (1983)). MetLife does not dispute that Oldoerp achieved success on the
9 merits. Nonetheless, it contends that under these circumstances—in particular, where defendants
10 prevailed at the first bench trial, only for the Ninth Circuit to reverse upon a clarification of the
11 proper standard of review—the court should decline to award fees.

12 In deciding whether to award fees in an ERISA action, a district court should consider,
13 among other things, the five “*Hummel* factors”:

- 14 (1) the degree of the opposing parties’ culpability or bad faith; (2) the ability of
15 the opposing parties to satisfy an award of fees; (3) whether an award of fees
16 against the opposing parties would deter others from acting under similar
17 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.

18 634 F.2d at 453. In applying these factors, the court “should apply its discretion consistent with
19 the purposes of ERISA, those purposes being to protect employee rights and to secure effective
20 access to federal courts.” *Smith v. CMTA–IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir.
21 1984). ERISA’s fee provision should therefore “be read broadly to mean that a plan participant
22 or beneficiary, if he prevails in his suit under § 1132 to enforce his rights under the plan, should
23 ordinarily recover an attorney’s fee unless special circumstances would render such an award
24 unjust.” *Id.* at 589 (internal quotations omitted).

25 A review of the *Hummel* factors reveals that while some tip in MetLife’s favor, no
26 “special circumstances” would render a fee award to Oldoerp unjust. *See id.* The first factor—
27 the degree of culpability or bad faith—favors MetLife. Although defendants erred in denying
28 Oldoerp’s claim, there is no evidence that their actions were taken in bad faith. Moreover, as
evidenced by the initial findings of fact and conclusions of law issued in 2011, defendants’

1 conduct was defensible under an “abuse of discretion” standard. (*See* Findings of Fact and
2 Conclusions of Law, May 2, 2011, ECF No. 47). While that standard is not applicable here, the
3 prior findings nonetheless reflect defendants’ relatively low culpability. The second factor
4 weighs in Oldoerp’s favor, as MetLife does not contest it can satisfy a fee award. The third
5 factor, which focuses on the potential deterrent effect of a fee award, also tips in plaintiff’s favor.
6 A fee award could help ensure that, going forward, MetLife exercises more care in processing
7 claims—especially claims pertaining to chronic fatigue, depression, and other conditions that
8 may require the administrator to evaluate a claimant’s self-reported symptoms. The fourth
9 factor—whether the parties requesting fees sought to benefit all participants and beneficiaries of
10 an ERISA plan or to resolve a significant legal question regarding ERISA—implicates two
11 considerations. First, Oldoerp brings this claim for herself and not for any other beneficiaries.
12 This weighs slightly against a fee award. Second, however, Oldoerp’s case ultimately helped
13 clarify a significant legal question: Is an “abuse of discretion” standard appropriate where an
14 ERISA Summary Plan Document vests discretion in the plan’s administrator? On balance,
15 therefore, the fourth factor is neutral. The fifth factor—the relative merits of the parties’
16 positions—redounds in Oldoerp’s favor. Plaintiff won every major disputed legal issue in this
17 case: the appropriate standard of review (*de novo*), whether extrinsic evidence was admissible
18 (yes), and whether MetLife erred in denying her claim (yes).

19 In sum, Oldoerp is entitled to attorney fees. There are no “special circumstances” that
20 “would render such an award unjust.” *See* 746 F.2d at 589. While defendants’ initial success in
21 this case is somewhat relevant to the first *Hummel* factor, it is far from sufficient to preclude a
22 fee award.

23 B. Reasonableness of Fees

24 Fee awards in ERISA actions are calculated using a hybrid lodestar/multiplier approach.
25 *See McElwaine v. U.S. West, Inc.*, 176 F.3d 1167, 1173 (9th Cir. 1999). This approach has two
26 parts: (1) the court determines the lodestar amount by multiplying the number of hours
27 reasonably expended in the litigation by a reasonable hourly rate; and (2) the court may adjust
28 the lodestar upward or downward using a multiplier based on factors not subsumed in the initial
calculation. *Van Gerwen v. Guarantee Mutual Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000).

1 The party seeking an award of fees must submit evidence supporting the hours worked and the
2 rates claimed. *Id.* The court may reduce these hours if the documentation is inadequate or if the
3 hours are duplicative, excessive, or unnecessary. *Id.* “There is a strong presumption that the
4 lodestar figure represents a reasonable fee, and a multiplier may be used only in rare or
5 exceptional cases where the lodestar is unreasonably low or unreasonably high.” *Thivierge v.*
6 *Hartford Life & Acc. Ins. Co.*, 2006 WL 2917926 (N.D. Cal. Oct. 11, 2006) (citing *Van Gerwen*,
7 214 F.3d at 1045).

8 *i. Attorney Hourly Rates*

9 The fee applicant bears the burden of producing satisfactory evidence “that the requested
10 rates are in line with those prevailing in the community for similar services by lawyers of
11 reasonably comparable skill, experience, and reputation.” *Blum v. Stenson*, 465 U.S. 886, 895,
12 n.11 (1984). “Affidavits of the plaintiff[’s] attorney and other attorneys regarding prevailing
13 fees in the community, and rate determinations in other cases, particularly those setting a rate for
14 the plaintiff[’s] attorney, are satisfactory evidence of the prevailing market rate.” *United*
15 *Steelworkers of America v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990). As a general
16 rule, the forum district represents the relevant legal community. *See Gates v. Deukmejian*, 987
17 F.2d 1392, 1405 (9th Cir. 1992).

18 Russell Petti, Oldoerp’s lead attorney, claims he is entitled to fees at the rate of
19 \$600/hour. In support, he submits (i) two declarations from other experienced ERISA attorneys,
20 (ii) two declarations from former federal prosecutors, both of whom worked with Petti when he
21 was an Assistant United States Attorney, and (iii) excerpts of rate determinations from other
22 cases. This evidence provides ample justification for Petti’s claimed rate of \$600/hour. The rate
23 determinations from other cases are especially persuasive. Most recently, in 2011, a district
24 judge in the Central District of California held that \$550 was a reasonable rate for Petti. *See*
25 *Dunner v. University of Southern California Long Term Disability Plan*, 09-01732 (C.D. Cal.
26 Apr. 26, 2011); (ECF No. 82, Exh. R). The year prior, a different judge in that same court held
27 that \$550 was a reasonable rate. *See Whalen v. Standard Insurance Co.*, 09-0978 (C.D. Cal. Feb.
28 4, 2010); (ECF No. 82, Exh. Q). In addition, Petti attaches five other court orders in which
district judges have granted his requested hourly rate. Given that at least three years have passed

1 since the entry of the Central District orders, and considering Petti’s significant ERISA
2 experience and demonstrated skill as an advocate, \$600 is a reasonable hourly rate for his
3 services.

4 MetLife faults Petti for failing to include declarations from attorneys practicing in the
5 Northern District of California. Instead, all four declarants practice in Los Angeles. While
6 MetLife is correct that the forum district represents the relevant legal community, *see Gates*, 987
7 F.2d at 1405, defendants do not argue that there is a meaningful distinction between rates
8 charged by ERISA attorneys in the Northern and Central Districts.¹ Furthermore, some
9 California district courts have recognized that it is appropriate to apply a “national rate” when
10 assessing ERISA fee requests:

11 Although the Court recognizes that the “relevant community,” when
12 determining appropriate attorneys’ rates, is generally the one in which the district
13 court sits, it is appropriate to consider the declarations of attorneys in other
14 jurisdictions because ERISA cases involve a national standard, and attorneys
15 practicing ERISA law in the Ninth Circuit tend to practice in different districts.
16 Furthermore, the Court observes that ERISA cases are often considered to be
17 complex, ERISA plaintiff cases are often undesirable, and Plaintiff’s attorneys
18 possess extensive experience in ERISA law.

19 *Mogck v. Unum Life Ins. Co. of Am.*, 289 F. Supp. 2d 1181, 1190-91 (S.D. Cal. 2003); *see also*
20 *McAfee v. Metro. Life Ins. Co.*, 625 F. Supp. 2d 956, 975 (E.D. Cal. 2008) (same) *aff’d*, 368 F.
21 App’x 771 (9th Cir. 2010). Given that it is appropriate to consider declarations from other
22 districts in ERISA cases, and considering that there appears to be no meaningful difference
23 between ERISA attorney rates in the Northern and Central Districts, Petti has submitted more
24 than enough evidence to justify his claimed hourly rate of \$600/hour.

25 John Breslo, Oldoerp’s attorney based in Arizona, requests fees at the rate of \$500/hour.
26 In support, he submits (i) a 1987 letter of recommendation from Senator John McCain, (ii)
27 copies of various significant jury verdicts he has won in personal injury cases in recent years,
28 and (iii) declarations from two other members of the Arizona bar stating that Breslo’s claimed

¹ Indeed, it appears that \$600/hour is a reasonable rate for an experienced ERISA attorney in the Northern District. *See Oster v. Standard Ins. Co.*, 768 F. Supp. 2d 1026, 1035 (N.D. Cal. 2011) (“The declarations of these ERISA specialists confirm that Mr. Coleman’s \$600 hourly rate is consistent with the prevailing rates for ERISA litigation specialists in the San Francisco Bay Area.”).

1 rate is reasonable. One declaration is from Gabriel Kory, an attorney with eleven years of
2 experience practicing in Arizona. The other is from Martin Solomon, an Arizona attorney who
3 has known Breslo for thirteen years. Neither attorney works on ERISA cases, but both advocate
4 on behalf of individual plaintiffs. Although neither attorney states his own current hourly rate,
5 both declare that they are familiar with market rates in Arizona, and that Breslo's claimed rate of
6 \$500/hour is reasonable.

7 Breslo's supporting documents are not especially helpful. The McCain letter, which does
8 not speak to Breslo's skill or experience as an attorney, is irrelevant. Further, although Breslo's
9 ability to secure significant monetary awards for his clients is probative of his skill as a
10 plaintiff's attorney, the submitted copies of jury verdicts are not particularly useful for assessing
11 his reasonable hourly rate. While the attorney declarations are more probative of the
12 reasonableness of Breslo's claimed rate, neither declarant reveals his *own* hourly rate.
13 Accordingly, Breslo's evidence offers no guidepost for assessing the reasonableness of his
14 claimed rate. Unlike Petti, Breslo does not submit court orders identifying a reasonable hourly
15 rate for him in any prior cases. MetLife, meanwhile, argues that Breslo is only entitled to
16 \$325/hour. While defendants invoke a 2011 order from the District of Arizona finding that
17 another ERISA attorney was entitled to that same rate, *see Mazet v. Halliburton Co. Long-Term*
18 *Disability Plan*, 2011 WL 3290468 (D. Ariz. Aug. 1, 2011), there the rate was uncontested, and
19 the order contains no meaningful discussion of the attorney's reputation, skill, or experience.²

20 Although Breslo's documentary evidence leaves something to be desired, it is evident
21 that he has significant experience and has served as an effective advocate for his client in this
22 case. While the supporting documents do not support his claimed rate of \$500/hour, neither
23 would MetLife's requested rate of \$325/hour be sufficient. On balance, the evidence supports
24 \$450/hour as a reasonable rate for Breslo's services.

25
26
27 ² Plaintiff's observation that the attorney in *Mazet* went to University of West Los Angeles
28 School of Law, a "fourth-tier" law school with a low bar passage rate, bears no apparent
relevance. Moreover, if plaintiff wishes to compare Breslo to the attorney in *Mazet*, it is worthy
of note that the attorney in that action has apparently been a member of the Arizona bar since
1980, whereas Breslo has been practicing law since the early 1990s.

1 ii. *Current Rates vs. Historical Rates*

2 The parties further dispute whether Breslo and Petti should be paid their current rates for
3 all hours worked. MetLife argues that because this case has been ongoing since 2008, it would
4 be unfair to pay current rates for time Oldoerp's attorneys billed four or five years ago.
5 Defendants request that, for hours incurred through 2012, Breslo and Petti should be paid their
6 historical rates.

7 The court has discretion to apply the rates in effect at the time the work was performed.
8 *Bell v. Clackamas Cnty.*, 341 F.3d 858, 868 (9th Cir. 2003). It may “also award rates at an
9 attorney's current rate where appropriate to compensate for the lengthy delay in receiving
10 payment.” *Id.* Oldoerp's attorneys waited more than five years to be paid for their work in this
11 case. Although Petti's rates have increased since the inception of the litigation, they have done
12 so at a fairly modest pace. For example, as explained above, Petti's prior rate of \$550/hour was
13 approved by various court orders in 2010 and 2011. Now, more than three years since the order
14 in *Dunner*, Petti's reasonable rate is \$600/hour, representing a 9% increase. Under these
15 circumstances, where the case was filed nearly six years ago and where rewarding current rates
16 does not trigger an inordinate increase in the overall fee award, it is appropriate to award
17 attorney fees based on Petti's current reasonable rate of \$600/hour and Breslo's reasonable rate
18 of \$450/hour.

19 C. Reasonableness of Hours Billed

20 “In determining reasonable hours, counsel bears the burden of submitting detailed time
21 records justifying the hours claimed to have been expended.” *Chalmers v. City of Los Angeles*,
22 796 F.2d 1205, 1210 (9th Cir. 1986). “Where the documentation of hours is inadequate, the
23 district court may reduce the award accordingly.” *Hensley v. Eckerhart*, 461 U.S. 424, 433
24 (1983). A district court should also exclude from the lodestar fee calculation any hours that were
25 not “reasonably expended,” such as hours that are excessive, redundant, or otherwise
26 unnecessary. *See id.* at 433–34. MetLife raises four categories of objections to the hours billed
27 by Oldoerp's counsel, arguing that Breslo and Petti (i) billed for administrative/clerical tasks,
28 which are not recoverable, (ii) spent excessive time reviewing documents, (iii) spent excessive

1 time preparing for and traveling to hearings, and (iv) submitted various other entries that were
2 excessive, duplicative, or otherwise unreasonable.

3 *i. Clerical/Administrative Tasks*

4 Hours billed for administrative tasks are not compensable. *See Nadarajah v. Holder*, 569
5 F.3d 906, 921 (9th Cir. 2009) (holding that tasks “clerical in nature” should be “subsumed in
6 firm overhead rather than billed” and that “[w]hen clerical tasks are billed at hourly rates, the
7 court should reduce the hours requested to account for the billing errors”). MetLife attaches a
8 four-page appendix (“Appendix A”) identifying hours spent on allegedly administrative or
9 clerical tasks. In *Nadarajah*, the activities considered clerical were filing, obtaining transcripts,
10 and document organization. *Id.* Some of Petti’s and Breslo’s tasks fall into this category. For
11 example, in an entry typical for Petti, on 09/03/2009 he billed .3 hours for “Review and revise
12 stipulation, file.” The court in *Nadarajah* held that “filing” was a clerical task. *Id.* Similarly,
13 many of Petti’s entries include “arranging exhibits,” “gathering exhibits,” and creating tables.
14 These, too, are administrative tasks.

15 At the same time, MetLife’s appendix is overbroad, challenging numerous tasks that are
16 entirely reasonable for an attorney to perform. Reviewing applicable local rules, for example,
17 was an appropriate use of Petti’s time as an attorney. It was also reasonable for Petti to review
18 the accuracy of citations in legal briefs he submitted on behalf of his client. Only a few of Petti’s
19 and Breslo’s entries appear to be purely clerical or administrative in nature:

- 20 - 03/30/2009: “Arranging exhibits for discovery motion.” (0.6 hours)
- 21 - 12/23/2010: “Consideration of travel arrangements re trial.” (.6 hours)
- 22 - 12/16/2011: “Putting brief in final, tables.” (1.6 hours)
- 23 - 01/10/2013: “Scan and Bates label SSI file (review).” (0.4 hours)
- 24 - 08/30/2013: “Putting exhibit, declaration together.” (0.8 hours)

25 (See Petti Declaration, ECF No. 82-2, Exh. S; Breslo Declaration, ECF No. 81-2, Exh. E). These
26 entries, totaling 3 hours of Petti’s time and 1 hour of Breslo’s time, will be deducted from
27 plaintiff’s fee request.

28 Numerous of Petti’s entries combine administrative tasks with actions that are otherwise
reasonable for an attorney to perform on behalf of his client:

- 1 - 05/18/2009: “Review and revise Reply papers, gather exhibits.” (1.5 hours)
- 2 - 09/03/2009: “Review and revise stipulation, file.” (0.3 hours)
- 3 - 10/14/2010: “Arranging telephonic appearance, drafting stip and order, filing same.” (1.4 hours)
- 4 - 10/14/2010: “Review and revise CMC, letter to clerk, filing.” (0.4 hours)
- 5 - 09/23/2011: “Drafting extension letter to EC, filing same.” (0.5 hours)
- 6 - 10/10/2011: “Review and revise brief, prepare tables.” (1.0 hour)
- 7 - 10/11/2011: “Filing brief, emails to help desk re: notice of manual filing, review rules for same.” (0.5 hours)
- 8 - 12/08/2011: “Review rules, filing.” (0.3 hours)
- 9 - 11/26/2012: “Review and revision motion, filing.” (0.5 hours)
- 10 - 05/07/2013: “Review and calendar CMC order.” (0.2 hours)
- 11 - 06/27/2013: “Review and calendar order.” (0.3 hours)
- 12 - 08/30/2013: “Review and revise Opening TM, Motion to Admit, file.” (3.8 hours).
- 13 - 09/10/2013: “Review and revise Opposition, do filing.” (2.2 hours).
- 14 - 10/02/2013: “Filing Motion to Strike, letter to clerk.” (0.5 hours).
- 15 - 11/20/2013: “Email to court reporter, file and prepare ordering form.” (0.4 hours).
- 16 - 12/13/2013: “Drafting Declaration, review and revise same, arrange exhibits.” (2.1 hours).
- 17 - 12/13/2014: “Review and revise papers, file.” (0.8 hours)
- 18 - 12/20/013: “Final review of Response papers, tables and filing.” (1.3 hours)
- 19 - 03/21/2014: “Compiling exhibits, review and revise Declaration.” (1.4 hours)

20 (See Petti Declaration, ECF No. 82-2, Exh. S) (emphasis added). The Ninth Circuit permits
 21 district courts to impose percentage-based reductions where otherwise reasonable attorney tasks
 22 are included as part of a single billing entry that also includes unreasonable elements. *See Welch*
 23 *v. Metro. Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007) (approving a 20% reduction for “block-
 24 billed” entries, but reversing the district court for indiscriminately reducing *all* hours billed).
 25 The aforementioned Petti entries, which total 19.4 hours, will be reduced by three hours—
 26 approximately fifteen percent—to account for the inclusion of tasks that are administrative or
 27 clerical in nature. Although attorneys who make detail-oriented billing entries “should not be
 28 punished for being meticulous and honest,” *Palomares v. Astrue*, C-11-4515 EMC, 2012 WL

1 6599552 (N.D. Cal. Dec. 18, 2012), Petti's entries include enough apparently administrative
2 work that this minor reduction is warranted.

3 *ii. Time Spent Reviewing Documents*

4 Over the course of this five-year case, Petti spent 55.1 hours reviewing documents.
5 MetLife contends this was an excessive and unreasonable use of Petti's time. In order to make
6 effective arguments on behalf of his client, Petti was required to comb through a complex and
7 lengthy administrative record comprised of a variety of medical reports and other documents.
8 Petti also moved successfully for the admission into evidence of his client's Social Security
9 Administration file, itself comprising an additional ninety-seven pages of records and reports.
10 Petti should not be penalized for taking adequate time to formulate thorough, detail-oriented
11 arguments on behalf of his client. The time spent reviewing documents was reasonable.

12 *iii. Time Spent Preparing For Hearings*

13 MetLife argues that Petti and Breslo spent excessive time preparing for, and traveling to,
14 hearings and conferences in this case. Petti billed 44.5 hours preparing for and attending four
15 events: a 2009 status conference, the 2011 bench trial, the 2012 Ninth Circuit oral argument, and
16 the 2013 bench trial. This hardly seems unreasonable, especially considering Petti's declaration
17 that the travel time alone for these trips was 32 hours, thus leaving 12.5 hours for attendance and
18 additional preparation. This, considering Petti's role as Oldoerp's oral advocate, is entirely
19 reasonable.

20 Breslo, however, is another story. He spent 47 hours preparing for and attending the
21 2011 bench trial, 2012 Ninth Circuit argument, and 2013 bench trial. Breslo did not, however,
22 participate in oral argument before this court or the Ninth Circuit. Although it was reasonable
23 for Breslo to assist his co-counsel in preparing for oral argument, MetLife cannot reasonably be
24 expected to pay for Breslo to observe Petti's advocacy at the rate of \$450/hour.³ Similarly,
25 MetLife should not be expected to pay for Breslo's time during his travel to those events, nor, in
26

27 _____
28 ³ While it is not presumptively unreasonable for a prevailing party to seek attorney fees on behalf
of multiple lawyers in attendance at trial, in this instance, there does not appear to be a
justification for two experienced attorneys (one of whom presented no oral argument) to be
compensated for appearing at an ERISA bench trial.

1 light of Breslo's role, was it appropriate for him to bill *more* time for those events than Petti.
2 Accordingly, Breslo's time is reduced by 37 hours.⁴

3 *iv. Miscellaneous Other Objections (Appendix B)*

4 Finally, MetLife attaches an appendix (Appendix B) listing entries it claims should be
5 omitted from the final tally. It argues that the entries are vague, duplicative, and/or not
6 reasonably necessary. Of Petti's Appendix B entries, only one is problematic: a 09/24/2010
7 entry apparently regarding another case. In his reply, Petti retracts this item, which he claims
8 was included by mistake. Accordingly, his time is reduced by 0.5 hours. Of Breslo's Appendix
9 B entries, only a few are facially unreasonable. First, Breslo spent 0.6 hours drafting a fee
10 agreement with Ms. Oldoerp. MetLife argues this activity should be subsumed in firm overhead.
11 In response, plaintiff withdrew this entry from Breslo's fee request. Second, after the Ninth
12 Circuit panel was announced, Breslo spent 3.5 hours researching the panel members. Petti, by
13 comparison, spent 2.2 hours on panel research. As explained above, Breslo did not argue before
14 the Ninth Circuit. While it was reasonable for him to conduct some research on the appellate
15 panel, 3.5 hours is excessive, especially when compared to Petti's entry. It was unreasonable for
16 Breslo to spend more than one hour on this task. Taking these two unreasonable entries together,
17 Breslo's time is reduced by 3.1 additional hours.

18 The remainder of Petti's and Breslo's entries are reasonable. Although Breslo's entries
19 generally are not as granular and detailed as Petti's, both attorneys documented their work with
20 sufficient detail to support their request for fees.

21 D. Lodestar Calculation

22 Commensurate with the reductions discussed above, Petti and Breslo reasonably
23 expended 552.7 hours and 165.7 hours, respectively, in connection with this case.⁵ Applying
24

25 _____
26 ⁴ This reduction includes time spent traveling to and attending the first bench trial (eight hours),
27 the Ninth Circuit argument (seven hours), and the second bench trial (eight hours). It also
28 includes a fourteen-hour reduction for excessive time spent preparing for these events.
Excluding travel, Petti spent only 12.5 hours attending and preparing for the same events *and* a
status conference.

⁵ Petti's initial tally (559.2 hours) is reduced by 6.5 hours. Breslo's reported time (206.8 hours)
is reduced by 41.1 hours.

1 each attorney's reasonable rate, the lodestar amount comes to \$406,185.⁶ After determining the
2 lodestar amount, the court may adjust it "upward or downward using a multiplier based on
3 factors not subsumed in the initial calculation." *Van Gerwen*, 214 F.3d at 1045. Neither party
4 requests a multiplier here. Accordingly, Oldoerp is entitled to \$406,185 in attorney fees.

5 III. COSTS

6 Oldoerp also seeks \$10,831.14 in costs.⁷ In addition to basic filing costs, Oldoerp's
7 counsel incurred service fees, messenger and delivery fees, travel costs, a mediation fee, and
8 printing costs. MetLife maintains that, aside from \$805 in filing fees, Oldoerp's request is not
9 supported by sufficient evidence.

10 As an initial matter, Oldoerp is entitled to taxable costs. Civil Local Rule 54-3 allows
11 taxation of certain categories of costs, some of which are relevant here: filing fees, service of
12 process, reporter's transcripts obtained for appeal, and costs on appeal. The bulk of Oldoerp's
13 filing, service, and appeal-related transcript costs are thus appropriate. One exception, however,
14 is her request (dated August 11, 2011) for a \$610.50 "filing fee." At that point, Oldoerp's case
15 had been appealed to the Ninth Circuit. She had already incurred a \$455 appellate filing fee in
16 May 2011, so the origin of the additional \$610.50 fee is unclear. Despite MetLife's objection,
17 plaintiff did not explain the fee's source in her reply brief. Accordingly, this item is stricken
18 from Oldoerp's request for costs.

19 Because this is an ERISA action, Oldoerp is also entitled to non-taxable costs where it is
20 "the prevailing practice in a given community" for lawyers to bill those costs separately from
21 their hourly rates." *See Trustees. of Constr. Indus. & Laborers Health & Welfare Trust v.*
22 *Redland Ins. Co.*, 460 F.3d 1253, 1258 (9th Cir. 2006) (*quoting Missouri v. Jenkins*, 491 U.S.
23 274, 287 (1989)). Plaintiff argues that it is the prevailing practice for mediation costs, printing
24 costs, carrier and delivery costs, and travel costs (including food, hotel, airfare, and public
25 transportation) to be billed separately from her attorney's hourly rates. In support, Petti submits
26 a declaration stating that these are costs he would expect to bill to a client who was paying him

27 _____
28 ⁶ Petti's fees amount to \$331,620 (552.7 hours at \$600/hour). Breslo's fees total \$74,565 (165.7
hours at \$450/hour).

⁷ Petti and Breslo seek to recover \$4,795.14 and \$6,042.00, respectively.

1 on an hourly basis. Breslo's declaration, by contrast, lacks any supporting statement regarding
2 the passage of costs to hourly clients. Although Oldoerp's request also mentions a supporting
3 declaration from attorney Glenn Kantor regarding the prevailing practice in "this legal
4 community," *see* ECF No. 82 at 17:10-11, Kantor's declaration is nowhere to be found in
5 plaintiff's filings.

6 Despite the paucity of supporting evidence regarding the "prevailing practice," there is no
7 serious dispute that these are the sorts of costs an attorney in the relevant community would pass
8 along to a client separately from the attorney's hourly rate. Numerous judges in this district have
9 approved requests for out-of-pocket litigation costs under the "prevailing practice" standard
10 despite slim supporting evidence from the requesting party. *See. e.g., Barnes v. AT & T Pension*
11 *Benefit Plan-Nonbargained Program*, 963 F. Supp. 2d 950, 973 (N.D. Cal. 2013) (awarding
12 costs in ERISA action for meals, travel, courier fees, and postage costs even though the
13 supporting declarations failed to address the prevailing practice in the relevant community);
14 *Mahach-Watkins v. Depee*, C 05-1143 SI, 2009 WL 3401281 (N.D. Cal. Oct. 20, 2009) ("The
15 Court has adjudicated many fee and cost petitions, and finds that attorneys routinely bill their
16 clients" for copy, mailing, and legal research costs); *Langston v. N. Am. Asset Dev. Corp. Grp.*
17 *Disability Plan*, C 08-02560 SI, 2010 WL 330085 (N.D. Cal. Jan. 20, 2010) ("Plaintiff asserts
18 that such out-of-pocket litigation expenses are normally billed separately to clients, and
19 defendants offers [sic] no contrary evidence or authority."), *reconsidered on other grounds*, C
20 08-02560 SI, 2010 WL 1460201 (N.D. Cal. Apr. 12, 2010). Accordingly, it is permissible for a
21 prevailing ERISA plaintiff in this district to recover reasonable out-of-pocket costs relating to
22 travel, research (including non-appeal-related transcript requests), postage and courier services,
23 and the like.

24 This does not, however, mean that all of Oldoerp's requested non-taxable costs are
25 recoverable. As discussed above, it is not apparent why Breslo attended both trials and the Ninth
26 Circuit oral argument. Although it is understandable that Ms. Oldoerp would want her attorney
27 to be present at those proceedings, MetLife is not required to foot the bill. Because Breslo is not
28

1 entitled to recover the costs of travel to those proceedings, his request is reduced by \$2,000.94.⁸
2 Petti's request, meanwhile, is further reduced by \$12 to reflect a charge—later withdrawn in
3 plaintiff's reply brief—at a San Francisco bar.

4 The remainder of Petti's and Breslo's non-taxable costs are recoverable. Accordingly,
5 when combined with the permissible taxable costs discussed above, Oldoerp is entitled to
6 recover \$8,213.70 in costs and out-of-pocket litigation expenses.⁹

7 IV. CONCLUSION

8 For the reasons set forth above, Oldoerp's motion is granted in part and she is entitled to
9 recover \$414,398.70 in attorney fees and costs.

10 IT IS SO ORDERED.

11 DATED: 6/12/14

12 

13
14 Honorable Richard Seeborg
15 United States District Judge

16
17
18
19
20
21
22
23
24
25
26 ⁸ This reduction includes \$1,187.50 in airlines charges, \$649.51 in hotel-related expenses, \$81.67
27 in meals, and \$82.26 in other miscellaneous travel fees. It appears, though, that Breslo paid for
28 Petti's hotel room on at least one occasion. Accordingly, and considering that it is reasonable for
him to help co-counsel prepare for trial, Breslo is permitted to recover the 10/16/2013 hotel cost
in the amount of \$590.86.

⁹ This reflects \$4,172.64 incurred by Petti and \$4,041.06 incurred by Breslo.