

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA
9

10 THERMOLIFE INTERNATIONAL,
11 LLC, et al.,

12 Plaintiffs,

13 v.

14 MYOGENIX CORP., et al.,

15 Defendants.

Case No.: 13-CV-651 JLS (MDD)
(LEAD CASE)

**ORDER GRANTING DEFENDANTS’
APPLICATIONS FOR ATTORNEYS’
FEES**

(ECF Nos. 284, 285, 299, 311)

16
17 AND ALL RELATED CASES.
18

19 Presently before the Court are Defendant Hi-Tech Pharmaceuticals, Inc.’s (“Hi-
20 Tech”) and Defendant Vital Pharmaceuticals, Inc.’s (“Vital”) applications for attorneys’
21 fees, (ECF Nos. 284, 311 and Nos. 285, 299, respectively).¹ Also before the Court are
22 Plaintiffs’ responses in opposition to the fee applications, (ECF Nos. 293 (“Opp’n to Fee
23 Apps.”), 303 (“Opp’n to Vital Supp.”), 312 (“Opp’n to Hi-Tech Supp.”)). Defendants also
24 filed replies in support of their fee applications, (ECF Nos. 295 (“Vital Reply”), 304 (“Vital
25 Supp. Reply”), 307 (“Hi-Tech Reply”)). The Court awards fees as detailed below.
26

27
28 ¹ Both Defendants filed two applications each: an original fee application and a supplemental fee application.

BACKGROUND

Beginning in March 2013, Plaintiffs filed eighty-one related patent infringement lawsuits in this Court, including the instant case regarding Defendants Vital and Hi-Tech. The Court bifurcated the proceedings for purposes of invalidity, enforceability, and infringement and, with the consent of the Parties, consolidated these actions up to and including trial on the invalidity of the patents in suit. Vital, Hi-Tech, and GNC² proceeded to the invalidity trial phase, and after a five-day trial in August 2016, the Court found that all patents-in-suit were invalid, thereby concluding the litigation. Subsequently, Defendants Vital and Hi-Tech separately moved for attorneys' fees against Plaintiffs The Board of Trustees of the Leland Stanford Junior University and Thermolife International, LLC (collectively "Plaintiffs"). (*See* ECF Nos. 246, 253.) Both Vital and Hi-Tech based their claims on 35 U.S.C. § 285, which enables the Court to award attorneys' fees in "exceptional cases."

The Court concluded "under the totality of the circumstances Defendants have shown that the case is exceptional such that an award of attorney fees is justified" and granted Defendants' motions. (ECF No. 282, at 6.)³ Plaintiffs filed a motion for reconsideration, which the Court denied. (*See* ECF No. 315.)

Hi-Tech filed an initial application wherein it requested an award of \$991,744.52. ("Hi-Tech Fee App.," ECF No. 284.) Hi-Tech then filed a supplemental application, requesting an additional \$22,493.75 for fees and costs incurred since the filing of its first application, (for a total of \$1,014,238.27). ("Hi-Tech Supp. Fee App.," ECF No. 311). Vital also filed an initial Application for Fees wherein it requested an award of \$382,641.99. ("Vital Fee App.," ECF No. 285). Vital then filed a Supplemental Application, requesting a total of \$413,859.08, alleging the extra fees were incurred as a result of Plaintiffs' motion for reconsideration and Plaintiffs' opposition to Vital's Fee

² GNC did not move for attorneys' fees.

³ Pin citations refer to the CM/ECF page numbers electronically stamped at the top of each page.

1 Application. (“Vital Supp. Fee App.,” ECF No. 299.) Plaintiffs assert many arguments
2 in response, all of which will be addressed below.

3 **LEGAL STANDARD**

4 Pursuant to 35 U.S.C. § 285, “[t]he court in exceptional cases may award reasonable
5 attorney fees to the prevailing party.” Reasonable attorneys’ fees are generally based on
6 the traditional “lodestar” calculation set forth in *Hensley v. Eckerhart*, 461 U.S. 424, 433
7 (1983). *See Fischer v. SJB–P.D., Inc.*, 214 F.3d 1115, 1119 (9th Cir. 2000). A reasonable
8 fee is determined by multiplying (1) “the number of hours reasonably expended on the
9 litigation” by (2) “a reasonable hourly rate.” *Hensley*, 461 U.S. at 433.

10 “[T]he fee applicant bears the burden of establishing entitlement to an award and
11 documenting the appropriate hours expended and hourly rate.” *Id.* at 437. To do so, the
12 applicant “should submit evidence supporting the hours worked and rates claimed.” *Id.*
13 “Where the documentation of hours is inadequate, the district court may reduce the award
14 accordingly.” *Id.* The district court may also exclude any hours that are excessive,
15 redundant, or otherwise unnecessary. *Id.* at 434. However, the party seeking fees need not
16 provide comprehensive documentation to prevail. *Id.* at 437. District courts have
17 “‘considerable discretion’ in determining the amount of reasonable attorney fees under
18 § 285.” *Homeland Housewares, LLC v. Sorensen Research*, 581 Fed. App’x. 877, 881
19 (Fed. Cir. 2014) (internal citations omitted).

20 **ANALYSIS**

21 **I. Reasonableness of Hourly Billing Rate**

22 To determine the appropriate lodestar amount, the Court must first assess the
23 reasonableness of counsel’s claimed hourly billing rate. *Credit Managers Ass’n of S. Cal.*
24 *v. Kennesaw Life & Accident Ins. Co.*, 25 F.3d 743, 750 (9th Cir. 1994). “A court awarding
25 attorney fees must look to the prevailing market rates in the relevant community.” *Bell v.*
26 *Clackamas Cnty.*, 341 F.3d 858, 868 (9th Cir. 2003) (citing *Blum v. Stenson*, 465 U.S. 886,
27 895 (1984)). To determine the prevailing market rates, courts should consider “the fees
28 that private attorneys of an ability and reputation comparable to that of prevailing counsel

1 charge their paying clients for legal work of similar complexity.” *Davis v. City & Cnty. of*
2 *San Francisco*, 976 F.2d 1536, 1545 (9th Cir. 1992), *vacated in part on other grounds on*
3 *denial of reh’g*, 984 F.2d 345 (9th Cir. 1993). While in most cases, the relevant legal
4 community is “the forum in which the district court sits” *Gonzalez v. City of Maywood*,
5 729 F.3d 1196, 1205–06 (9th Cir. 2013), in patent cases, federal circuit law is applied to
6 the issue of attorney fees. *Q-Pharma, Inc. v. Andrew Jergens Co.*, 360 F.3d 1295, 1299
7 (Fed. Cir. 2004). “Evidence the Court should consider includes ‘[a]ffidavits of the
8 [movant’s] attorney and other attorneys regarding prevailing fees in the community, and
9 rate determinations in other cases, particularly those setting a rate for the [movant’s]
10 attorney.’” *Ravet v. Stern*, No. 07-CV-31 JLS (CAB), 2010 WL 3076290, at *2 (S.D. Cal.
11 Aug. 6, 2010) (citing *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403,
12 407 (9th Cir. 1990)).

13 **A. *Hi-Tech***

14 In its fee application, Hi-Tech seeks hourly rates of “the partner attorneys primarily
15 responsible for handling the case” as follows: \$380/hour for Mr. Gallagher; \$425/hour for
16 Mr. Leach; \$500/hour for Ms. Posner; \$655/hour for Mr. Blythe; and \$845/hour for Mr.
17 Hawkins. (Hi-Tech Fee App. 6.) But Hi-Tech’s application does not itemize the hourly
18 rate of every attorney who worked on this matter—various other attorneys for Hi-Tech
19 filed declarations detailing the hourly rates of themselves and others, but Hi-Tech does not
20 list all of the attorneys in its application. For clarity’s sake, the Court has compiled the
21 hourly rates of everyone listed in Hi-Tech’s application and the attached declarations.

22 Mr. Gallagher	\$380
23 Mr. Leach	\$500
24 Ms. Posner	\$655
25 Mr. Blythe	\$655
26 Mr. Hawkins	\$845
27 Dr. Smythe	\$430
28 Ms. Parker	\$225
Ms. Leach	\$125
Mr. Hillyer	\$485

Mr. Feldman	\$575
Mr. Frank	\$375
Ms. DeAngelis	\$365
Mr. Stahl	\$275

(See ECF Nos. 284-1, 284-5–284-7.)

Hi-Tech provided the experience and practice areas of a few of its attorneys. Mr. Gallagher is a partner at Hoffman & Baron. (“Gallagher Decl.,” ECF No. 284-3, ¶ 1.) Accordingly to his biography, Mr. Gallagher’s practice focuses on patent infringement, antitrust, trade secret, and unfair competition disputes. (ECF No. 284-6, at 16.) Mr. Leach is the owner of The Law Offices of Arthur W. Leach and specializes in commercial litigation matters, particularly those relating to the dietary supplement industry. (“A. Leach Decl.,” ECF No. 284-4, ¶ 1.) Mr. Leach has tried “dozens of complex civil and criminal cases.” (*Id.* ¶ 8.)

Ms. Posner is an attorney with Posner Law Corporation. (“Posner Decl.,” ECF No. 284-2, ¶ 1.) For the past 25 years of her career, Ms. Posner has practiced primarily in the field of complex business, class action and intellectual property litigation. (*Id.* ¶ 2.) Mr. Blythe, an attorney at King and Spalding, LLP, was retained by Hi-Tech when “trial was imminent.” (Hi-Tech Fee App. 4.) Mr. Blythe specializes in intellectual property litigation, particularly patent infringement disputes. (“Hawkins Decl.,” ECF No. 284-5, ¶ 1.) Mr. Hawkins is also an attorney at King and Spalding, LLP. He specializes in intellectual property litigation, particularly patent infringement disputes. (Hawkins Decl. ¶ 1.) Also at King & Spalding is Dr. Smythe, a patent agent who worked on this matter and who holds a Ph.D and M.S. in Chemistry and B.A. in Biology and Chemistry. (*Id.* ¶ 2.) Mr. Hillyer was a partner at Feldman Gale during relevant times. (“Hillyer Decl.,” ECF No. 284-1, ¶ 1.) Mr. Hillyer specializes in litigation of intellectual property disputes. (*Id.*) Hi-Tech did not provide any information as to any other attorneys.

In support of its attorneys’ hourly rates, Hi-Tech provides that the rates of most of the attorneys are “substantially below the \$795 per hour median billing rate for partners in

1 large national firms, as set forth in the American Intellectual Property Law Association
2 (“AIPLA”) *Economic Survey*.” (Hi-Tech Fee App. 6.) This is aside from Mr. Hawkins,
3 whose rate is “still lower than the \$868 third quartile figure set forth in the AIPLA
4 *Economic Survey*.” (*Id.*) Hi-Tech also cites cases where California district courts have
5 found similar rates reasonable when evaluating rates under 35 U.S.C. § 285. (*Id.*)

6 Plaintiffs do not contest Hi-Tech’s hourly rates. “In the absence of opposing
7 evidence, the proposed rates are presumed reasonable.” *Velez v. Wynne*, 220 Fed. App’x
8 512, 515 (9th Cir. 2007) (quoting *Cortes v. Metro Life Ins. Co.*, 380 F. Supp. 2d 1125, 1129
9 (C.D. Cal. 2005)). The Court thus presumes the rates are reasonable at the start. A court
10 may refer to AIPLA surveys in determining a reasonable rate. *Mathis v. Spears*, 857 F.2d
11 749, 755 (Fed. Cir. 1988.) And, “[w]hen . . . a fee target has failed to offer either
12 countervailing evidence or persuasive argumentation in support of its position, we do not
13 think it is the court’s job either to do the target’s homework or to take heroic measures
14 aimed at salvaging the target from the predictable consequences of self-indulgent
15 lassitude.” *United States v. \$28,000 in U.S. Currency*, 802 F.3d 1100, 1105–06 (9th Cir.
16 2015) (internal citation and quotation marks omitted); see *Alzheimer’s Inst. of Am. v. Eli*
17 *Lilly & Co.*, No. 10-CV-482-EDL, 2016 WL 7732621, at *3 (N.D. Cal. Apr. 14, 2016)
18 (finding the defendant’s hourly rates reasonable because the plaintiff did not object and the
19 rates were less than the average AIPLA market rate). Upon review of the AIPLA survey
20 evidence, and given the lack of opposition by Plaintiffs, the Court finds Hi-Tech’s
21 attorneys’ hourly rates reasonable.

22 ***B. Vital***

23 Vital’s fee agreement with its attorneys is more complicated than Hi-Tech’s. In
24 October 2016, Vital “entered into a contingency fee arrangement with its attorneys for
25 purposes of moving for attorneys’ fees pursuant to 35 U.S.C. § 285.” (Vital Fee App. 14.)
26 Before October 2016, Vital’s attorneys charged their fixed hourly rates.

27 *1. Vital’s Fixed Hourly Fees (Before October 2016)*

28 Vital claims hourly rates ranging from \$125/hour (for staff) to \$400/hour (for

1 partners). (*Id.*) Vital provides the hourly rates and experience of the six attorneys charged
2 for handling this matter. (“DiGiovanni Decl.,” ECF No. 285-1, at 2–3.) Mr. DiGiovanni
3 (at \$400/hour) is a partner with 20 years of experience practicing primarily intellectual
4 property litigation. (*Id.* ¶ 3.) Mr. Mulveny (at \$400/hour) is a former partner with 15 years
5 of experience practicing primarily intellectual property litigation. (*Id.* ¶¶ 5–6.) Mr.
6 Lambert (at \$350–\$355/hour) is counsel with 11 years of litigation experience and 12 years
7 of engineering experience. (*Id.*) Ms. Yang (at \$305/hour) is a former associate with 6
8 years of experience. (*Id.*) Mr. Rahmeier (at \$250/hour) is an associate with 9 years of
9 experience. (*Id.*) Ms. Medina (at \$355/hour) is an associate with 3 years of experience.
10 (*Id.*)⁴ Vital argues that its rates are 30–50% lower than the median nationwide billing rates
11 presented in the AIPLA *Economic Survey*. (*Id.* at 16.)

12 Again, Plaintiffs do not contest these rates. After reviewing the AIPLA survey
13 evidence and taking into consideration the attorneys’ experience and practice levels, along
14 with and lack of opposition from Plaintiffs, the Court finds Vital’s counsel’s hourly rates
15 reasonable.

16 2. *Vital’s Contingency Fees (After October 2016)*

17 After October 2016, Vital’s attorneys reduced their fees in preparing the fee
18 application and related materials, “in exchange for payment of 25% of any fees award
19 granted by the Court and subsequently recovered.” (*Id.*) Vital’s attorneys state they
20 incurred \$79,701 in fees, but only charged Vital \$39,850.50. (*Id.* at 15.) Vital’s counsel
21 therefore discounted \$40,000 in fees under the arrangement, and will gain 25% of the total
22 award (approximately \$95,000) —Vital claims these two amounts are “comparable.” (*Id.*)
23 It appears that Vital’s attorneys are requesting the Court award \$39,850.50 for the
24 contingency agreement, and will also be given \$95,000 from Vital. Plaintiffs do not contest
25 anything related to the contingency agreement.

26 “While ‘a contingency agreement cannot be used as a positive or negative multiplier
27

28 ⁴ Paralegal “C Rasnick” also appears on Vital’s billing records at a rate of \$125/hour.

1 after reasonable fees have been determined . . . [t]he Court may consider a contingency fee
2 agreement when determining [a] reasonable fee to the extent it is representative of the
3 prevailing rate in the relevant community.” *Kilopass Tech., Inc. v. Sidense Corp.*, 82 F.
4 Supp. 3d 1154, 1168 (N.D. Cal. 2015) (quoting *Fisher v. City of San Diego*, 12-CV-1268-
5 LAB-NLS, 2013 WL 4401387, at *1 n.1 (S.D. Cal. Aug. 14, 2013)).

6 Although the Court finds it questionable that counsel will be receiving both the
7 \$39,850.50 for the contingency agreement and the approximately \$95,000 on top of that,
8 the Court does not evaluate the reasonableness of this situation. Vital will be paying
9 counsel the \$95,000—this will not be coming from Plaintiffs. “[N]egotiation and payment
10 of fees by sophisticated clients are solid evidence of their reasonableness in the market.”
11 *Id.* at 1167 (internal citations omitted). Therefore, the Court evaluates for reasonableness
12 only the time billed for the \$39,850.50 amount.

13 **II. Reasonableness of Hours Expended**

14 The Court must determine the number of compensable hours Defendants’ attorneys
15 (and their staff) reasonably expended on this litigation. In determining the hours expended,
16 courts only award fees for “hours reasonably expended on the litigation” excluding “hours
17 that are excessive, redundant, or otherwise unnecessary.” *Hensley*, 461 U.S. at 433–34.
18 To assess whether the number of hours billed is reasonable, Defendants must submit
19 detailed records justifying the hours that have been expended. *Chalmers v. City of Los*
20 *Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986). The Court may reduce the hours through its
21 discretion “where documentation of the hours is inadequate; if the case was overstaffed
22 and hours are duplicated; [or] if hours expended are deemed excessive or otherwise
23 unnecessary.” *Id.*

24 **A. Plaintiffs’ Objections to Hours Expended**

25 In broad summary, Plaintiffs argue: 1. Defendants are not entitled to any fees
26 because they have not attempted to show which fees relate solely to working on the ’459
27 patent infringement case; 2. Hi-Tech’s lawyers have not spent one minute more than they
28 would have working on this case despite the exceptional conduct; 3. Vital’s requested fees

1 should be limited to work on the '459 patent, or, at most, 1/3 of its adjusted fees; 4. Hi-
2 Tech's fees are inflated and unreasonable. (Opp'n to Fee Apps. 9–22.)

3 *1. Plaintiff's Objections Relating to the '459 Patent*

4 The Court recognizes that attorneys' fees awarded under § 285 must "bear some
5 relation to the extent of the misconduct." *Special Devices, Inc. v. OEA, Inc.*, 269 F.3d
6 1340, 1344 (Fed. Cir. 2001). But "[d]istrict courts are not required to tie fees directly to
7 each instance of exceptionality 'because it is the totality of the circumstances,' and not just
8 discrete acts of litigation conduct, that justify the court's award of fees.'" *Large Audience*
9 *Display Sys., LLC v. Tennmann Prods., LLC*, No. CV 11-3398-R, 2017 WL 2432140, at
10 *1 (C.D. Cal. June 2, 2017) (quoting *Homeland Housewares*, 581 Fed. App'x at 881.)
11 Indeed, if the Court had only found one patent to be invalid, it would be appropriate to
12 apportion the fees accordingly.

13 Where a plaintiff has obtained excellent results, his attorney should recover a fully
14 compensatory fee. Normally this will encompass all hours reasonably expended on
15 the litigation If, on the other hand, a plaintiff has achieved only partial or limited
16 success, the product of hours reasonably expended on the litigation as a whole times
a reasonable hourly rate may be an excessive amount.

17 *Hensley*, 41 U.S. at 435–36.

18 To the extent Plaintiffs argue that the Court based its exceptionality finding on the
19 '459 patent alone, this is incorrect. The Court evaluated the totality of the circumstances
20 in finding exceptionality, and did not limit its finding to only the '459 patent.⁵ The Court
21 previously found all patents at issue to be invalid. The Court did not find Plaintiffs' pre-
22 filing investigation and litigation conduct related only to one of the patents at issue and
23 thus does not find that the Defendants' attorneys' fees should be limited to the actions taken
24 as to one patent or to any specific product.

25
26
27 ⁵ Additionally, Vital states "*only* the '459 Patent was in the case as to Vital, and thus all of Vital's counsel
28 time pertained to the '459 Patent." (Vital Reply 12.) Vital states "Vital's counsel led the Defendants'
successful efforts to invalidate the asserted claim of the '459 Patent and did not participate in the efforts
with regard to the other patents." (*Id.* at 8 n.3.)

1 2. *Vital's Fees*

2 Plaintiffs request the Court reduce Vital's fees by 10% given "significant problems"
3 raised in Vital's counsel's billing records. (Opp'n to Fee Apps. 16.) The Court addresses
4 Plaintiffs' objections in turn.

5 a. Work on the "'579 Patent"

6 Plaintiffs contest Vital's counsel's hours of work on the "'579" patent that has
7 nothing to do with this case. In reply, Vital states this was a typo and intended to write the
8 "'459 patent". (Vital Reply 13.) The Court declines to remove these fees due to a
9 typographical error.

10 b. Redactions

11 Plaintiffs argue Vital's fees include "a slew of inexplicable redactions covering
12 many hours which do not permit the Court to assess whether any of that time actually
13 related to this matter." (Opp'n to Fee Apps. 15.) Vital does not explain these redactions
14 except for describing them as "privilege redactions." (Vital Reply 13.) Billing records are
15 typically redacted to prevent disclosure of materials protected by the attorney-client
16 privilege or work product doctrine.

17 When a party has submitted inadequate records, this Court is "neither obligated to
18 explain what type of records should be submitted, nor to request additional information.
19 The burden of presenting the appropriate fee documentation rests squarely on the shoulders
20 of the attorneys seeking the award." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19
21 F.3d 1291, 1306 (9th Cir. 1994). "Where the documentation of hours is inadequate, the
22 district court may reduce the award accordingly." *Hensley*, 461 U.S. at 433; *see also Kabos*
23 *v. Schwan's Home Serv., Inc.*, No. CV-F-9-859 LJO SKO, 2010 WL 3943609, at *5 (E.D.
24 Cal. Oct. 4, 2010) (reducing the fees unsubstantiated by redacted hours). But if the redacted
25 entries have descriptions that provide sufficient information as to the tasks, the fees can be
26 recovered. *Jones v. Corbis Corp.*, 489 Fed. App'x 155, 157 (9th Cir. 2012).

27 In *Democratic Party of Washington State v. Reed*, 388 F.3d 1281, 1286 (9th Cir.
28 2004), counsel included entries such as "Counsel call to discuss [REDACTED]" and

1 “Research Supreme Court case law involving [REDACTED].” The Court found “these
2 redactions do not impair the ability of the court to judge whether the work was an
3 appropriate basis for fees.” *Id.* Similarly, here, one of Vital’s entries states “review issue
4 of [redacted]; researched caselaw re [redacted]; and finalized memo re [redacted]. (ECF
5 No. 285-3, at 10.) The other redacted entries are similar. Vital is entitled to secrecy about
6 its attorney work product, and the Court is able to review of Vital’s counsel’s hours spent
7 on privileged matters for reasonableness. Thus, the Court declines to reduce hours based
8 on redactions.

9 c. Time Spent on General Education

10 Plaintiffs argue counsel should not be reimbursed for time spent on familiarizing
11 themselves with local rules, filing procedures, and the like. (Opp’n to Fee Apps. 15.)

12 The Court agrees. Courts have found that time expended to become familiar with
13 the local rules governing scheduling procedures are in the nature of “general education”
14 and should not be billed to the client. *Sunstone Behavioral Health, Inc. v. Alameda Cnty.*
15 *Med. Ctr.*, 646 F. Supp. 2d 1206, 1215 (E.D. Cal. 2009). Fees for work that is clerical in
16 nature are considered part of normal overhead costs and are not included in recoverable
17 hours. *Nadarajah v. Holder*, 569 F.3d 906, 921 (9th Cir. 2009). In *Nadarajah*, the Ninth
18 Circuit identified tasks such as mailing, obtaining transcripts, researching filing
19 procedures, the time spent recording hours worked, and assembling/organizing documents
20 as examples of clerical work that are not billable. *Id.* The Ninth Circuit found “[w]hen
21 clerical tasks are billed at hourly rates, the court should reduce the hours requested to
22 account for the billing errors.” *Id.* This is true even when the work is done by a paralegal.
23 *Id.*

24 Vital’s counsel did spend time becoming familiar with this Court’s local rules. (*See*
25 ECF No. 285-3, at 3 (2 hours spent by Ms. Yang reviewing local rules and standing rules);
26 *id.* at 97 (approximately 0.2 hours spent by Ms. Medina researching local rules); *id.* at 165
27
28

1 (same); *id.* at 108 (0.5 hours spent by Mr. Rasnick researching filing procedures)).⁶ The
2 Court removes these fees and reduces Vital’s fees by \$814.50.

3 Counsel also spent time organizing binders. (*See* ECF No. 285-3 at 51 (0.4 hours
4 by Rasnick); 132; (0.5 hours by DiGiovanni); *id.* at 133 (1.1 hours by Rasnick). Per
5 *Nadarajah*, this clerical time should be removed. The Court removes these fees and
6 reduces the fee award by \$387.50.⁷

7 d. Travel Time

8 Plaintiffs argue the Court should reduce the time billed by a local lawyer located in
9 Los Angeles to travel to attend a hearing in San Diego. (Opp’n to Fee Apps. 16 (citing
10 ECF No. 285-3, at 109).) Plaintiffs argue travel time for local attorneys is not billable. (*Id.*
11 at 16 n.2.) The Court will address travel expenses (i.e. airfare, taxi cab charges, etc.) in its
12 evaluation of costs below and will remove any unnecessary travel time there.

13 e. Time Spent on Motions Vital Lost

14 Plaintiffs argue Vital should not be reimbursed for working on a motion for summary
15 judgment and judgment on the pleadings motion Vital lost. (Opp’n to Fee Apps. 16.) Vital
16 argues the motions, while denied, “formed the basis for trial arguments that resulted in the
17 invalidation of each and every claim asserted by Plaintiffs in this case.” (Vital Reply 13
18 n.5.) While the Court has discretion to subtract unreasonable or unproductive time from
19 the lodestar, a party is not required to prevail on every disputed issue to avoid a reduced
20 fee award. *See Alzheimer’s Inst.*, 2016 WL 7732621, at *7 (“[R]ecovery of attorneys’ fees
21 is not strictly limited to time spent on winning arguments, but rather includes time spent
22 reasonably by the prevailing party.”). Vital’s motions were not meritless, and the Court
23 declines to reduce the award for time spent on the motions.

24
25 ⁶ The Court also finds an example of this in ECF No. 285-3, at 165 (12/7/16 entry by Ms. Medina of 2.2
26 hours). Because the Court reduces this entry as block-billing, *see infra* Section II.A.2.g., the Court does
27 not reduce it here.

28 ⁷ Plaintiffs also argue the Court should reduce the time spent for “Reexamination research.” (Opp’n to
Fee Apps. 15). Because there was a total of .25 hours spent on this research, incurring \$50, (ECF No.
285-3, at 28), the Court declines to analyze this minor fee.

1 f. Work on Co-Defendant’s Motion on Laches

2 Plaintiffs argue Vital’s counsel’s time spent working “on a co-defendant’s motion
3 for laches which had no concern to [Vital]” should be reduced. (Opp’n to Fee Apps. 16.)
4 Vital argues laches is a defense that Vital asserted. (Vital Reply 13 n.5 (citing Complaint
5 ¶ 134, (ECF No. 8 in Case No. 13-CV-1015-JLS (MDD)).) While it is true Vital asserted
6 the defense of laches in its Complaint filed in 2013, Vital has not convinced the Court that
7 the time spent reviewing “GNC’s laches summary judgment briefing” and attending
8 “summary judgment hearing regarding GNC’s laches motion” in 2016 was necessary. (*See*
9 ECF No. 285-3, at 120, 126.) Thus, the Court declines to award this time by Mr.
10 DiGiovanni (a total of 2.6 hours). The Court reduces the fee award by \$1,040.

11 g. Block-Billing

12 Block-billing is “the time-keeping method by which each lawyer and legal assistant
13 enters the total daily time spent working on a case, rather than itemizing the time expended
14 on specific tasks.” *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 945 n.2 (9th Cir. 2007).
15 Courts are to “reduce hours that are billed in block format . . . because block billing makes
16 it more difficult to determine how much time was spent on particular activities.” *Id.* at
17 948; *see also Fischer v. SJB–P.D. Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000) (holding that
18 a district court may reduce hours to offset “poorly documented” billing). But block-billing
19 is permissible where it “involves the grouping of highly related tasks that rarely cover more
20 than a few hours.” *Sunstone Behavioral Health*, 646 F. Supp. 2d at 1217. The Court need
21 not reduce hours where entries “are detailed enough for the Court to assess the
22 reasonableness of the hours.” *Campbell v. Nat’l Passenger R.R. Corp.*, 718 F. Supp. 2d
23 1093, 1103 (N.D. Cal. 2010). Hours may be reduced if the billing makes it impossible for
24 the Court to determine how much time is spent on each task and thus whether the time
25 spent was reasonable. *See Banas v. Volcano Corp.*, 47 F. Supp. 3d 957, 867–68 (N.D. Cal.
26 2014).

27 After careful review of Vital’s fee records for evidence of block billing, (ECF No.
28 285-3), the Court concludes that the majority of the attorneys’ entries do not pose a “block-

1 billing” problem. However, several entries are problematic: ECF No. 28503, at 48 (7/7/14
2 entry of 5.4 hours); *id.* at 120 (5/10/16 entry of 3.4 hours); *id.* at 134 (7/22/16 entry of 2.7
3 hours) *id.* at 135 (7/29/16 entry of 8.5 hours); *id.* at 155 (10/12/16 entry of 4.8 hours); *id.*
4 at 165 (12/7/16 entry of 2.2 hours). Therefore, a reduction to the number of hours expended
5 is appropriate on this basis.

6 In *Welch v. Metropolitan Life Insurance Co.*, the Ninth Circuit affirmed a district
7 court’s authority to reduce block-billed hours by 10 % to 30 %. 480 F.3d at 948; *see also*
8 *Pierce v. Cty. of Orange*, 905 F. Supp. 2d 1017, 1030 (C.D. Cal. 2012) (noting that it is not
9 uncommon to impose a 5% to 20% reduction for block-billed hours). The Court finds it
10 necessary to reduce block-billed hours by 10%, the low-end percentage from *Welsh*. Thus,
11 the Court reduces Vital’s fees by \$967.50.⁸

12 h. Duplication

13 The Court finds it necessary to reduce duplicative fees. Mr. DiGiovanni included
14 two entries on the same day entitled “meet with Dr. Volek and other defense counsel to
15 prepare for trial testimony.” *See* ECF No. 285-3, at 133. To remove the duplication, the
16 Court reduces Vital’s fees by \$600.

17 3. *Hi-Tech’s Fees*

18 Plaintiffs also object to various portions of Hi-Tech’s fees.

19 a. Work by Feldman Gale

20 Plaintiffs argue the attorneys of Feldman Gale were only involved in this matter for
21 2.5 months (from April to June 2013) and spent 71.5 hours on this case for a total of
22 \$24,270.89. (Opp’n to Fee Apps. 17.) Plaintiffs argue fees by attorneys involved on such
23 a transient basis should be excluded. (*Id.* at 18.)

24 The attorneys at Feldman Gale include Mr. Hillyer, Mr. Feldman, Mr. Frank, Ms.
25 DeAngelis, and Mr. Stahl. (Hillyer Decl. ¶¶ 1–3.) Each of these attorneys spent less than
26

27 ⁸ The calculation is as follows: 5.4 hours by Rahmeier (\$250/hour); 3.4 hours by DiGiovanni (\$400/hour);
28 2.7 hours by DiGiovanni (\$400/hour) 8.5 hours by DiGiovanni (\$400/hour); 4.8 hours by Medina
(\$355/hour); 2.2 hours by Medina (\$355/hour) = \$9,675. 10% of this is \$967.50.

1 10 hours each on this case, except for Mr. Frank, who spent 40.6 hours on this case. (*Id.*
2 ¶ 4.)

3 Hi-Tech argues Feldman Gale was involved in the early stages of the litigation,
4 focusing on the complaint, answer, product analysis, and correspondence with co-
5 defendants. Hi-Tech argues after June 2013, when Feldman Gale left the case, no billing
6 was submitted until January 2014, when Mr. Gallagher and Ms. Posner began working on
7 the case; these attorneys did not spend significant time reviewing Feldman Gale’s work.
8 (Hi-Tech Reply 6–7.)

9 Courts have excluded the hours of those who billed fewer than 100 hours on a matter.
10 *See Courthouse News Serv. v. Planet*, No. CV 11-08083 SJO (FFMx), 2016 WL 9711194,
11 at *7 (C.D. Cal. Oct. 17, 2016) (excluding the hours of 33 timekeepers who billed fewer
12 than 100 hours on the matter “as the ‘transient involvement’ of attorneys billing minimal
13 time to this matter almost necessarily resulted in inefficiencies”); *Univ. Elecs., Inc. v. Univ.*
14 *Remote Control, Inc.*, 130 F. Supp. 3d 1331, 1338–39 (C.D. Cal. 2015) (same).

15 The court in *Kim Laube & Co. v. Wahl Clipper Corp.*, No. CV09-00814 JAK (JCx),
16 2013 WL 12085140 (C.D. Cal. Nov. 6, 2013), analyzed a similar situation when the
17 representation transfers to a new firm mid-case. There, defendant’s case was handled by
18 two associates at the Mayer Brown firm for a six-month period, Mr. Word and Mr. Mackey.
19 *Id.* at *5. Subsequently, defendant’s representation shifted to the Barnes & Thornburg
20 firm; neither Mr. Word nor Mr. Mackey transferred to Barnes & Thornburg.
21 “Consequently, the investment in each of them by [defendant] was lost, and those who
22 replaced them at Barnes & Thornburg had to invest time to become familiar with the case.”
23 *Id.* Accordingly, the court found it appropriate to award only 50% of the time billed by
24 Messrs. Word and Mackey. *Id.* The court distinguished Messrs. Word and Mackey from
25 others who worked at Mayer Brown. In contrast to Word and Mackey, the other associates
26 at Mayer Brown who worked on the matter, although they too did not transfer to Banes &
27 Thornburg, worked on “focused and unique” issues that did not need to be repeated by the
28 new lawyers. *Id.* at *6. The court found no need to reduce the time spent by these

1 associates.

2 Here, the Feldman Gale attorneys worked on the case for only three months in the
3 preliminary stage of the case, and the case was then shifted to Mr. Gallagher and Ms.
4 Posner. (Hi-Tech Reply 6.) First, the Court finds having five attorneys at Feldman Gale
5 on the matter created some duplicative billing. It is not reasonable to bill for each
6 attorney's time, each of whom reviewed the Complaint and other pleadings, when the
7 majority of the attorneys each worked less than 10 hours total on this case. The Court
8 reduces Feldman Gale's fees by 20%. The Court finds this reduction removes any
9 duplication and still allows recovery for the time the attorneys spent drafting pleadings,
10 memos, and completing research. Thus, the Court reduces the fee award by \$4,854.18.⁹

11 The Court also finds it appropriate to reduce certain fees to avoid repetition of work
12 when Hi-Tech's representation shifted. Although Hi-Tech argues Mr. Gallagher and Ms.
13 Posner did not spend "significant time" reviewing Feldman Gale's work, the new attorneys
14 did spend some time reviewing the work. (*See, e.g.*, Gallagher Decl. 4; Posner Decl. 5.) But
15 it cannot be said that Feldman Gale's work needed to be "repeated" by Mr. Gallagher and
16 Ms. Posner; thus, a reduction of all the time spent by Feldman Gale is not appropriate.
17 Still, the Court finds it would be duplicative to award both the time spent by Feldman Gale
18 and to award the time spent by Mr. Gallagher and Ms. Posner reviewing Feldman Gale's
19 work.

20 The Court reduces Mr. Gallagher's hours by 14.5 hours, which is approximately how
21 long it appears Mr. Gallagher spent reviewing Feldman Gale's work and getting up to speed
22 on the case. (*See* Gallagher Decl. 4.) Similarly, reduces Mr. Posner's hours by 9 hours.
23 (*See* Posner Decl. 5–6.) The Court reduces the fee award by \$5,510 for Mr. Gallagher and
24 \$4,500 for Ms. Posner.

27 ⁹ The Court also finds this reduction removes any improperly block-billed time. Although the majority of
28 Feldman Gale's entries do not pose a block-billing problem, a few entries are improperly block-billed.
The Court finds an across-the-board 20% reduction properly reduces the fees.

1 b. Jessica Leach and CL Parker

2 Plaintiffs argue Ms. Leach and Ms. Parker did not work on this case until after it was
3 closed and only spent time “to recover fees that Hi-Tech never spent on [them]” and claim
4 this is an attempt to “boost up the amount of legal fees after the case was closed from
5 attorneys who never worked on the case.” (Opp’n to Fee Apps. 18.) Vital argues it was
6 not attempting to raise fees, as it had no guarantee that fees would be awarded. (Vital
7 Reply 7.) Vital also argues the other alternative was for Mr. Leach to perform the work at
8 a higher rate, and Mr. Leach delegated work in an effort to reduce fees. (*Id.*) The Federal
9 Circuit has specifically approved a district court’s finding that attorney time spent on the
10 issue of attorney fees was recoverable. *See Central Soya Co. v. Geo. Hormel & Co.*, 723
11 F.2d 1573, 1578 (Fed. Cir. 1983); *see also Scott Paper Co. v. Moore Bus. Forms, Inc.*, 604
12 F. Supp. 835, 838 (D. Del. 1984) (recognizing *Central Soya* and holding the court will not
13 reduce “the fee for the reasonable time expended in preparing the elaborate fee application
14 and briefs filed”). Thus, the Court declines to reduce the award for time Ms. Leach and
15 Ms. Parker spent preparing the fee applications for this reason.¹⁰

16 Plaintiffs also argue Ms. Leach and Ms. Parker’s time entries include block-billing
17 and redactions. (Opp’n to Fee Apps. 18.) The majority of Ms. Leach’s entries include
18 lengthy blocks of time. Upon review of the time entries, most are lengthy simply due to
19 the great detail included in the entries, most of which read somewhat like a journal. “While
20 block-billing is less than ideal in providing a complete record to assess reasonableness,
21 adequate descriptions can still make it acceptable.” *Gilead Sci., Inc. v. Merck & Co, Inc.*,
22 No. 13-cv-04057-BLF, 2017 WL 3007071, at *8 (N.D. Cal. July 14, 2017). Most entries
23 contain related tasks and the Court is able to review these entries for reasonableness. But
24

25 ¹⁰ Further, Mr. Leach, Ms. Parker, and Ms. Leach’s billing records are not presented in an invoice format,
26 (see ECF Nos. 284-4, 284-6, and 284-7), and Plaintiffs reasonably question whether the bills were ever
27 submitted to Hi-Tech for payment. In a reply declaration, Mr. Leach declares the billing records “were
28 compiled in bills submitted to Hi-Tech for payment monthly, and have all been paid.” (“A. Leach Second
Decl.,” ECF No. 307-1, ¶ 7.) The Court finds Hi-Tech’s counsel has met its burden in proving the invoices
have been paid by the client.

1 the Court finds the following entries problematic: ECF No. 284-7, at 4 (12/19/16 entry of
2 6.25 hours, covering over ten different tasks, some of which are clerical work such as
3 “made copies”); *id.* at 6 (1/3/17 entry of 5 hours); *id.* at 9 (1/1/17 entry of 5 hours); *id.* at
4 10–11 (1/9/17 entry of 4.75 hours).

5 As to the entries of Ms. Parker, the Court finds problematic: ECF No. 284-6, at 4
6 (10/10/16 entry of 9.25 hours); *id.* at 6 (4/18/17 entry of 8 hours). The Court finds issue
7 with these entries of Ms. Leach and Ms. Parker because the entries cover a lengthy list of
8 tasks. Although these tasks, of course, all relate to the same issue (Hi-Tech’s application
9 for attorneys’ fees), the entries should have been more precisely documented to reflect the
10 amount of time spent on each task within the block entry. Accordingly, the Court reduces
11 these block-billed entries by 10%. The Court reduces the fee award by \$650.53.

12 c. King & Spalding

13 Plaintiffs argue King & Spalding’s billing is inflated and unreasonable. (Opp’n to
14 Fee Apps. 18.) Plaintiffs argue these attorneys duplicated the work done by Hi-Tech’s
15 “actual trial counsel.” (*Id.*) Hi-Tech argues it did not retain King and Spalding until “trial
16 was imminent” and the attorneys’ work was limited to drafting the direct examination of
17 Dr. Volek, preparing Dr. Volek for trial testimony, strategizing, and preparing closing
18 arguments. (Hi-Tech Fee App. 7.)

19 The attorneys at King & Spalding who worked on this matter are Mr. Hawkins, Mr.
20 Blythe, and patent agent Dr. Smythe. (Hawkins Decl. ¶ 2.) The fees charged by King &
21 Spalding totaled \$242,920.50. (*Id.* ¶ 5.) The attorneys worked from July 2016 to October
22 2016. Trial occurred in October 2016, but the attorneys at King & Spalding did not attend.
23 “The participation of more than one attorney does not necessarily constitute an unnecessary
24 duplication of effort.” *Kim v. Fujikawa*, 871 F.2d 1427, 1435 n.9 (9th Cir. 1989). The
25 Court reviews the billing records to determine if King & Spalding’s work was duplicative.

26 The King & Spalding attorneys spent copious time preparing for the direct
27 examination of Dr. Volek. (*See* ECF No. 284-5, at 5–7 (the majority of the 215.8 hours
28 King & Spalding spent on this matter was spent preparing the direct examination of and

1 “strategy” for Dr. Volek.) And yet, other attorneys also worked on preparing for Dr.
2 Volek’s testimony. Both Mr. Leach and Mr. Gallagher spent considerable time preparing
3 for Dr. Volek’s testimony and meeting with Dr. Volek. (*See* A. Leach Decl. 7, 11, 12).¹¹

4 While the Court believes the King & Spalding attorneys likely helped Hi-Tech’s
5 other attorneys in preparing testimony for Dr. Volek, the Court is not convinced there is no
6 duplication. “Necessary duplication—based on the vicissitudes of the litigation process—
7 cannot be a legitimate basis for a fee reduction. It is only where the lawyer does
8 unnecessarily duplicative work that the court may legitimately cut the hours.” *Moreno v.*
9 *City of Sacramento*, 534 F.3d 1106, 1113 (9th Cir. 2008); *see also Zest IP Holdings, LLC*
10 *v. Implant Direct Mfg., LLC*, No. 10-CV-0541-GPC WVG, 2014 WL 6851612, at *8 (S.D.
11 Cal. Dec. 3, 2014) (reducing fees for duplicate attorney time after finding plaintiffs had not
12 met their burden of proving the hours were necessary). Plaintiffs request the Court remove
13 the fees billed by King & Spalding in their entirety, but the Court finds at least some of the
14 firm’s work was necessary and reasonable in assisting Hi-Tech’s other attorneys. Still, Hi-
15 Tech has not proven all time billed by King & Spalding was reasonable and not duplicative.

16 Mr. Hawkins billed a total of 142.9 hours on this case; Mr. Blythe billed a total of
17 168.4 hours. Dr. Smythe billed a total of 27.6 hours on this case, but because of her unique
18 role as a patent agent, the Court does not find her work was duplicated. The Court finds it
19 necessary to reduce Mr. Hawkins and Mr. Blythe’s fees by 40%. *See Gates v. Deukmejian*,
20 987 F.2d 1392, 1400 (9th Cir. 1992) (recognizing that percentage reductions are acceptable
21 tools for courts to fashion reasonable fee awards); *Hanson v. Cnty. of Kitsap.*, No. 13-5388
22 RJB, 2015 WL 3965829, at *6 (W.D. Wash. June 30, 2015) (reducing requested hours by
23 33% across the board to account for vagueness, block billing, excessive hours, and
24 duplication of hours). The Court believes this will remove the duplicative work and allow
25 recovery for King & Spalding’s work done on the closing arguments, for which the Court
26

27
28 ¹¹ The Court does not document all work Mr. Leach spent on Dr. Volek, but notes almost every billed
entry by Mr. Leach in late June 2016 to July 2016 involved Dr. Volek.

1 does not find evidence of duplication. Thus, the Court reduces the fee award by \$48,300.20
2 for Mr. Hawkins and \$44,120.80 for Mr. Blythe, for a total of \$92,421.00.¹²

3 d. Mr. Gallagher

4 Plaintiffs argue Mr. Gallagher block-billed his time and worked on matters that had
5 nothing to do with Hi-Tech. (Opp'n to Fee Apps. 20–21.) Upon review of Mr. Gallagher's
6 entries for block-billing problems, the Court finds many problematic entries. While
7 Plaintiffs request the Court trim Mr. Gallagher's hours by 20% overall, the Court finds this
8 would be improper. In the cases cited by Plaintiffs as justification for this request, courts
9 reduced the block-billed entries by a certain percentage, not the fees overall. Therefore,
10 the Court reviewed all of Mr. Gallagher's entries, finding problematic block-billing in, to
11 name a few: Gallagher Decl. 9 (2/21/14 entry of 2.5 hours); *id.* (2/24/14 entry of 4.8 hours);
12 *id.* at 12 (3/5/14 entry of 7.4 hours); *id.* at 17 (4/15/14 entry of 4.7 hours); *id.* at 18 (4/30/14
13 entry of 6.6 hours); *id.* at 19 (5/1/14 entry of 4.7 hours); *id.* (5/5/14 entry of 5.7 hours).
14 The Court does not list each entry here, but has found Mr. Gallagher's problematic block-
15 billing to encompass roughly 40% of his overall billing.

16 Mr. Gallagher's block-billing is more problematic than that of Hi-Tech's other
17 attorneys. While the other attorneys listed above billed in blocks of time, for the most part,
18 their blocks were composed of related entries. This is not the case with many of Mr.
19

20 ¹² The Court also reviewed King & Spalding's entries for internal duplication. On August 2, August 3,
21 and August 4, 2016, Mr. Blythe billed 13.5 hours, 12.5 hours, and 14.0 hours, respectively, to "[a]nalyze
22 trial transcript, including admission of exhibits, demonstratives, elements of testimony, and potential
23 strategies; correspondence with H. Hawkins and A. Leach regarding status and strategy." (ECF No. 284-
24 5, at 10.) The entry is identical on all three days. On those same days, Mr. Hawkins billed 7.8 hours, 7.2
25 hours, and 5.8 hours, respectively to "[r]eview trial transcript and prepare summary of evidence." (*Id.*)
26 Again, the entries are identical on all three days, except for the third day, where "prepare draft order" is
27 included. (*Id.*) The Court understands all work cannot be completed in one day, and thus it may be
28 reasonable to complete the same task on consecutive days. But, the Court finds the documentation on
these days is inadequate to show why these two attorneys spent large blocks of time with copied-and-
pasted descriptions, especially considering neither of these attorneys attended the trial. The Court
therefore finds it is within its discretion to reduce these fees for these days as duplicative with inadequate
documentation. But, to reduce the same fees twice would be, ironically, duplicative. Therefore, the Court
finds a 40% across-the-board reduction more appropriate.

1 Gallagher’s entries. For example, Mr. Gallagher billed 4.8 hours to “[r]eview draft
2 document requests, interrogatories and requests to admit to be served on Stanford; analyze
3 standing issue and Hi-Tech’s proposed response should ThermaLife file a motion seeking
4 to add Stanford as a party; analyze possible motion to dismiss to accompany an opposition
5 to ThermoLife’s motion to amend.” (*Id.* at 9.) Given that one of these tasks involves
6 reviewing discovery, but two involve analyzing “possible” situations, the Court cannot
7 determine the reasonableness of the entries when billed in this block format.

8 While the Court realizes its estimation of Mr. Gallagher’s block-billed time may not
9 be exact, to pore over each record would improperly turn the Court into a “green eyeshade
10 accountant,” when the “essential goal in shifting fees (to either party) is to do rough justice,
11 not to achieve auditing perfection.” *Fox v. Vice*, 563 U.S. 826, 838 (2011). The Court
12 reduces the block-billed entries by 10%, thus, the Court reduces Mr. Gallagher’s fees by
13 \$16,667.12.¹³

14 e. Mr. Leach

15 Plaintiffs argue Mr. Leach also block-billed his time, worked on matters having
16 nothing to do with Hi-Tech, billed for non-legal work, and worked on correcting mistakes.
17 (Opp’n to Fee Apps. 21.)

18 In response, Mr. Leach filed a declaration indicating he “inadvertently included a
19 billing entry” for another case for a total of 15 minutes. (A. Leach Second Decl. ¶ 4.) But
20 in its Reply, Hi-Tech states Mr. Leach’s “unrelated entries . . . equate to 1.1 hours of work,
21 or \$550.” (Hi-Tech Reply 11 n.5.) The Court therefore reduces the fee award by \$550 for
22 the unrelated entries.

23 Mr. Leach also declared that although his bills include non-legal entries such as
24 “filled the car with gas,” he did not charge for this time, but only included this so the client
25 would understand the fuel charge. (A. Leach Second Decl. ¶¶ 5–6.) While this may be
26

27
28 ¹³ The calculation is as follows: Mr. Gallagher’s total fees were \$416,678. (Gallagher Decl. ¶ 5.) The Court reduced 40% of this fee by 10%.

1 true, to include this in a block-billed entry is problematic. The entry reads “Meeting with
2 John for breakfast followed by continued prep for Dr. Volek at OSU; departed for the
3 airport with John and Tammy, dropped them off, filled the car with gas, returned the rental
4 car and made my flight to Atlanta; call with Jared (17 min).” (A. Leach Decl. 8.) The
5 entry is for exactly 8 hours. (*Id.*) Block-billing an entry with both legal and non-legal
6 tasks, without specifying the time spent on each, does not provide the Court with adequate
7 information to evaluate the time spent on the legal tasks within the block and ensure non-
8 legal tasks are excluded. *See Darling Int’l, Inc. v. Baywood Partners, Inc.*, No C-05-3758
9 EMC, 2007 WL 4532233, at *5 (N.D. Cal. 2007) (excluding hours claimed for “purely
10 clerical and/or secretarial tasks [transmitting materials to a client, making travel
11 arrangements, copying documents, setting up and taking down a war room, serving
12 documents, coordinating a court reporter, and so forth] for which there should be no
13 compensation”).

14 Thus, the Court reduces this block-billed time, as well a few other entries for the
15 same reasons. *See* A. Leach Decl. 8–9 (6-hour entry which includes legal work as well as
16 “made reservations (hotel and flight)” and “located a great rate for the Westin”); *id.* at 9
17 (6-hour entry which includes legal work as well as “changed rooms and moved closer to
18 the airport”). Additionally, the Court finds problematic the January 2, 2017 entry of 5
19 hours as a block-billed entry of unrelated tasks. (*Id.* at 18). The remainder of Mr. Leach’s
20 entries, while lengthy and greatly detailed, pose no block-billing problem. The Court
21 reduces the improper block-billed entries by 10%, thus reducing the fee award by
22 \$1,062.50.

23 Plaintiffs also state Mr. Leach spent time correcting errors. (Opp’n to Fee Apps. 21
24 (citing A. Leach Decl. 14, 18).) In order to remove any duplication due to the attorney’s
25 own error, the Court reduces the fee award by 1 hour of Mr. Leach’s time, or \$425.00.

26 f. Ms. Posner

27 Plaintiffs state Ms. Posner’s entries are “succinct and to the point,” but argue Ms.
28 Posner also charged Hi-Tech for work done on irrelevant matters. (Opp’n to Fee Apps 22.)

1 The Court reviewed Ms. Posner’s entries for references to unrelated matters. Upon
2 doing so, the Court came across various vague entries. Courts have reduced fee awards for
3 vague entries. *See Santiago v. Equable Ascent Fin.*, No. C 11-3158 CRB, 2013 WL
4 3498079, at *6 (N.D. Cal. July 12, 2013) (“[T]he work billed for unnamed drafts and
5 telephone calls with unknown parties is too vague to be reviewed.”); *Dailey v. Societe*
6 *Generale*, 915 F. Supp. 1315, 1328 (S.D.N.Y. 1996) (excluding entries for “telephone
7 call,” “consultation” and “review of documents” as insufficiently specific to determine
8 whether they were duplicative or excessive). The Court removes as vague: ECF No. 284-
9 2, at 6 (0.3 hour entry entitled “Calls and email to and from counsel re various issues”); *id.*
10 at 5 (approximately 0.5 hour entry for the same task); *id.* at 11 (0.2 hour entry entitled
11 “Further review, edits, etc.”); *id.* at 14 (0.2 hour entry entitled “Review expert
12 information”); and *id.* at 17 (0.3 hour entry entitled “Review follow up to JDG call, etc.”).¹⁴

13 The Court also deducts Ms. Posner’s time spent on unrelated matters. Various
14 entries by Ms. Posner refer to the “Better Body Sports action” or to “Gaspari.” Neither
15 Ms. Posner nor Hi-Tech has met its burden of proving that entries which appear to have no
16 relation to this matter are reasonably billed. While the Court understands Ms. Posner may
17 have been reviewing other cases for assistance with this matter (for example, it was likely
18 she reviewed the “motion for attorney’s fees in the Better Body Sports action” for
19 assistance with the attorneys’ fees motion in this case, (*id.* at 11)), the Court finds various
20 entries to be billed without explanation as to their reasonableness. The Court removes:
21 ECF No. 284-2, at 7 (0.1 hour of “Review and analysis of cost bill in Better Body action”);
22 *id.* at 11 (0.1 hour entry, 0.2 hour entry, and 0.1 hour entry of “Review email re status
23 conference setting on Better Body Sports case”); *id.* at 12 (0.1 hour entry of “Review ex
24 parte motion of Gaspari counsel to withdraw,” and 0.1 entry related to Gaspari); *id.* at 16
25

26
27 ¹⁴ While the Court realizes all of these entries are short, the Court finds it would be remiss not to exclude
28 them simply due to their short length, nor can the Court deduct Ms. Posner’s bills by 10% overall, as
Plaintiffs request.

1 (0.4 entry of “File substitution of attorney re Formutech”).¹⁵ In total, the Court removes
2 2.6 hours of Ms. Posner, or \$1,300.

3 **III. Expert Witness Fees**

4 Vital seeks \$21,954.52 in expert witness and consultant fees. (Vital Fee App. 18.)
5 Hi-Tech does not specify the amount of requested expert fees, but includes it in its request
6 for costs. (Hi-Tech Fee App. 8.) Plaintiffs argue Defendants are not entitled to expert fees.
7 (Opp’n to Fee Apps. 22.)

8 “Section 285 does not provide for the award of expert witness fees.” *In re Electro-*
9 *Mech. Indus.*, 359 F. App’x 160, 165–66 (Fed. Cir. 2009); *see also Amsted Indus. Inc. v.*
10 *Buckeye Steel Castings Co.*, 23 F.3d 374, 379 (Fed. Cir. 1994) (“Section 285 does not
11 include shifting of expert fees”). But, “the Court may invoke its inherent power to
12 impose sanctions in the form of reasonable expert fees in excess of what is provided for by
13 statute” provided that the non-prevailing party acted in bad faith or fraudulently. *Takeda*
14 *Chem. Indus. Ltd. v. Mylan Labs., Inc.*, 549 F.3d 1381, 1391 (Fed. Cir. 2008); *see iLOR,*
15 *LLC v. Google, Inc.*, 631 F.3d 1372, 1380 (Fed. Cir. 2011) (noting that although district
16 courts cannot impose expert fees under § 285, “a court can invoke its inherent power to
17 award such fees in exceptional cases based upon a finding of bad faith” (citations omitted)).

18 The Court has already reviewed this case under *Octane Fitness, LLC v. ICO Health*
19 *& Fitness, Inc.*, 134 S. Ct. 1749 (2014) and determined the case is exceptional under the
20 totality of the circumstances. (*See* ECF No. 282.) The Court has noted that its Order
21 finding exceptionality “was ‘based on a finding of unfairness or bad faith in the conduct of
22 the losing party, or some other equitable consideration.’” (ECF No. 315 (quoting
23 *Checkpoint Sys. Inc. v. All-Tag Sec.*, 858 F.3d 1371, 1376 (Fed. Cir. 2017)).) The “purpose
24 of § 285 is, in a proper case and in the discretion of the trial judge, to compensate the
25 prevailing party for its monetary outlays in the prosecution or defense of the suit.” *Mathis,*
26

27
28 ¹⁵ While the Court understands Formutech was another Defendant in this matter, Ms. Posner has not met her burden of explaining why it is reasonable to bill Hi-Tech for this action.

1 857 F.2d at 755 (emphasis and quotation omitted). Thus, the Court finds it appropriate to
2 award expert fees in this case.

3 **IV. Costs**

4 Vital requests \$34,424.38 in costs and expenses “associated with photocopying,
5 PACER searches, computer assisted research, telecommunications services, expert witness
6 / consultant fees, postage and express delivery service expenses, travel expenses, and books
7 and publications.” (*Id.* at 17.) Removing expert fees, addressed above, Vital requests
8 \$12,469.86 in costs. Hi-Tech requests \$27,306.52 in “costs and expenses associated with
9 photocopying, charges via PACER, computer assisted research, telecommunication
10 services, expert witness / consultant fees, postage and express delivery service expenses,
11 and travel expenses.” (Hi-Tech Fee App. 8.) Plaintiffs argue Defendants should be granted
12 only a portion of their costs. (Opp’n to Fee Apps. 22)

13 Section 285 refers only to attorney fees and does not mention costs. But, the Federal
14 Circuit has held that costs can be awarded under § 285. *Central Soya Co., Inc. v. Geo. A.*
15 *Hormel & Co*, 723 F.2d 1573, 1578 (Fed. Cir. 1983). Thus, the issue is the reasonableness
16 of the costs.

17 In reviewing each Hi-Tech’s requested costs, the Court finds instances of
18 duplication. This is true especially in travel expenses. “With respect to long-distance travel
19 for out-of-state attorneys, courts generally do not allow fees for such time absent a showing
20 that recovering for travel time is customary in the particular facts of the case.” *Zest IP*
21 *Holdings*, 2014 WL 6851612, at *10. Courts in this district “are reluctant to award fees
22 for traveling to a hearing where an insufficient showing has been made that local counsel
23 alone could not have attended and/or the out-of-state counsel could not have attended
24 telephonically.” *Id.*

25 Various defense attorneys traveled to San Diego and other locations for hearings,
26 meetings, and trial. Mr. Gallagher and Mr. Leach both attended trial in July and August
27 2016. Mr. Leach, Mr. Gallagher, Mr. Hawkins (all for Hi-Tech) and Mr. DiGiovanni (for
28 Vital) all met with Dr. Volek in Ohio in July 2016 to prepare for trial. The Court finds Hi-

1 Tech has not met its burden of proving why three of its attorneys needed to travel to Ohio
2 to meet with the expert. *See id.* (reducing travel expenses because “[p]laintiffs have not
3 established that recovery for attorney travel time is customary under the particular facts of
4 the case”). Hi-Tech did not provide any details as to how much its counsel incurred in
5 travel expenses specifically. Thus, the Court reduces Hi-Tech’s cost award by \$8,703,
6 which is approximately the cost of Mr. Gallagher’s travel to Ohio, as well as for his time
7 spent in Ohio. (*See* ECF No. 284-3, at 67–68.) The Court does not find it necessary to
8 reduce Vital’s travel costs.

9 Further, the Court finds there is naturally some duplication due to Hi-Tech’s various
10 attorneys on the matter. It is important to note that Hi-Tech had various groups of attorneys
11 working on this matter; Feldman Gale, King & Spalding, and the main lawyers, including
12 Mr. Leach and Mr. Gallagher. Hi-Tech has not provided a detailed list of costs for the
13 Court to review, only providing a final number. Due to the lack of explanation as to the
14 costs, the Court finds there has been a duplication in costs such as photocopying and legal
15 research by the various firms working on this case over time. Thus, the Court reduces the
16 requested costs, minus the fees already subtracted out above, by 10%.¹⁶ The Court reduces
17 Hi-Tech’s fees by \$1,898.35.

18 On the other hand, Vital has met its burden in proving its costs were reasonably
19 incurred. (Vital Fee Apps. 17.) Vital divided its costs by topic, and the Court finds these
20 costs were reasonable and necessary.

21 ///

22 ///

23 ///

24
25 ¹⁶ The Court finds it is important to note that it is well within its discretion to reduce all requested fees by
26 10%. *See Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) (“[T]he district court can
27 impose a small reduction, no greater than 10 percent—a ‘haircut’—based on its exercise of discretion and
28 without a more specific explanation.”). The Court does not do so, but is therefore within its discretion to
reduce costs by 10%.

1 **V. Interest**

2 Vital seeks \$68 per week in post-judgment interest from April 4, 2017 until payment
3 is made by Plaintiffs, as well as \$15,160.36 in prejudgment interest. (Vital Fee App. 7 &
4 n.1.) Hi-Tech adopts this argument. (Hi-Tech Fee App. 8.)

5 “Under 28 U.S.C. § 1961(a), interest is allowed on money judgments in civil cases
6 recovered in a district court accruing from the date of the entry of the judgment. Courts
7 have interpreted this to mean that post-judgment interest is calculated ‘from the date of the
8 judgment establishing the right to the award.’” *Monolithic Power Sys., Inc. v. 02 Micro*
9 *Int’l Ltd.*, No. C 08-4567 CW, 2012 WL 1577365, at *3 (N.D. Cal. May 3, 2012) (internal
10 citations omitted); *see also Mathis*, 857 F.2d at 759–60 (awarding post-judgment interest
11 in a patent case, noting that “[t]he provision for calculating interest from entry of judgment
12 deters use of the appellate process by the judgment debtor solely as a means of prolonging
13 its free use of money owed the judgment creditor”). Additionally, a court has the authority
14 to award pre-judgment interest on an unliquidated sum made under Section 285 in cases of
15 “bad faith or exceptional circumstances.” *Mathis*, 857 F.2d at 761. The Court has noted
16 above its finding of bad faith. “There is no applicable federal statute establishing a
17 prejudgment interest rate.” *Gust, Inc. v. Alphacap Ventures, LLC*, 15cv6192 (DLC), 2017
18 WL 2875642, at *7 (S.D.N.Y. July 6, 2017).

19 Plaintiffs do not contest Defendants’ request for post-judgment interest. The Court
20 grants post-judgment interest from April 4, 2017, the date the Court determined that this
21 case was exceptional and fees were appropriate. (ECF No. 282.) “Such interest shall be
22 calculated from the date of the entry of the judgment, at a rate equal to the weekly average
23 1-year constant maturity Treasury yield, as published by the Board of Governors of the
24 Federal Reserve System, for the calendar week preceding.” 28 U.S.C § 1961.

25 On the other hand, Plaintiffs do contest Defendants’ request for pre-judgment
26 interest. The Court finds pre-judgment interest is warranted due to the Court’s finding of
27 bad faith. Vital requests \$15,160.36 in prejudgment interest. (Vital Fee App. 13.) Hi-
28 Tech does not specify an amount. (Hi-Tech Fee App. 8.) Prejudgment interest shall be

1 calculated using the prime interest rate compounded quarterly. *See Ill. Tool Works, Inc. v.*
2 *MOC Prod. Co.*, No. 9-CV-1887 JLS (MDD), 2013 WL 12064544, at *8 (S.D. Cal. Oct.
3 25, 2013) (applying the prime rate); *Idenix Pharm. LLC v. Gilead Sci., Inc.*, No. 14-846-
4 LPS, 2017 WL 4216993, at *9 (D. Del. Sept. 22, 2017) (same). Given that the interest
5 depends on the appropriate rate and the date of payment, the Parties **SHALL** confer on the
6 appropriate amounts of pre-judgment and post-judgment interest rates to be paid, based on
7 this Order and the date of payment by Plaintiffs.

8 **VI. Supplemental Fees**

9 At last, the Court reaches the supplemental fee applications filed by both parties,
10 (ECF Nos. 299, 311.) Vital states from the date it filed its original application (on April
11 18, 2017) to the date it filed its supplemental application, it incurred an additional
12 \$27,249.50 in fees and \$396.51 in costs.¹⁷ (Vital Supp. Fee App. 4.) Hi-Tech requests
13 \$22,493.75. (Hi-Tech Supp. Fee App. 2.) The Court reviews both for reasonableness.

14 **A. Vital**

15 Plaintiffs argue Vital's counsel spent 12.4 hours making corrections to the initial fee
16 petition. (Opp'n to Vital Supp. 2.) Plaintiffs also argue Vital's 27.7 hours in drafting a 10-
17 page reply brief is excessive. (*Id.*) Vital agrees it spent 9.6 hours to prepare the corrected
18 fee petitions, but argue these fees are recoverable. (Vital Supp. Reply 2.)

19 The Court finds it would be unreasonable to allow Vital to recover for time its
20 attorneys spent correcting their own mistakes. Although Vital determined it spent 9.6 hours
21 preparing the corrected petitions, to do so was a rough estimation based in part on Ms.
22 Medina's block-billing. (*See* Vital Supp. Reply 2 n.1.) The Court rounds this to 10 hours
23 and reduces the fee award by \$3,505. The Court finds no other issue with Vital's
24 supplemental fees.

25
26
27
28 ¹⁷ Vital also states it incurred \$3,571.08 in prejudgment interest, but the Court does not include this in its
analysis here.

1 ***B. Hi-Tech***

2 Plaintiffs argue Hi-Tech’s attorney’s billing 110.75 hours in 2 months is excessive.
3 (Opp’n to Hi-Tech Supp. 2.) The Court finds some duplication in three attorneys working
4 on this short-term matter. For example, both Ms. Parker and Ms. Leach have an entry
5 indicating they both drafted the section of the opposition to Plaintiffs’ motion for
6 reconsideration “relating to compensation and deterrence oriented goals.” (ECF No. 311-
7 2, at 4; ECF No. 311-3, at 4.) This duplication was not evident in Mr. Leach’s work, as he
8 was the senior attorney reviewing the work, but there was some overlap on the part of the
9 two associates. The Court therefore reduces both Ms. Leach and Ms. Parker’s fees by 40%,
10 or \$7,882. The Court finds this reduction also covers any unnecessary time spent on
11 preparing the unsuccessful motion for leave to file excess pages and all related tasks. (*See*
12 ECF No. 311-2, at 4.)

13 **VII. Conclusion**

14 ***A. Vital***

15 In sum, Vital requests \$382,641,99 in its first fee application. This is composed of:
16 \$293,206.75 in fees billed to the client, \$39,850.50 in fees through the contingency award,
17 \$34,424.38 in costs, and \$15,160.36 in prejudgment interest. Vital then requests
18 \$31,217.09 in its supplemental application, for a total of \$413,859.08.

19 The Court removes the request for pre-judgment interest from the calculation and
20 asks the Parties to confer on this issue. Therefore, Vital requests: \$395,127.64 in fees and
21 costs. Given the Court’s above reductions, the Court **AWARDS** Vital: **\$387,813.14**. This
22 does not include pre-judgment or post-judgment interest.

23
24
25
26 ///

27 ///

28 ///

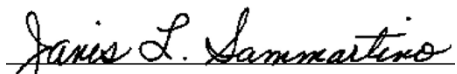
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

B. Hi-Tech

Hi-Tech requests \$991,744.52 in its first application, and an additional \$22,493.75 in its supplemental application for a total of \$1,014,238.27. Given the Court’s above reductions, the Court **AWARDS** Hi-Tech **\$867,814.59**. This does not include pre-judgment or post-judgment interest.

IT IS SO ORDERED.

Dated: January 8, 2018


Hon. Janis L. Sammartino
United States District Judge