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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SHALIMAR BEACH,)	3:11-cv-00007-HDM-VPC
)	
Plaintiff,)	
)	ORDER
vs.)	
)	
WAL-MART STORES, INC.,)	
)	
Defendant.)	
)	

Before the court is the defendant Wal-Mart's ("defendant") motion for attorney's fees and nontaxable costs (#74). Plaintiff Shalimar Beach ("plaintiff") has opposed (#75), and defendant has replied (#79). Pursuant to order of the court, the parties have filed supplemental briefs addressing the impact of the Ninth Circuit's decision in *Goldberg v. Pacific Indemnity Company*, 627 F.3d 752 (9th Cir. 2010) on defendant's request for nontaxable costs (#84, #89).

Plaintiff's complaint, which asserted a single claim of negligence against defendant, was filed in state court on December 3, 2010, and removed to this court on January 5, 2011. On May 23,

1 2012, defendant made plaintiff an offer of judgment in the amount
2 of One Hundred Thousand and One dollars (\$100,001.00). The offer
3 was made pursuant to Nevada Revised Statute § 17.115 and Federal
4 Rule of Civil Procedure 68. (Def. Mot. Attorney's Fees Ex. 1).
5 Plaintiff rejected the offer. (Def. Reply Ex. 4).

6 On October 30, 2012, trial commenced. On November 1, 2012,
7 the jury found in favor of the defendant and against the plaintiff.
8 Judgment was filed on November 1, 2013, and entered on November 6,
9 2012. On November 15, 2012, defendant filed the instant motion for
10 attorneys' fees and nontaxable costs. Defendant seek attorneys'
11 and paralegal fees in the amount of Thirty-Nine Thousand, Three
12 Hundred Fifty-Six dollars (\$39,356.00),¹ incurred from the date of
13 its offer of judgment to the date of entry of judgment, and other
14 nontaxable costs in the amount of Thirty-Six Thousand Three-Hundred
15 Twenty-Five Dollars and Twenty Eight Cents (\$36,325.28).

16 **I. Attorneys' Fees**

17 Defendant bases its claim for attorney's fees on Federal Rule
18 of Civil Procedure 54(d)(2), Nevada Rule of Civil Procedure 68, and
19 Nevada Revised Statutes § 17.115.

20 Federal Rule of Civil Procedure 54(d)(2) sets forth the
21 procedure for obtaining an award of attorneys' fees in federal
22 court. It does not, however, provide the substantive basis for
23 such an award. Fees are recoverable only if there is a rule,
24 statute, or contract that authorizes such an award. See *MRO*
25 *Commc'ns, Inc. v. Am. Tel & Tel. Co.*, 197 F.3d 1276, 1281 (9th Cir.
26 1999).

27
28 ¹ Defendant originally sought \$41,628.00 but subsequently lowered its
request to remove fees incurred after November 6, 2012.

1 A motion under Rule 54(d)(2) must identify the basis for the
2 requested award. Here, defendant identifies Nevada Revised
3 Statutes § 17.115.² Section 17.115 provides that “[a]t any time
4 more than 10 days before trial, any party may serve upon one or
5 more other parties a written offer to allow judgment to be taken in
6 accordance with the terms and conditions of the offer of judgment.”
7 *Id.* § 17.115(1). If a party rejects an offer of judgment and fails
8 to obtain a more favorable judgment, the court may order that party
9 to pay the offeror’s “[r]easonable attorney’s fees incurred by the
10 [offeror] for the period from the date of service of the offer to
11 the date of entry of the judgment.” *Id.* § 17.115(4)(d)(3).

12 Where, as here, the “court is exercising its subject matter
13 jurisdiction over a state law claim,” a party may recover
14 attorneys’ fees under state law giving a right thereto if the law
15 “reflects a substantial policy of the state” and “does not run
16 counter to a valid federal statute or rule of court.” See *MRO*
17 *Commc’ns*, 197 F.3d at 1281 (quoting *Alyeska Pipeline Serv. Co. v.*
18 *Wilderness Soc’y*, 421 U.S. 240, 259 n.31 (1975)).

19 The controlling case applicable to the facts of this case is
20 *MRO Communications*. In that case, the Ninth Circuit held that
21 under Federal Rule of Civil Procedure 54(d)(2), a prevailing
22 defendant could recover attorney’s fees incurred after a rejected
23 offer of judgment made pursuant to Nevada state law. *Id.* Here,
24 defendant made an offer of judgment pursuant to Nev. Rev. Stat. §
25 17.115. Defendant made its offer of judgment more than ten days
26

27 ² While defendant also identifies Nevada Rule of Civil Procedure 68,
28 its offer of judgment was not made pursuant to that rule. It is therefore
not a basis for an award in this case.

1 before trial. Plaintiff rejected the offer but failed to obtain a
2 more favorable judgment. Accordingly, under *MRO Communications* and
3 § 17.115, the defendant may recover reasonable attorney's fees.

4 Even so, plaintiff asserts several reasons why she believes an
5 award of attorney's fees in this case would be improper.

6 First, plaintiff argues that fees may only be awarded where
7 the complaint was frivolous, groundless, or brought to harass.
8 However, the case cited by plaintiff for this proposition - *Bobby*
9 *Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 971
10 P.2d 383, 386-87 (Nev. 1998) - involved an award of fees under
11 Nevada Revised Statutes § 18.010, which authorizes a court to award
12 attorney's fees when a claim "was brought without reasonable ground
13 or to harass the prevailing party." As such, the case is
14 inapplicable here, where the award of attorney's fees is based on
15 Nevada Revised Statutes § 17.115.

16 Second, plaintiff objects to an award of fees because defense
17 counsel has not disclosed his fee agreement with Wal-Mart.
18 Defense counsel argues that the fee agreement is protected by
19 attorney-client privilege but represents the rates set forth in the
20 motion for attorney's fees are the rates actually charged to and
21 agreed to be paid by the defendant. (Def. Reply Ex. 1 (Kent. Decl.
22 ¶ 23)). Plaintiff cites no law requiring disclosure of the
23 defendant's fee agreement before an award of fees. Defense counsel
24 has represented that the rates are accurate, and the court finds
25 the rates do not exceed the reasonable, customary rate in this
26 community.

27 Third, plaintiff appears to argue that because defendant
28 declined plaintiff's request to later settle the case for the

1 offer-of-judgment amount that any award of fees is not merited.
2 Plaintiff did not accept defendant's formal offer to settle the
3 case for \$100,001.00 before it expired. Further, plaintiff waited
4 until the eve of trial to attempt to accept the offer. By that
5 time, the defendant had incurred a substantial amount in fees to
6 prepare for trial and had no obligation to submit another offer of
7 settlement.

8 Finally, plaintiff asserts that fees should be denied because
9 defendant did not identify a federal rule allowing recovery of
10 attorney's fees. Defendant identified Federal Rule of Civil
11 Procedure 54(d)(2), which in conjunction with the offer-of-judgment
12 made pursuant to Nevada Revised Statutes § 17.115 provides a basis
13 for recovery in this case.

14 Under *MRO Communications* and § 17.115, the defendant may
15 recover reasonable attorney's fees subject to the court's
16 considerations of the factors set forth in *Beattie v. Thomas*, 668
17 P.2d 268, 274 (Nev. 1983). The court has the discretion to allow
18 any or all of the offeror's attorneys' fees incurred after service
19 of the offer. *Id.* In fashioning an award, the court must consider
20 four factors: (1) whether the plaintiffs' claim was brought in good
21 faith; (2) whether the defendant's offer of judgment was reasonable
22 and in good faith in both its timing and amount; (3) whether the
23 plaintiffs' decision to reject the offer and proceed to trial was
24 grossly unreasonable or in bad faith; and (4) whether the fees
25 sought by the offeror are reasonable and justified in amount. *Id.*;
26 see also *RTTC Commc'ns, LLC v. Saratoga Flier, Inc.*, 110 P.3d 24,
27 28 (Nev. 2005). An award of fees may be proper even where the
28 plaintiff's claim was brought in good faith and the plaintiff did

1 not act unreasonably in rejecting the offer of judgment. See *RTTC*,
2 110 P.3d at 29-30.

3 Plaintiff brought her claim to recover damages for injuries
4 suffered after slipping and falling in a puddle of water on
5 defendant's premises. The court finds plaintiff's claim was
6 brought in good faith.

7 The defendant made its offer of judgment after discovery had
8 closed but months before the trial date. This timing allowed
9 plaintiff to consider the offer in light of the evidentiary
10 strength of her claim before having to engage in much costly and
11 time-consuming trial preparation. The offer was therefore
12 reasonable in timing. While at the time defendant made its offer
13 plaintiff's claimed medical damages and lost wages exceeded
14 \$100,001, the offer was reasonable given the weaknesses defendant
15 perceived in plaintiff's case,³ including the lack of evidence that
16 defendant was aware of or caused the water spill and its expert's
17 opinion that a mere five percent of plaintiff's claimed medical
18 damages could be attributed to the fall.

19 For the same reason, plaintiff's decision to reject the offer
20 and proceed to trial was unreasonable, although not grossly so.

21 Finally, the fees sought are for the most part reasonable and
22 justified, as discussed further below.

23 On balance the court concludes the defendant is entitled to an
24

25 ³ Plaintiff argues that the offer was unreasonable because defendant
26 later refused to settle for \$100,000.00 and repeatedly declined to attend
27 a settlement conference with plaintiff. Plaintiff also argues that the
28 offer was just one part of ongoing settlement negotiations so her rejection
of the \$100,000 was not unreasonable. The court finds these assertions
irrelevant to determining whether the offer made by defendant was
reasonable.

1 award of its reasonable attorney's fees.

2 The first step in determining an attorney's fee award is to
3 calculate the "lodestar." *Candle v. Bristow Optical Co., Inc.*, 224
4 F.3d 1014, 1028 (9th Cir. 2000). The lodestar is reached by
5 multiplying the number of hours the prevailing party reasonably
6 expended on the litigation by a reasonable hourly rate. *Id.* In
7 most cases, the lodestar is presumptively a reasonable fee award.
8 *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1149 n.4 (9th Cir.
9 2001). However, if the circumstances warrant, the court may
10 "adjust the lodestar to account for other factors that are not
11 subsumed within it." *Id.* Those factors are:

12 (1) the time and labor required; (2) the novelty and
13 difficulty of the questions involved; (3) the skill
14 requisite to perform the legal service properly; (4) the
15 preclusion of other employment by the attorney due to
16 acceptance of the case; (5) the customary fee; (6)
17 whether the fee is fixed or contingent; (7) time
18 limitations imposed by the client or the circumstances;
19 (8) the amount involved and the results obtained; (9)
20 the experience, reputation, and ability of the
21 attorneys; (10) the "undesirability" of the case; (11)
22 the nature and length of the professional relationship
23 with the client; and (12) awards in similar cases.

19 *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1158 (9th Cir. 2002)
20 (citing *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th
21 Cir. 1975)). The court need not consider all factors - "only those
22 called into question by the case at hand and necessary to support
23 the reasonableness of the fee award." *Id.* In determining the
24 hours to be included in the lodestar, the court should exclude
25 hours that are "excessive, redundant, or otherwise unnecessary."
26 *McCown v. City of Fontana*, 565 F.3d 1097, 1102 (9th Cir. 2009).

27 In this case, the defendant seeks \$145 per hour for lead
28 counsel Stephen Kent, \$135 per hour for associate counsel Shannon

1 Parke, and \$90 per hour for paralegal Sherril Metcalf. The court
2 concludes these are reasonable hourly rates well within the range
3 of customary hourly charges in this locality.

4 The defendant seeks compensation for 118.7 hours by Mr. Kent,
5 127.8 hours by Ms. Parke and 79.6 hours by Ms. Metcalf. In
6 determining whether the hours sought are reasonable, the court
7 considers the plaintiff's several specific objections.

8 1. 7/19/12: Research federal procedural rules, setting order,
9 and local rules and prepare memorandum of pre-trial
10 dead lines - 1.8 hours

11 10/16/12: Legal research on cases indicating "mere happening"
12 instruction is no longer good law; note
13 distinguishing facts in analysis of law in premises
14 liability context - 1.5 hours

15 10/23/12: Legal research and legal requirements for the pre-
16 trial brief - .5 hours

17 Plaintiff objects to these charges incurred by Ms. Parke on
18 that grounds that Mr. Kent, who has represented Wal-Mart for 20
19 years, should have been well-versed in federal court procedures and
20 could have shared that knowledge with Ms. Parke. Plaintiff
21 provides no specific basis for objecting to the "mere happening"
22 jury instruction research. Defense counsel responds that research
23 of procedural rules is always necessary as rules are often
24 changing, and that research of the "mere happening" instruction was
25 necessitated by plaintiff's own motion in limine challenging its
26 inclusion. The court finds these charges reasonable and necessary.

27

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1 2. 7/24-12 to 11/1/12: Various charges relating to
2 compilation and redaction of exhibits
3 - 58.4 hours

4 Plaintiff objects to several of these charges as unreasonable
5 and/or duplicative.

6 First, plaintiff asserts that defendant's assembly of her
7 medical files into exhibits was duplicative because she had
8 included her entire relevant medical file in her proposed exhibits,
9 which she gave to defense counsel a week before trial. Second, she
10 asserts that the charges for redacting defendant's exhibits were
11 unreasonable because defense counsel repeatedly failed to redact
12 portions that plaintiff's counsel had already asked to be redacted,
13 requiring multiple revisions instead of just one. Third, plaintiff
14 objects to charges for assembling exhibits that were deemed
15 unrelated and thus inadmissible. Finally, plaintiff objects to the
16 total number of hours spent on exhibits as excessive.

17 Defendant responds that it could not rely on plaintiff's
18 exhibits as she had extensively redacted them, including removal of
19 reference to items that defense counsel thought might be admissible
20 at trial. Further, it argues that the repeated redactions were
21 necessitated by court rulings during trial, and that it was
22 impossible to know which exhibits would be admitted and which would
23 not. Finally, defendant asserts that plaintiff's representation of
24 the 58.4 hours of work is a gross oversimplification and that much
25 more work was conducted during than those hours than simply
26 compiling and redacting exhibits.

27 The court finds that - with one exception - the time spent by
28 Ms. Metcalf from July 24, 2012 to August 1, 2012, to compile the

1 defendant's exhibits was reasonable and necessary preparation for
2 trial. However, defendant does not explain why there are two
3 entries for the addition of Carson Tahoe records to exhibit binders
4 on August 1, 2012. The court will therefore reduce the fee award
5 by 0.3 hours attributable to Ms. Metcalf on August 1, 2012. The
6 court rejects plaintiff's objection to the inclusion of these
7 records at all. The Carson Tahoe records apparently related to
8 plaintiff's April 2009 visit to the emergency room after sticking
9 herself in the eye with a bamboo stick. While these records were
10 ultimately deemed inadmissible, defendant's argument for their
11 inclusion was not completely frivolous. Therefore, the defendant
12 is entitled to recover for the time spent to incorporate them into
13 the exhibit binders.

14 The court finds that the time spent from October 23, 2012, to
15 November 1, 2012, to make copies of and redactions to the exhibits
16 should be discounted due to duplication and/or unnecessary multiple
17 revisions. Recognizing that there were ongoing issues regarding
18 the extent of required redactions, but also recognizing that time
19 spent copying and redacting was increased by defendant's inclusion
20 of many duplicative exhibits and arguments to leave unredacted many
21 documents that should have been redacted, the court finds it proper
22 to reduce the hours spent for copying and redacting by twenty-five
23 percent. Therefore, the charges for those items - 2.4 hours (SAM)
24 on October 23, 2012, 3.9 hours (SAM) and 2.9 hours (SAM) on October
25 24, 2102, 4.2 hours (SAM) on October 25, 2012, 3.4 hours (SAM) on
26 October 30, 2012, 1.6 hours (SKP), .4 hours (SKP), and 3.6 hours
27 (SAM) on October 31, 2012, and 3 hours (SAM) on November 1, 2012 -
28 will be reduced by twenty-five percent. The court finds the

1 remainder of the time spent during that period to be reasonable and
2 necessary.

3 3. 8/1/12: Read records obtained from Sutter Auburn Faith
4 Hospital pertaining to Plaintiff's prior
5 hysterectomy - .4 hours

6 8/1/12: Discuss Sutter Auburn Faith records - .1 hours
7 Plaintiff objects to these charges because they involve
8 medical records unrelated to her damages in this case. Defendant
9 responds that a half hour to review and discuss whether plaintiff's
10 hysterectomy records should be included is reasonable. The court
11 concludes that this time was reasonably spent evaluating
12 plaintiff's medical records to determine if they were relevant to
13 the case.

14 4. 9/17/12 to 10/22/12: Focus Group Mock Trial Expenses -
15 33.1 hours⁴

16 Plaintiff objects to these charges because a mock trial is not
17 a reasonable and customary legal service. Defense counsel responds
18 that it had an obligation to be well prepared and receive an
19 independent evaluation of the case before trial. The court is not
20 persuaded by the defendant's argument. The following charges will
21 therefore be omitted from the attorney's fee award: (1) 9/17/12 -
22 email about focus group; read response - .1 hours (SSK); (2)
23 9/21/12 - email about mock trial - .1 hours (SSK); (3) 9/25/12 -
24 begin drafting Beach's mock trial case statement to show to focus
25 group - 3.7 hours (SKP); (4) 9/26/12 - continue work on Plaintiff's
26 focus group case statement - 5.4 hours (SKP); (5) 9/27/12 - finish

27
28 ⁴ While plaintiff's opposition objects to 28 hours, the line items she
objects to total 33.1 hours.

1 drafting Plaintiff's mock trial case statement for focus group -
2 5.1 hours (SKP); (6) 10/10/12 - work on mock trial opening
3 statement - 1.8 hours (SSK); (7) 10/11/12 - revise Plaintiff's case
4 summary for focus group - .8 hours (SKP); (8) 10/11/12 - prepare
5 law and jury instructions for focus group - 2.2 hours (SKP); (9)
6 10/11/12 - work on and present opening statement for mock trial -
7 5.6 hours (SSK); (10) 10/15/12 - participate in mock trial - 3.6
8 hours (SSK); (11) 10/15/12 - attend and take notes on focus group
9 discussion and results - 2.7 hours (SKP); (12) 10/16/12 - email
10 report to Julie Gibbens about mock trial results - .9 hours (SSK);
11 (13) 10/19/12 - read mock trial report - .5 hours (SSK); (14)
12 10/22/12 - read focus group summary to discuss with Mr. Kent - .6
13 hours (SAM). The court notes that while some of this time included
14 preparation of jury instructions and an opening statement, there
15 are other entries in the billing records for these items that are
16 reasonable and unrelated to the mock trial. There is no reason to
17 compensate for the same work twice.

18 5. 10/26/12: Take exhibits to court clerk at courthouse, discuss
19 exhibits - 1.8 hours (SSK)

20 Plaintiff objects to this charge as excessive because defense
21 counsel's office is only three blocks from the courthouse and a
22 messenger could have provided the same service instead of Mr. Kent.
23 In addition, she argues, the charge is duplicative because Ms.
24 Metcalf spent half an hour discussing exhibits with the courtroom
25 deputy the day before. Defendant responds that this charge was for
26 reviewing, loading and taking the exhibits to the courthouse,
27 locating and waiting for the clerk, discussing the exhibits, and
28 returning. The court finds this expense reasonable and not

1 duplicative of Ms. Metcalf's time. As Mr. Kent was the attorney
2 who represented defendant at trial, it was reasonable and necessary
3 for him to spend time with the courtroom deputy discussing the
4 presentation of exhibits.

5 6. 10/26/12 to 10/29/12: Time spent assembling information on
6 prospective jurors and preparing for
7 voir dire - 8.1 hours

8 Plaintiff objects to these charges as an excessive and seeks a
9 fifty percent reduction. Defendant responds that voir dire
10 preparation is critical, and this time was reasonable. The court
11 concludes that the time spent preparing for voir dire was
12 reasonable and not excessive.

13 7. 11/5/12 to 11/6/12: Charges for researching and preparing
14 Bill of Costs and Motion for
15 Attorney's Fees - 4.2 hours⁵

16 Plaintiff argues that because judgment should have been
17 entered the date the jury returned the verdict - November 1, 2012 -
18 defendant should not be allowed to recover any fees incurred
19 thereafter. Defendant responds that it should be allowed to
20 recover for what was standard post-trial work. Because the
21 judgment should have been entered on the date the jury returned its
22 verdict, the court in its discretion will not allow fees incurred
23 after November 1, 2012. Accordingly, these fees will be denied.

24

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27 ⁵ Plaintiff originally objected to all fees sought in connection with
28 preparation of posttrial motions, which were incurred up to November 13,
2012. Defendant conceded that all fees incurred after the day judgment was
entered cannot be recovered. This number reflects the request for fees
incurred November 6, 2012, and earlier.

1 8. 7/24/12 to 9/19/12: Time spent preparing motions in limine -
2 12.5 hours

3 Plaintiff objects on the basis that defendant's motion in
4 limine was "mainly stock or omnibus." Defendant responds that the
5 time spent drafting seventeen motions in limine was reasonable and
6 a necessary part of pretrial preparation. The court finds that
7 defendant's motions in limine were primarily stock and many
8 requested relief that is clearly provided for in the Federal Rules
9 of Civil Procedure. Accordingly, the court discounts the time
10 spent on defendant's motion in limine by two-thirds. The time
11 spent by Mr. Kent will be reduced from 2.5 hours to 1.66 hours and
12 the time spent by Ms. Parke will be reduced from 10 hours to 6.67
13 hours.

14 9. 7/20/12: Compile list of witnesses with contact information
15 and a brief description of prior testimony and
16 statements - 2.5 hours (SKP)

17 7/24/12: Prepare list of documents disclosed to Plaintiff to
18 compare to list of documents identified in pretrial
19 order - 2.1 hours (SAM)

20 Plaintiff objects to this time as duplicative of work done
21 earlier in litigation, citing to defendant's disclosures of
22 witnesses and documents and all supplements thereto. (Pl. Opp'n
23 Ex. 6). The court finds that the first charge, while summarizing
24 information already disclosed, also included updating that
25 information to include any relevant testimony obtained during
26 discovery as to those witnesses. Accordingly, the court finds this
27 charge reasonable. The court finds that the second charge was for
28 essentially summarizing information already disclosed to the

1 plaintiff, and as such the charge for 2.1 hours is excessive. The
2 court will reduce this charge by fifty percent.

3 10. 8/30/12 to 9/27/12: Time spent creating a special damages
4 chart - 9.3 hours

5 Plaintiff objects on the grounds that 9.3 hours was an
6 excessive amount of time to compile a chart consisting of
7 relatively few medical expenses as well as information about
8 insurance that was inadmissible. Defendant responds that
9 considerable time was required to sort through plaintiff's medical
10 bills to determine which were attributable to her slip-and-fall.
11 It also argues that the insurance information was relevant because
12 defendant should not have had to pay more in damages than
13 plaintiff's insurance actually paid out. The court finds this
14 charge reasonable and denies plaintiff's objection to such.

15 11. 8/30/12 to 10/26/12: Charges for working on jury instructions -
16 7.7 hours

17 Plaintiff argues that this time is excessive because most of
18 defendant's proposed instructions were stock and counsel also spent
19 time researching an assumption of the risk instruction that the
20 court ultimately concluded did not apply. Plaintiff requests only
21 that the time spent by SKP (4.3 hours) be denied.

22 Defendant responds that preparation of jury instructions is a
23 time consuming but important task, that the law is always changing,
24 and that there are many things the parties need to consider in
25 assembling their instructions.

26 The court finds this charge reasonable and denies plaintiff's
27 objection to such.

28

1 12. 10/23/12: Prepare request for leave to file reply - 2 hours
2 10/25/12: Revise motion for leave to file reply and reply in
3 support of motion in limine II - .9 hours

4 Plaintiff objects to these charges as replies are not allowed
5 to motions in limine. Defendant responds that it was required to
6 prepare a request for leave to file the reply precisely because
7 replies are not typically allowed, and that a reply was
8 necessitated here by new information raised by plaintiff during the
9 pretrial conference. The court finds these charges reasonable and
10 denies plaintiff's objection to such.

11 13. 11/6/12: Expenses incurred the day judgment was entered - 1.2
12 hours

13 As discussed above, the court declines to award these
14 expenses.

15 Accordingly, based on these adjustments, the court calculates
16 the lodestar as follows:

17	102.5 hours at \$145/hour:	\$14,862.50
18	88 hours at \$135/hour:	\$11,880.00
19	66.8 hours at \$90/hour:	\$6,012.00

20 _____
21 Total: \$32,754.50

22 The court does not find reason to adjust the lodestar up or
23 down based on any of the factors. The fees sought were reasonable
24 and customary and if anything below market, and defense counsel
25 obtained a very favorable result. Accordingly, the defendant's
26 motion for attorney's fees is **GRANTED** in the amount of \$32,754.50.

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1 **II. Nontaxable Expenses**

2 Defendant seeks \$27,494.86 in expert witness fees, \$300.00 in
3 "witness location investigation" fees, and \$8,531.42 in "mock
4 trial/focus group" expenses. Defendant bases its request on Nevada
5 Revised Statutes §§ 17.115, 18.020, and 18.005.

6 In actions brought to recover more than \$2,500, Nevada law
7 allows recovery of up to \$1,500 per expert witness "unless the
8 court allows a larger fee after determining that the circumstances
9 surrounding the expert's testimony were of such necessity as to
10 require the larger fee," § 18.005(5), and "[a]ny other reasonable
11 and necessary expense incurred in connection with the action," §
12 18.005(17). Nev. Rev. Stat. § 18.020(3). Where a plaintiff has
13 rejected an offer of judgment made pursuant to § 17.115 but has
14 failed to obtain a more favorable judgment, Nevada law allows the
15 court to order payment of the defendant's reasonable expert witness
16 costs. Nev. Rev. Stat. § 17.115(4) (d) (1).

17 Where a statute authorizes an award of reasonable attorney's
18 fees to a prevailing party, the court has the discretion to award
19 reasonable out-of-pocket litigation expenses as part of the
20 attorney's fee award "when it is the prevailing practice in a given
21 community for lawyers to bill those costs separate from their
22 hourly rates." *Grove v. Wells Fargo Fin. Calif., Inc.*, 606 F.3d
23 577, 579-82 (9th Cir. 2010). These "do not include costs that,
24 like expert fees, have by tradition and statute been treated as a
25 category of expenses distinct from attorney's fees." *Trustees of*
26 *the Constr. Indus. & Laborers Health & Welfare Trust v. Redland*
27 *Ins. Co.*, 460 F.3d 1253, 1258 (9th Cir. 2006). Defendant has not
28 made any showing it is the prevailing practice in this community

1 for lawyers to bill mock trial expenses or witness location
2 investigation fees costs separate from their hourly rates. See
3 *Grove*, 606 F.3d at 579-82; see also *Secalt S.A. v. Wuxi Shenxi*
4 *Constr. Mach. Co., Ltd.*, 668 F.3d 677, 690 (9th Cir. 2012) (finding
5 abuse of discretion in awarding nontaxable expenses as part of
6 attorney's fee award where no finding made that it was the
7 prevailing practice in the local community to charge such costs
8 separately from attorneys' fees). Further, the court finds neither
9 expense to be a reasonable litigation cost that should be
10 compensated. As discussed above, defendant's mock trial expenses
11 have not been shown to be reasonable and customary litigation
12 expenses. Further, defendant has not explained why it did not have
13 its former employee Rachel Davis' contact information. Although
14 Davis left her employment with defendant before the trial in this
15 matter, defendant was on notice that she was a potential witness in
16 this case before she left. The fees for a private investigator to
17 track Davis down after defendant failed to maintain Davis' contact
18 information should not be shifted to plaintiff. For the same
19 reasons, to the extent these items are recoverable under Nevada
20 Revised Statutes § 18.005(17) and § 18.020(3), the court finds
21 neither to be a reasonable and necessary litigation expense. The
22 request for mock trial expenses and witness location investigation
23 fees is therefore **DENIED**.

24 The award of expert witness fees in federal court is a
25 procedural matter controlled by federal statute. See *Aceves v.*
26 *Allstate Ins. Co.*, 68 F.3d 1160, 1168 (9th Cir. 1995) ("[F]ederal
27 law should control the reimbursement of expert witnesses in federal
28 courts sitting in diversity jurisdiction."); see also *First Nat'l*

1 *Mortgage Co. v. Fed. Realty Inv. Trust*, 631 F.3d 1058, 1070-71 (9th
2 Cir. 2011). “[W]hen a prevailing party seeks reimbursement for
3 fees paid to its own expert witnesses, a federal court is bound by
4 the limit of § 1821(b), absent contract or explicit statutory
5 authority to the contrary.” *Crawford Fitting Co. v. J.T. Gibbons,*
6 *Inc.*, 482 U.S. 437, 439 (1987); *see also Tracy v. Am. Family Mutual*
7 *Ins. Co.*, 2010 WL 5477751, at *8-9 (D. Nev. 2010) (diversity action
8 in which the court granted expert witness fees subject to the limit
9 of § 1821(b)). Therefore, § 1821(b) controls to the exclusion of
10 Nevada cost provisions authorizing higher expert witness fees. Nor
11 does Nevada’s offer-of-judgment statute provide a basis for
12 awarding fees beyond those provided for in § 1821(b). The Ninth
13 Circuit has held that where a state offer-of-judgment statute
14 purports to grant the right to recover expert witness fees, and the
15 policies underlying the state statute “are sufficiently coextensive
16 with the asserted purposes of” Federal Rule 68 “to indicate that
17 the Federal Rule occupies the state rule’s field of operation, then
18 the two rules are in direct conflict and the Federal Rule precludes
19 the state rule’s application in federal diversity actions.”
20 *Goldberg*, 627 F.3d at 755-58 (internal punctuation omitted). While
21 *Goldberg* involved Arizona Rule of Civil Procedure 68, an offer-of-
22 judgment rule allowing recovery of double costs and expert witness
23 fees, the court concludes there is no material difference between
24 Arizona Rule 68 and Nev. Rev. Stat. § 17.115(4)(d)(1) in their
25 purpose or application. *See Albios v. Horizon Communities, Inc.*,
26 132 P.3d 1022, 1029 (Nev. 2006) (noting the purpose of § 17.115 is
27 “to save time and money for the court system, the parties, and the
28 taxpayer”); *John W. Muije, Ltd. v. A N. Las Vegas Cab Co., Inc.*,

1 799 P.2d 559, 561 (Nev. 1990) ("The purpose of [§] 17.115 is to
2 promote settlement of suits by rewarding defendants who make
3 reasonable offers and penalizing plaintiffs who refuse to accept
4 them."). Accordingly, the defendant's recovery of expert witness
5 fees is limited to those provided for by 28 U.S.C. § 1821(b).
6 Defendant did not seek these fees in its bill of costs. The
7 defendant's motion for expert witness fees is therefore **DENIED**.

8 **Conclusion**

9 The defendant's motion for attorney's fees and other
10 nontaxable costs (#74) is **GRANTED IN PART** and **DENIED IN PART**. It
11 is **DENIED** as to the request for expert witness fees and other
12 nontaxable costs. It is **GRANTED** as to the request for attorney's
13 fees, which are hereby awarded in the amount of \$32,754.50.

14 IT IS SO ORDERED.

15 DATED: This 23rd day of July, 2013.

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18 UNITED STATES DISTRICT JUDGE

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