UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SCOTT SCHUTZA and JOHN KARCZEWSKI, Plaintiffs, v. CITY OF SAN DIEGO; AIR CALIFORNIA ADVENTURE, INC., a California Corporation doing business as TORREY PINES GLIDERPORT, and DOES 1-10, Defendants.	Case No.: 3:13-cv-2992-CAB-(KSC) **ORDER ON MOTION FOR ATTORNEYS' FEES** **[Doc. No. 104]**

This matter comes before the Court on Plaintiffs Scott Schutza and John Karczewski's (collectively "Plaintiffs") Motion for Attorneys' Fees under the Americans with Disabilities Act ("ADA"). [Doc. No. 104.] The Court finds the matter suitable for determination on the papers submitted in accordance with Civil Local Rule 7.1(d)(1) and therefore denies Defendants' request oral argument. For the reasons set forth below, the Court grants the motion.

I. Background

Plaintiffs are both unable to walk or stand independently as the result of paraplegia, and use wheelchairs for mobility. In the Spring of 2013, Plaintiffs visited the Torrey Pines Gliderport ("Gliderport") seeking to join other spectators in watching the sailplanes, hang gliders and paragliders and encountered various barriers that denied them full and equal access to and enjoyment of the premises.

On December 12, 2013, Plaintiffs filed suit against Defendants alleging violations of ADA, 41 U.S.C Sections 12101, *et seq.*, the California Unruh Civil Rights Act (the "Unruh Act"), California Civil Code Section 51, *et seq.*, and the California Disabled Persons Act ("CPDA"), California Civil Code Sections 54.1 *et seq*. [Doc. No. 1.]

After two years of litigation, the parties filed cross motions for summary judgment. [Doc. Nos. 47, 50.] On June 29, 2016, this Court issued an Order that denied Defendants' motion for summary judgment and granted in part and denied in part Plaintiffs' motion for summary judgment. [Doc. No. 65.] In its Order, the Court determined that the Gliderport was a place of public accommodation that was subject to the ADA. The Court granted Plaintiffs' Title III ADA claim related to the portable toilets located at the Gliderport, the Unruh Act claim and the CPDA claim. Finding triable issues of fact regarding the ease of remediation of the violations occurring at the parking lot, concession stand and picnic tables and whether the relief sought by Plaintiffs were reasonable accommodations, the Court denied Plaintiffs' Title II ADA claim and the Title III ADA claims on these barriers.

Following the November 4, 2016 Pretrial Conference, the parties engaged in settlement discussions that culminated in the issuance of a consent decree. [Doc. No. 107.] Under the terms of the consent decree, Defendants would provide two designated disable accessible parking spots, one fully compliant accessible unisex bathroom and an accessible concession stand at the Gliderport. The parties also agreed to have the Court determine the amount of recoverable statutory penalties and the attorneys' fees award.

On April 14, 2017, Plaintiffs filed their application for attorneys' fees and costs, requesting a total of $90,533. [Doc. No. 104.] Additionally, Plaintiffs request $24,000 in

statutory penalties under the Unruh Act. [*Id*. at 6[1].] Defendants filed their opposition [Doc. No. 108] and Plaintiffs filed their reply [Doc. No. 109].

II. Legal Standard

The ADA provides that the court, "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs." 42 U.S.C. § 12205. "A prevailing plaintiff under the ADA should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Jankey v. Poop Deck,* 537 F.3d 1122, 1130 (9th Cir. 2008) (internal quotation marks and citation omitted). Without this fee-shifting provision "few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (per curiam). "Consequently, recovery is the rule rather than the exception." *Jankey,* 537 F.3d at 113 (internal quotation marks and citation omitted). Additionally, any person found in violation of the Unruh Act "is liable for . . . any [attorneys'] fees that may be determined by the court. . . ." CAL. CIV. CODE § 52(a).

Typically, "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (citation omitted). "The prevailing party inquiry does not turn on the magnitude of the relief obtained." *Farrar v. Hobby*, 506 U.S. 103, 111 (1992). Rather, in ADA cases, "[f]or a litigant to be a 'prevailing party' for the purposes of awarding attorneys' fees, he must meet two criteria: he must achieve a material alteration of the legal relationship of the parties, and that alteration must be judicially sanctioned." *Jankey,* 537 F.3d at 1129-30 (quoting *P.N. v. Seattle Sch. Dist. No. 1*, 474 F.3d 1154, 1172 (9th Cir. 2007)).

[1] Document numbers and page references are to those assigned by CM/ECF for the docket entry.

The most useful starting point for determining attorneys' fees awarded under the ADA is by performing the lodestar calculation – the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Hensley*, 461 U.S. at 433. For a fee request to be adjudged reasonable, it must "exclude from this initial fee calculation hours that were not 'reasonably expended'" and should not include fee requests for hours that are excessive, redundant, or otherwise unnecessary. *Id.* at 433-34.

III. Discussion

Defendants do not challenge Plaintiffs' prevailing party status. Having entered judgment for Plaintiffs on one of their ADA claims, their Unruh Act claim and their CDPA claim, the Court finds them to be the prevailing party and therefore entitled to recover fees and litigation expenses under the ADA and Unruh Act.

With their motion for attorneys' fees and judgment, Plaintiffs submit a declaration from one of their attorneys, Mr. Mark Potter, along with supporting documentation that provide an itemized description of the time spent by their counsel on this matter beginning on March 18, 2013 and ending in March 2017. [Doc. Nos. 104-2, 104-3.] The declaration also sets forth counsel and his colleagues' qualifications and hourly rates. Plaintiffs request a total award in the amount of $90,533.00 demanding $84,055 in attorneys' fees and $6,478 in litigation expenses. Further, Plaintiffs seek $24,000 in statutory penalties under the Unruh Act; $12,000 per Plaintiff for each violation they encountered on three different occasions. [Doc. No. 104-1 at 6.]

Defendants do not dispute the hourly rates of Plaintiffs' counsel but object to the award of any fees, and in the alternative, argue that any award should be proportionally reduced to take into account all the facts and circumstances of the case and the results obtained. [Doc. No. 108 at 5-25.] Defendants also assert that Plaintiffs should not be awarded statutory damages, and assuming that they are so entitled, argue that Plaintiffs must mitigate their damages under the Unruh Act. [*Id*. at 26-27.]

A. Fee award proportional to Plaintiffs' recovery

Defendants argue that Plaintiffs' recovery should be reduced to reflect the minimal success they achieved. [Doc. No. 108 at 11-14, 22-23.] Defendants posit that "Plaintiffs received essentially no relief as a result of their attorney's effort; the vast majority of the relief received was provided voluntarily, independent of any settlement discussions, and prior to the settlement demanded by Plaintiffs' attorneys." [Doc. No. 108 at 13:17-20.] Plaintiffs counter that they have substantially prevailed, achieved excellent results that warrant granting the full fee amount and that Defendants are downplaying the results achieved. [Doc. No. 109 at 10-14.] The Court agrees with Plaintiff.

In determining the amount of fees to award, district courts must consider the results obtained. *Hensley*, 461 U.S. at 434. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Id.* at 435. In such circumstances reduction of the fee award is not required simply because plaintiff has not prevailed on every issue. *Id.* "If on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Id.* at 436.

The Court finds Defendants' claim that Plaintiffs achieved little or no success disingenuous and a misrepresentation of their stance throughout this litigation. While Defendants claim they willingly made changes to alleviate the barriers long before the negotiation of the settlement, they were unwilling to make any concessions or remedy any of the barriers until after their summary judgment motion was denied in full. Further, the Court finds Defendants' assertion that Plaintiffs' pursuit of their claims after they were aware of Defendants compliance "unreasonable and vexatious tactics [that] accomplished little more than to multiply the proceedings in violation of 28 U.S.C. § 1927" lacks merit. 28 U.S.C. § 1927 provides that any person "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." In the Court's view, Plaintiffs were simply ensuring that Defendants' continued responsibility to

provide accessible parking spots, toilets and a concessions area was appropriately memorialized.

In the complaint, Plaintiffs alleged that there were multiple barriers at the Gliderport which prevented them, and similarly situated persons, "full and equal" access to Defendants' public facilities as required by the ADA. [Doc. No. 1 at ¶ 2.] Plaintiffs identified the following barriers: (1) no designated accessible parking spaces; (2) no accessible restroom facilities; (3) unsafe pedestrian paths of travel that were not accessible to wheelchair uses; (4) no accessible picnic tables; (5) a concessions stand with a counter that was too high and which had no accessible path to it and its adjoining seating area. [*Id.* at ¶15.] As a result of Plaintiffs' efforts, Defendants are obligated to provide and maintain two designated accessible parking stalls with access aisles, a fully compliant accessible restroom, an accessible transaction counter, and a picnic table that is accessible, properly designated and reserved. [Doc. No. 107.]

The Court is familiar with the positions taken by the parties during this case. For example, it was Defendants who contended that the Gliderport was not a place of public accommodation and asserted that it did not have to provide ADA compliant restrooms, eating areas and parking spaces because of the historic nature of the Gliderport. [Doc. Nos. 47, 55, 58, 63.] Furthermore, Defendants' unwillingness to effectuate changes at the Gliderport was evidenced by their contentions in their summary judgment briefings that the public street provided an alternative site for watching the sailplanes, hang gliders and paragliders [Doc. No. 63 at 5, fn. 4], and that replacing the partially complaint toilet with one that was completely compliant was not readily achievable, would cost too much money and that under the applicable ADA standard they were relieved of any responsibility to provide any accessible toilet at all. [Doc. No. 55 at 11, 12; Doc. No. 63 at 10.] The Court is not convinced that any of the changes effectuated at the Gliderport would have occurred but for Plaintiffs' pursuit of this lawsuit.

The Court is also unwilling to interpret Plaintiffs' abandonment of their pedestrian paths of travel claim as evidence of their ineligibility for a fee award. Rather, the Court

views it as a pragmatic response in consideration of how "readily achievable" remediation of a coastal bluff would be. Defendants assert that "the single most divisive issue in this case has been the grading of the coastal bluff in order to provide level parking or compliant paths of travel." [Doc. No. 108 at 8.] Yet, it was Defendants who claimed that the potential presence of native artifacts and sensitivity of the surrounding ecosystem necessitated involving multiple agencies, would cost hundreds of thousands of dollars and take years to conclude while scoffing at Plaintiffs suggestions that it did not require such excessive structural changes. [Doc. No. 47-1, 47-14, 47-16, 55-5, 55-6.] Notably, the consent decree provides for the designation of two accessible stalls with access aisles, and allows for delineation of the spaces via blue pavers, a solution that is markedly similar to one proposed by Plaintiffs at the summary judgment stage.

Upon consideration of the results achieved, the Court concludes that Plaintiffs have "obtained excellent results, [and their] attorney[s] should recover a fully compensatory fee." *Hensley*, 461 U.S. at 435.

B. Lodestar calculation supports requested fee

Having found Plaintiffs' excellent results support an award of fees, the Court considers whether the lodestar amounts supports the requested attorneys' fee award. Plaintiffs' counsel declares that they have worked over 246.9 on the case, and that the calculated lodestar fee on these hours is $84,055.00. The Court concludes that the lodestar amount supports approval of the requested attorneys' fees.

Under the lodestar method, "the Court first determines the appropriate hourly rate for the work performed, and then multiplies that amount by the number of hours properly expended in doing the work. "Although 'in extraordinary circumstances' the amount produced by the lodestar calculation may be increased, 'there is a strong presumption that the lodestar is sufficient.'" *Antoninetti v. Chipotle Mexican Grill, Inc.*, 643 F.3d, 1165, 1176 (9th Cir. 2010). Typically, "affidavits of the plaintiffs' attorney and other attorneys regarding prevailing fees in the community and rate determinations in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the

prevailing market rate." *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990) (citing *Chalmers v. City of L.A.*, 796 F.2d 1205, 1214 (9th Cir. 1986)). *See also PLCM Group v. Drexler*, 22 Cal. 4th 1084, 1095 (2000) (a reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and experience in the relevant community). In addition to considering affidavits and evidence submitted by the parties, the court may "rely on its own familiarity with the legal market." *Ingram v. Oroudjian*, 647 F.3d 925, 928 (9th Cir. 2011). For a fee request to be adjudged reasonable it must "exclude from this initial fee calculation hours that were not 'reasonably expended'" and should not include fee requests for hours that are excessive, redundant, or otherwise unnecessary. *Hensley*, 461 U.S. at 433-34.

1. Reasonableness of hourly rate

Defendants do not object to the hourly rate. Plaintiffs calculate the lodestar with the following hourly rates for attorneys from the law firm Potter Handy, LLP and its' Center for Disability Access Division: $425 for Mark Potter, $425 for Russell Handy, $350 for Phyl Grace, $250 for Chris Carson, $250 for Isabel Masanque, $250 for Amanda Lockhart, $250 for Tamara Zaki. [Doc. No. 104-1 at 10.] In support, declarations and other evidence are offered to demonstrate the reasonableness of these rates compared to the prevailing market rates in the San Diego community for attorneys of their experience and ability. [Doc. Nos. 104-2, 104-3.] Included as evidence are four central district cases, from 2011, 2015 and 2016, where Plaintiffs' counsel requested similar hourly rates that were found to be reasonable by the court. [Doc. Nos. 104-6 – 104-9.] *See, e.g., Salinas v. Rite Aid Lease Mgmt. Co., et al.*, No CV 10-7499 SVW (FMOx), 2011 WL 1107213, at *1-2 (C.D. Cal. Mar. 17, 2011) (approving hourly rate of $425 for Messrs. Potter and Handy); *Lopez v. Gordon*, Case No. 2:14-cv-07791-CAS(BKx), 2016 WL 6998563, at * 2 (C.D. Cal. Nov. 28, 2016) (concluding that the Mr. Potter's hourly rate of $425, Ms. Grace's hourly rate of $350, Ms. Carson's hourly rate of $250 and Ms. Masanque's hourly rate of $250 were reasonable.).

After reviewing the evidence offered and awards in similar cases, the Court concludes the hourly rates Plaintiffs seek are reasonable. *See United Steelworkers,* 896 F.2d at 407 (rate determinations in other cases setting a rate for plaintiffs' attorney provide satisfactory evidence).

2. Inclusion of unnecessary hours in fee request

Defendants assert that Plaintiffs' fee request should be reduced for unnecessary hours. After tallying the entries in the chart proffered by Defendants, it appears that they are requesting 23.4 hours be subtracted from the number of hours worked. Defendants posit that Plaintiffs' inclusion of the claim regarding the accessible picnic tables at the Gliderport was in bad faith and take issue with a number of entries in Plaintiffs' billing records. [Doc. No. 108 at 13-22.] Plaintiffs object to all but one of Defendants' challenged entries, claiming entitlement to all but 2.2 of the 246.9 hours worked.

As to the picnic tables, the Court finds no merit in Defendants' assertion. In the order on the cross motions for summary judgment the Court determined that "[w]hether or not these picnic tables are ADA compliant is a material fact in dispute." [Doc. No. 65 at 24:14-15.] Defendants' claim that Plaintiffs "acted in bad faith when they continued to pursue their claim regarding the tables knowing all along that there were, in fact, accessible tables at the Gliderport" ignores the Court's earlier finding on the issue. If Defendants had provided compliant picnic tables at the Gliderport prior to the filing of this lawsuit, they did not provide such compliance evidence to the Court, or the issue would have been moot. *See Oliver v. Ralphs Grocery Co.*, 654 F.3d 903, 905 (9th Cir. 2011) (an ADA claim becomes moot once the defendant corrects the violation because "damages are not recoverable under Title III of the ADA – only injunctive relief is available for violations of Title III."). Accordingly, the Court declines to reduce the fee award on this basis.

Further, the Court has reviewed the billable entries that Defendants take issue with. [Doc. No. 108 at 14-22.] While Defendants have generated a chart that includes the 43 challenged entries, they provide very little information pertaining to the reasons for the challenge, aside from the conclusory entries "admin," "attorneys cannot bill for review of

one's own billing entries," "unnecessary time expended," "discussion between two attorneys representing the same client cannot be billed to the client," "discovery motion denied," "block billing" and "not billable." The Court does not find such challenges adequately describe why these hours were excessive. Furthermore, Defendants provide no case law in support of their boilerplate conclusions or any evidence to support their contentions before summarily concluding that "[n]one of the foregoing items are billable or should be counted as compensable items." Without more, the Court is unwilling to find that these entries are not billable or that the time was not "reasonable expended" on the litigation.

As Plaintiffs concede the duplicative billing entry regarding the public records search performed by Mr. Potter, the Court will deduct 2.2 hours of his time, at a rate of $425 an hour, from the total fee award.

C. Award of statutory damages under the Unruh Act

Plaintiffs assert that they are both entitled to $12,000 in statutory damages. Defendants counter that an award of damages under the Unruh Act is at the discretion of the Court and are not automatically awarded due to a violation. [Doc. No. 108 at 23-25.] Relatedly, Defendants argue that Plaintiffs must mitigate their damages under the Unruh Act and are precluded from "stacking their damages." [*Id.* at 26-27.]

The Unruh Act provides that:

> Whoever denies, aids or incites a denial, or makes any discriminatory or distinction contrary to Section 51 or 51.5, is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of the three times the amount of actual damage but in no case less than four thousand dollars ($4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided by Section 5.1 or 51.5

CAL. CIV. CODE § 52(a). Because actual damages and statutory damages are listed as two separate categories "proof of actual damages is not a prerequisite to recovery of statutory minimum damages." *Botosan v. Paul McNally Realty*, 216 F.3d 827, 835 (9th Cir. 2000). *See also Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 731 (9th Cir. 2007) ("The litigant need

not prove she suffered actual damages to recover the independent statutory damages of $4,000."); *Moore v. Dollar Tree Stores, Inc.*, 85 F. Supp. 3d 1176, 1183 (E.D. Cal. 2015) ("To recover statutory damages, plaintiffs must showed that they were denied "equal access," proof of actual damages is not required."). Further, when a plaintiff brings an Unruh Act claim on the grounds that a defendant has violated the ADA, they "may obtain statutory damages on proof of an ADA access violation without the need to demonstrate additionally that the discrimination was intentional." *Munson v. Del Taco*, 46 Cal. 4th 661, 670 (2009); *Moore* 85 F. Supp. 3d at 1183 (a violation of the ADA constitutes a violation of the Unruh Act, therefore "[w]here the basis of liability for an Unruh Act violation is an ADA violation, plaintiff need not prove intentional discrimination.").

The Court declines Defendants' invitation to revisit the issue of whether or not Plaintiffs were denied full and equal access to the Gliderport, choosing instead to stand by its earlier finding at the summary judgment stage. There, the Court concluded "Plaintiffs established that they encountered an ADA violation on March 11, 2013 and March 13, 2013, and in September 2014 and therefore have established Unruh Act violations."[2] [Doc. No. 65 at 26:1-3.] *See, e.g., Hubbard v. Rite Aid Corp.*, 433 F. Supp. 2d 1150, 1170 (S.D. Cal. 2006) (holding that the evidence established three visits in which Plaintiff was denied full access which entitled each Plaintiff to $12,000, $4,000 each per violation.). *See also Vogel v. Rite Aid Corp.*, 992 F. Supp. 2d 998, 1014 (C.D. Cal. 2014) (Plaintiff's declaration that he encountered barrier once and that his knowledge of the barrier deterred him from making two subsequent visits was affirmative evidence sufficient to show three violations of the Unruh Act. The court awarded Plaintiff $12,000 in statutory damages.)

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[2] Details regarding the access issues Plaintiffs' experienced during their March 11 and March 13, 2013 visits to the Gliderport are provided in their declarations, [Doc. Nos. 50-3, 50-4], submitted in support of their motion for summary judgment. While at the Gliderport, Plaintiffs were unable to use the portable restrooms, were unaware of the existence of a toilet at the concession stand that may be wheelchair accessible, found only one parking spot designated for disable use, and encountered a concession stand with a counter that was too high for them. [Doc. No. 47-16 at 16-21, 39, 40-42, 43; Doc. No. 50-3; Doc. No. 50-4.]

The Court also disagrees with Defendants assertion that Plaintiffs are obligated to mitigate damages. The Court continues to find that "there is no requirement that Plaintiff mitigate damages when he is merely seeking statutory damages." *Langer v. McHale*, Civil No. 13cv2721-CAB-NLS, 2014 WL 5422973, at * 4 (S.D. Cal. Oct. 20. 2014).

Accordingly, the Court concludes that under Section 52, Plaintiffs are entitled to statutory damages totaling $24,000. Each Plaintiff shall receive an award of $12,000, $4,000 for each of the three visits.

D. Litigation Expenses

As the prevailing party, Plaintiffs are also entitled to costs. *See* 29 U.S.C. § 1920, Federal Rule of Civil Procedure 54(d)(1), and Local Rule 54.1.

Defendants object to the inclusion of $1,200 paid to Mr. Taylor as "the fourth person billing for site inspections and taking pictures." [Doc. No. 108, at 22.] Within the declaration of Mr. Potter filed in in support of the motion, Mr. Taylor is identified as the individual who performed the investigations and visits to the Gliderport throughout the case, gathered photographs and confirmed/denied Defendants' representations about facts. [Doc. No. 104-2 at ¶ 3.] The Court finds nothing untoward about the inclusion of Mr. Taylor's costs in the application and therefore declines to make any reduction in the requested costs amount. *See United Steelworkers,* 896 F.2d at 407 ("Out of pocket litigation expenses are reimbursable as part of the attorneys' fee, distinct from the costs already awarded under 28 U.S.C. § 1920.")

Accordingly, the Court accepts counsel's declaration regarding costs and awards $6,478.00 in costs.

IV. Conclusion

In light of the foregoing, the Court finds the requested fees are reasonable, and grants Plaintiffs' motion for attorneys' fees in the amount of $83,120[3] and $6,478 in costs. The

[3] This amount includes a deduction of $935 for 2.2 hours that Plaintiffs concede were duplicative.

Court also awards $12,000 in statutory damages to each of the Plaintiffs for the three violations of the Unruh Act.

It is **SO ORDERED**.

Dated: July 24, 2017

Hon. Cathy Ann Bencivengo
United States District Judge