

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

3 DAVID LEE PHILLIPS, )  
4 )  
5 Plaintiff, )  
6 vs. )  
7 STATE BAR OF NEVADA, et al., )  
8 Defendants. )  
9 )

Case No.: 2:16-cv-00412-GMN-CWH

ORDER

10 Pending before the Court is the Motion for Attorney’s Fees, (ECF No. 68), filed by  
11 Defendants State Bar of Nevada and State Bar of Nevada Board of Governors (collectively  
12 “Defendants”). Plaintiff David Lee Phillips (“Plaintiff”) did not file a Response. For the  
13 reasons set forth herein, Defendants’ Motion for Attorney’s Fees is **DENIED**.

14 **I. BACKGROUND**

15 On February 26, 2016, Plaintiff filed his Complaint before this Court, alleging various  
16 claims of civil rights violations against Defendants. (Compl., ECF No. 1). Attached to the  
17 Complaint, Plaintiff included a “Certificate of Service,” purporting to have effectuated service  
18 by mail. On June 3, 2016, Defendants filed a Motion to Dismiss pursuant to Rule 12(b)(5) of  
19 the Federal Rules of Civil Procedure (“FRCP”), asserting that Plaintiff failed to provide  
20 sufficient service of process. In response, Plaintiff argued, inter alia, that Defendants waived  
21 any objection to improper service by appearing before the Court and demonstrating an intent to  
22 defend against the suit. (See Resp. to MTD, ECF No. 45). On March 16, 2017, the Court  
23 granted Defendants’ Motion to Dismiss and dismissed the case without prejudice. (ECF No.  
24 66).

1 **II. DISCUSSION**

2 A) *Attorney's Fees* under 42 U.S.C. § 1988

3 Defendants assert that they are entitled to \$22,960.00 in attorney's fees pursuant to 42  
4 U.S.C. § 1988. (Mot. Atty. Fees 4:4–5:11, ECF No. 68). Under § 1988, a court in its discretion  
5 may award reasonable attorney's fees to the prevailing party. *Braunstein v. Arizona Dep't of*  
6 *Transp.*, 683 F.3d 1177, 1187 (9th Cir. 2012). If the prevailing party is a defendant, the Court  
7 may only award fees in “exceptional circumstances” where the plaintiff's claims are “frivolous,  
8 unreasonable, or groundless.” *Id.*

9 In their Motion, Defendants argue that “exceptional circumstances” warrant the Court  
10 imposing attorney's fees against Plaintiff. (Mot. Atty. Fees 5:5–11). In making this argument,  
11 however, Defendants fail to address the threshold requirement that they be a prevailing party.  
12 The Supreme Court has held that a party may be accorded “prevailing party” status only when  
13 that party obtains judicial relief “creat[ing a] ‘material alteration of the legal relationship of the  
14 parties.’ ” *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532  
15 U.S. 598, 604 (2001) (quoting *Tex. State Teachers Assn. v. Garland Indep. School Dist.*, 489  
16 U.S. 782 (1989)). In the Ninth Circuit, a dismissal without prejudice does not constitute a  
17 material alteration in litigants' legal relationship. See *Oscar v. Alaska Dep't of Educ. & Early*  
18 *Dev.*, 541 F.3d 978, 982 (9th Cir. 2008). Accordingly, Defendants are not a prevailing party for  
19 the purpose of attorney's fees.

20 B) *Attorney's Fees* under 28 U.S.C. § 1927

21 Defendants also argue that they are entitled to an award of attorney's fees under 28  
22 U.S.C. § 1927. (Mot. Atty. Fees 5:12–6:17). According to Defendants, such sanctions are  
23 warranted because Plaintiff frivolously caused unnecessary motion work and improperly  
24 attempted to conduct discovery. (See *id.*). An award of sanctions under 28 U.S.C. § 1927  
25 requires a finding of bad faith, which “is present when an attorney knowingly or recklessly

1 raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an  
2 opponent.” *W. Coast Theater Corp. v. City of Portland*, 897 F.2d 1519, 1528 (9th Cir. 1990);  
3 see also *Barber v. Miller*, 146 F.3d 707, 711 (9th Cir. 1998).

4 As an initial matter, the Court notes that sanctions under § 1927 apply to individual  
5 attorneys, as opposed to law firms or parties. See *F.T.C. v. Alaska Land Leasing, Inc.*, 799 F.2d  
6 507, 510 (9th Cir. 1986). Defendants’ Motion, however, refers only to Plaintiff’s collective  
7 conduct throughout the proceedings. As Plaintiff has been represented by multiple attorneys  
8 throughout this matter, the Court finds Defendants’ Motion too vague to support a finding of  
9 sanctions. Furthermore, the Court does not find sanctions appropriate based on Plaintiff’s  
10 failure to properly serve Defendants. While Plaintiff erroneously attempted to argue that  
11 Defendants waived their objections to improper service, the Court does not find Plaintiff’s  
12 argument so knowingly or recklessly frivolous as to give rise to a finding of bad faith. See  
13 *Miller*, 146 F.3d at 711. Moreover, while Plaintiff filed a number of unsuccessful motions  
14 throughout this matter, the Court denied these motions largely on procedural grounds due to the  
15 pending service issue. As the Court did not reach the merits of these motions, the Court cannot  
16 say that these filings constitute bad faith. The Court therefore declines to issue attorney’s fees  
17 under § 1927.<sup>1</sup>

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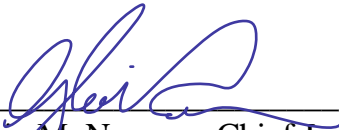
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25 <sup>1</sup> For the reasons stated previously in this Order, the Court also declines to exercise its inherent authority to issue attorney’s fees. See *in re Keegan Mgmt. Co., Sec. Litig.*, 78 F.3d 431, 436 (9th Cir. 1996) (stating that courts may not invoke their inherent powers to sanction counsel absent a specific finding of bad faith).

1 **III. CONCLUSION**

2 **IT IS HEREBY ORDERED** that Defendants' Motion for Attorney's Fees, (ECF No.  
3 68), is **DENIED**.

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5 **DATED** this 14 day of March, 2018.

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9 Gloria M. Navarro, Chief Judge  
10 United States District Judge  
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