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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN FRANCISCO DIVISION**

11 NELIA VIRTUSIO,

12 Plaintiff,

13 v.

14 FINANCIAL INDUSTRY
15 REGULATORY AUTHORITY, INC.,

16 Defendant.

Case No. 12-cv-00602 NC

**ORDER RE: TENTATIVE RULING
AND SETTING HEARING ON
FINRA'S MOTION FOR
ATTORNEYS' FEES AND
VIRTUSIO'S MOTION TO STRIKE
BILL OF COSTS**

Re: Dkt. Nos. 52, 66

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18 Pending before the Court are FINRA's motion for attorneys' fees, Dkt. No. 52, and
19 Virtusio's motion to strike FINRA's bill of costs, Dkt. No. 66. After the Court vacated the
20 hearing on FINRA's motion for attorneys' fees, Dkt. No. 73, Virtusio requested leave to file
21 an objection to the declaration from Nick Geannacopulos submitted in support of FINRA's
22 reply on the motion for attorneys' fees. Dkt. Nos. 70-1, 75. The Court hereby reschedules
23 the hearings on both FINRA's motion for attorneys' fees and Virtusio's motion to strike
24 costs, originally scheduled for June 26, 2013 and July 17, 2013 respectively, for **July 24,**
25 **2013 at 1:00 p.m.** in Courtroom A, 15th Floor, U.S. District Court, 450 Golden Gate
26 Avenue, San Francisco, California.

27 Based on the arguments presented by both parties, the Court is inclined to award
28 FINRA its reasonable attorneys' fees under California Labor Code § 218.5 (providing for

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1 the recovery of reasonable attorneys’ fees and costs in “action brought for the nonpayment
2 of wages, fringe benefits, or health and welfare or pension fund contributions”). Here, the
3 first cause of action for breach of contract and the fourth cause of action for failure to pay
4 wages appear to be actions “brought for the nonpayment of wages,” and, in any event, the
5 degree of overlap between those causes of action appears to be such that apportionment of
6 fees is not feasible. *See Kirby v. Immoos Fire Protection, Inc.*, 53 Cal. 4th 1244, 1255-56
7 (2012) (holding that “[t]he words ‘nonpayment of wages’ in section 218.5 refer to an
8 alleged legal violation, not a desired remedy” and inquiring as to whether the nonpayment
9 of wages is “the gravamen” of the claim); *Aleman v. AirTouch Cellular*, 209 Cal. App. 4th
10 556, 584 (2012) (directing the trial court to determine the amount of reasonable attorneys’
11 fees awardable for defense of the § 218.5 causes of action, apportioning fees incurred for
12 the separate causes of action as appropriate). In this case, while there are common issues
13 between all of the claims, the Court is not convinced that FINRA is entitled to all of its
14 attorneys’ fees incurred in defense of the causes of action for bad faith and intentional
15 infliction of emotional distress.

16 At the July 24, 2013 hearing, the parties should be prepared to address (1) whether
17 under California Labor Code § 218.5 it is appropriate for the Court to award fees for
18 defense of all of Virtusio’s claims, including those for bad faith and intentional infliction of
19 emotional distress; and (2) how the Court should apportion the fees requested.

20 Additionally, the “Lodestar Chart” FINRA has submitted in support of its request for
21 attorneys’ fees does not provide the Court with sufficient information to determine the
22 reasonable attorneys’ fees expended in defense of the causes of action brought for the
23 nonpayment of wages. *See e.g., The Traditional Cat Ass’n, Inc. v. Gilbreath*, 340 F.3d 829,
24 834 (9th Cir. 2003) (holding that, to apportion fees, a court may be required to supplement
25 the record due to inadequate documentation); *see also Drumm v. Morningstar, Inc.*, 695 F.
26 Supp. 2d 1014, 1022 n.7 (N.D. Cal. 2010) (requiring a party moving for attorneys’ fees
27 under § 218.5 to submit additional documentation to distinguish work done in support of the
28 unpaid wage claim).

1 Moreover, the declarations submitted by FINRA in support of its motion for
2 attorneys' fees, Dkt. Nos. 52-1, 70-1, do not adequately describe the level of experience
3 (such as the number of years of practice) of all of the attorneys for whose work FINRA
4 seeks fees. The declarations state in a conclusory manner that "the rates charged in this
5 case are well within the range of hourly rates in the San Francisco markets for counsel with
6 the experience and litigation skills possessed by FINRA's defense team." Dkt. Nos. 52-1 ¶
7 19; 70-1 ¶ 19. FINRA, however, does not specify the range of the applicable prevailing
8 market rate for similar services by attorneys with experience comparable to that of each
9 attorney whose fees are included in FINRA's motion. *See Garcia v. Resurgent Capital*
10 *Services, L.P.*, No. 11-cv-1253 EMC, 2012 WL 3778852, at *2 (N.D. Cal. Aug. 30, 2012)
11 (to assess a reasonable hourly rate, "courts consider the prevailing market rate in the
12 community for similar services by lawyers of reasonably comparable skill, experience, and
13 reputation.") (citation omitted); *see also Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973,
14 980 (9th Cir. 2008) ("[a]ffidavits of the plaintiffs' attorney[s] and other attorneys regarding
15 prevailing fees in the community, and rate determinations in other cases . . . are satisfactory
16 evidence of the prevailing market rate.").

17 By July 22, 2013, FINRA must submit the following: (1) a copy of counsel's
18 invoices, as referred to in Nick Geannacopoulos's declaration, Dkt. No. 70-1 ¶ 13, for all of
19 the fees sought in FINRA's motion; (2) declaration(s) describing the level of experience of
20 all of the attorneys for whose work FINRA seeks fees; and (3) declaration(s) or other
21 authority supporting FINRA's contention that the rates charged in this case are "well within
22 the range" of the applicable prevailing market rates.

23 Virtusio's motion requesting leave to file an objection to Geannacopoulos's declaration
24 is DENIED. The Court will hear Virtusio's objections and argument at the hearing.

25 IT IS SO ORDERED.

26 Date: July 5, 2013

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28 Nathanael M. Cousins
 United States Magistrate Judge