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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MALEM MEDICAL, LTD., et al.,  
Plaintiffs,  
v.  
THEOS MEDICAL SYSTEMS, INC., et al.,  
Defendants.

Case No. [13-cv-05236-EMC](#)

**ORDER GRANTING IN PART  
PLAINTIFFS’ MOTION FOR  
ATTORNEYS’ FEES AND COSTS**

Docket No. 143

On March 8, 2017, Plaintiffs Malem Medical, LTD. et al. filed a motion for Order to Show Cause asking the court to hold Defendants, Theos Medical Systems, Inc. et al., in contempt. *See* Docket No. 84. On August 10, 2017, this Court issued an order finding the Defendants in civil contempt for making disparaging statements to various regulatory agencies. *See* Docket No. 132. Subsequently, Plaintiffs filed a motion for \$156,169.00 in attorney fees and costs incurred by Plaintiffs in pursuing the motion for contempt. *See* Docket No. 143 (“Motion”). Because some of the time entries submitted by Plaintiffs’ attorneys are duplicative, irrelevant, or vague, and because \$156,169.00 is excessive considering the limited amount of actual court filings, the Court applies a 25 percent discount to Plaintiffs’ requested amount, which results in \$117,126.75, and **GRANTS IN PART** the motion for attorneys’ fees and costs.

**I. BACKGROUND**

On July 14, 2015, this Court signed a Consent Decree and Order providing injunctive relief to Plaintiffs, the enforcement of which this Court retained jurisdiction. *See* Docket No. 83 (“Consent Decree”). The Consent Decree required that Defendants not disparage Plaintiffs or any of their products. Consent Decree ¶ 9. Plaintiffs and Defendants also entered into a Settlement Agreement which stipulated that the prevailing party or parties in an action relating to the

1 enforcement of the Agreement or the Consent Decree shall be entitled to recover their reasonable  
2 attorney fees and costs. *See* Docket No. 85-1 (“Settlement Agreement”) at 9. In 2016, Plaintiffs  
3 were subject to a FDA inquiry based on 85 MedWatch complaints received by the FDA beginning  
4 in Fall 2015. *See* Motion at 3. Plaintiffs believed that Defendants were responsible for falsely  
5 filing those complaints to FDA and four other governmental agencies. *Id.* Around the same time,  
6 a number of suspicious reviews of Malem products also started to appear on Amazon. *Id.* The  
7 complaints and the Amazon reviews contained substantially similar language. Motion at 4. Thus,  
8 Plaintiffs also believed that Defendants were responsible for those Amazon reviews. *Id.*  
9 Plaintiffs’ attorneys started preparing for the motion for contempt one year before filing. *See*  
10 Docket Nos. 144-2, 145-2.

11 On March 8, 2017, Plaintiffs filed a Motion for Order to Show Cause, asking the Court to  
12 hold Defendants in contempt for filing false complaints to five governmental agencies in violation  
13 of the Consent Decree. *See* Docket No. 84. On April 2, Plaintiffs filed a second motion to reopen  
14 discovery to determine if Defendants had violated the Consent Decree by posting disparaging  
15 comments on Amazon. *See* Docket No. 89. On April 13, Defendants filed an opposition denying  
16 that the complaints to government agencies and the Amazon reviews were made by or attributable  
17 to the Defendants. *See* Docket No. 99. On July 31, a bench trial was held and three witnesses  
18 testified. Plaintiffs did not present any evidence regarding the Amazon reviews. *See* Opposition,  
19 Exh. A. On August 10, this Court issued an order finding the Defendants in civil contempt for  
20 making disparaging statements to various regulatory agencies. *See* Docket 132 (“Order”).

21 In preparing for the contempt proceeding, Plaintiffs hired two attorneys, Mr. Levin and Mr.  
22 Craigie, to represent them. Mr. Craigie, as the lead attorney, was mainly responsible for  
23 contacting clients, appearing before the court, and taking depositions. He seeks \$94,155.00 for  
24 210.70 hours of work with a \$450 hourly rate for the contempt proceeding. *See* Docket No. 145  
25 ¶ 5. Mr. Levin was responsible for researching and drafting the pleadings. He claims \$39,390.00  
26 for 98.45 hours of work with a \$400 hourly rate for the contempt proceeding. *See* Docket No. 144  
27 ¶ 6. Mr. Levin also hired a personal investigator, Mr. Hodgson, to investigate those reports and  
28 reviews and locate possible witnesses, which resulted in \$4,079.50 in fees. *Id.* ¶ 8. Plaintiffs also

1 incurred \$3,029.60 in costs related to the contempt proceeding. Motion at 4. In addition, Mr.  
2 Craigie spent 17 hours working on the motion for fees, and Plaintiffs requested an additional  
3 award of attorneys' fees in the amount of \$7,650.00. See Docket No. 153 ¶ 6. In total, Plaintiffs  
4 seek \$156,169.00 in attorneys' fees and costs. See Docket No. 151 at 6.

5 **II. LEGAL STANDARD**

6 Attorneys' fees are available to a party where specifically authorized by a contract. *Int'l*  
7 *Union of Petroleum & Indus. Workers v. W. Indus. Maintenance, Inc.*, 707 F.2d 425, 428 (9th Cir.  
8 1983). Attorney's fees can also be awarded as compensatory damage to the prevailing party in a  
9 civil contempt motion within the discretion of the district court. *Perry v. O'Donnell*, 759 F.2d  
10 702, 705 (9th Cir. 1985).

11 Reasonable attorneys' fees are generally calculated using the lodestar method, whereby the  
12 court multiplies a reasonable number of hours worked by a reasonable hourly rate. *Perdue v.*  
13 *Kenny A. ex rel. Winn*, 559 U.S. 542, 546 (2010). The fee applicant bears the burden of  
14 establishing entitlement to an award and documenting the appropriate hours expended and hourly  
15 rates. See *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1992). "Those hours may be  
16 reduced by the court where documentation of the hours is inadequate; if the case was overstaffed  
17 and hours are duplicated; [or] if the hours expended are deemed excessive or otherwise  
18 unnecessary." *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986). It is within  
19 the district court's discretion to deal with these problematic entries. For example, the district court  
20 can apply a reduction rate to duplicative hours. However, if the reduction is more than 10%, the  
21 court must give a "specific explanation." See *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112  
22 (9th Cir. 2008).<sup>1</sup>

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26 <sup>1</sup> Plaintiffs have a valid basis for attorneys' fees and costs under both California law and federal  
27 law. California law is materially similar to federal law in determining the reasonableness of  
28 attorneys' fees. Both California law and federal law require the court to calculate a lodestar figure  
and then adjust the figure based on similar factors. See *Gracie v. Gracie*, 217 F.3d 1060, 1070  
(9th Cir. 2000); cf. *Serrano v. Priest*, 20 Cal. 3d 25 (1977). Since the California and federal  
approaches are the same, the Court cites federal law in the analysis for consistency.



1 for 5/31/2017, 6/16/2017, 6/26/2017, 7/6/2017, 7/11/2017. Plaintiffs can only recover attorneys'  
2 fees arising out of the contempt proceeding. Hours spent on the defamation and anti-SLAPP  
3 claims are irrelevant to this contempt proceeding and are therefore excluded.

4 3. Vague Entries

5 The Supreme Court held in *Hensley* that counsel is not required to record in great detail  
6 how each minute of time is expended but should at least identify the general subject matter of his  
7 time expenditures. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). "Work entries are  
8 inadequately vague when the district court is unable to discern how the time spent is attributable to  
9 the case at hand." *Center for Food Safety v. Vilsack*, No. C-08-00484 JSW, 2011 WL 6259891,  
10 at \*8 (N.D. Cal. Oct. 13, 2011). Courts have held that they were unable to determine the  
11 reasonableness of the billing entries like "conferences," "telephone calls," or "review of  
12 documents" without describing the subject of the call or correspondences. *Id.* Therefore, such  
13 entries are vague and should be deducted or reduced. *Id.*

14 Mr. Levin's time entries contain vague entries such as "research," "review documents,"  
15 "correspondence," "Phone call with Peter Craigie," and "Phone call with client." *See* Docket 144-  
16 2, entries for 1/19/2016, 2/1/2016, 3/16/2016, 6/3/2016, 7/29/2016, 12/14/2016, 12/15/2016,  
17 4/7/2017, 5/10/2017, 6/12/2017, 6/29/2017, 7/10/2017, 8/24/2017. The Court is unable to  
18 determine the reasonableness of those hours without knowing the subjects of those research,  
19 documents, and correspondence. Moreover, there are also vague entries like "draft motion," "draft  
20 pleadings," and "draft discovery documents." *See* Docket 144-2, entries for 2/23/2016, 3/9/2016,  
21 3/10/2016, 3/11/2016, 3/14/2016, 3/18/2016, 3/24/2016, 3/28/2016, 4/5/2016, 7/19/2016,  
22 7/20/2016, 7/21/2016, 10/5/2016, 10/18/2016, 12/13/2016, 1/5/2017, 1/19/2017, 1/25/2017,  
23 2/3/2017, 2/4/2017, 2/9/2017, 2/15/2017, 3/1/2017, 3/2/2017, 3/3/2017, 3/4/2017, 3/5/2017,  
24 3/8/2017, 3/17/2017, 3/22/2017, 4/29/2017, 7/14/2017, 7/17/2017, 7/20/2017.

25 While the vague time entries recorded after March 2017 match the timeline of the  
26 contempt proceeding, it may be inferred that most of the "motions" and "pleadings" in those  
27 entries refer to the contempt proceeding. However, as noted above, both attorneys indicate that  
28 they were also working on other claims such as the defamation and anti-SLAPP claims. Vague

1 entries make it difficult to verify all the claimed hours pertained to the contempt charge only. The  
2 hours with vague entries account for 25 percent to 30 percent of the hours submitted by Mr. Levin.  
3 Without more specific details, it is difficult for the Court to determine the reasonableness of these  
4 hours.

5 4. Block Billing

6 If the party engages in block billing, it is reasonable for the district court to reduce the  
7 hours, since it is difficult to determine how much time was spent on particular activities. *Welch v.*  
8 *Metropolitan Life Ins. Co.*, 480 F.3d 942 (9th Cir. 2007); *see also Fischer v. SJB–P.D. Inc.*, 214  
9 F.3d 1115, 1121 (9th Cir. 2000) (holding that a district court may reduce hours to offset “poorly  
10 documented” billing). Instead of individually listing the task and the amount of time spent on  
11 each, Mr. Craigie combined multiple tasks within blocks of time in numerous entries, making it  
12 impossible to evaluate the reasonableness of these entries. *See, e.g.*, Docket No. 145-2, entries for  
13 3/8/2017, 3/30/2017, 3/31/2017.

14 B. The Limited Scope of the Filings on Contempt

15 In addition to the four major problems identified in the attorneys’ records, the Court finds  
16 \$156,169.00 in attorneys’ fees and costs is excessive compared to the limited amount of court  
17 filings and court appearances for the contempt proceeding. Plaintiffs’ counsel filed a total of 7  
18 briefs and a handful of declarations. *See* Docket Nos. 84, 89, 92, 100, 120, 126, 127. The 7 briefs  
19 total 34 pages. The declarations vary from 2 to 4 pages. The contempt motion resulted in a one-  
20 day bench trial with only three witnesses testifying. Even including the fees-on-fees, \$156,169.00  
21 is excessive for the limited scope of the contempt filings and trial. Mr. Craigie argued that what  
22 makes this case unique is the difficulty in investigating the complaints and the Amazon reviews.  
23 However, investigating facts should be conducted by an investigator or at an investigator’s rate.  
24 This Court has already included the investigator’s fees as a reasonable cost incurred in this  
25 contempt proceeding. The need for investigation in this matter did not justify the amount of  
26 attorneys’ fees incurred and claimed herein.

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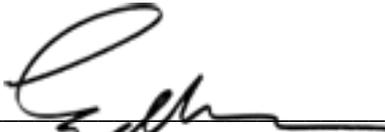
**IV. CONCLUSION**

Accordingly, for all the reasons stated above, the Court finds fees and costs are warranted, but the request for \$156,169.00 for attorneys' fees and costs is excessive and unreasonable. The Court **GRANTS IN PART** the motion for attorneys' fees, applies a 25% discount to Plaintiffs' requested amount, and awards the Plaintiffs \$117,126.75 for attorneys' fees and costs.

This order disposes of Docket No. 143.

**IT IS SO ORDERED.**

Dated: November 7, 2017

  
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EDWARD M. CHEN  
United States District Judge