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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

TRACEY McEUEEN,

Plaintiff,

v.

RIVERVIEW BANCORP, INC., a  
Washington corporation; RIVERVIEW  
COMMUNITY BANK, a Washington  
nonprofit corporation,,

Defendants.

CASE NO. C12-5997 RJB

ORDER ON PLAINTIFF’S MOTION  
FOR ATTORNEY FEES AND  
COSTS

This matter comes before the Court on plaintiff Tracy McEuen’s Motion for Attorney Fees and Costs. Dkt. 142. The Court has considered the pleadings in support of and in opposition to the motion and the record herein.

**INTRODUCTION AND BACKGROUND**

On November 19, 2012, Plaintiff Tracey McEuen filed this action against Defendants Riverview Bancorp, Inc., and Riverview Community Bank (Riverview), asserting causes of action pursuant to Section 806 of the Corporate and Criminal Fraud Accountability Act,

1 Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. § 1514A(a)(1) and Washington common law  
2 prohibiting wrongful discharge against public policy, based on alleged whistleblower retaliation  
3 (discharge from employment). Dkts. 1 & 28. The Complaint sought compensatory damages of  
4 \$400,000.00 for lost income and \$1,000,000.00 for non-economic damages, together with  
5 reasonable attorney fees for McEuen’s attorneys and litigation costs, including expert witness  
6 fees. Dkt. 28 pp. 9-10. After the resolution of a number of contentious discovery motions (Dkts.  
7 39, 48, 62, 97), the denial of Defendants motion for summary judgment (Dkt. 96), and on the eve  
8 of trial, McEuen accepted, on April 4, 2014, Defendants’ Offer of Judgment. Dkt. 140.  
9 Pursuant to Rule 68, Judgment was entered for McEuen against Riverview in the sum of  
10 \$110,000.00, plus “costs, expert witness fees, and reasonable attorney fees available under 18  
11 U.S. Code 1514A(c)(2)(C).” Dkt. 141

12 On April 24, 2014, McEuen filed the present Motion for Attorney Fees and Costs  
13 pursuant to Fed. R. Civ. P. 54(d)(2), 18 U.S.C. § 1514A(c)(2)(C) and RCW 49.48.030. Dkt. 142.  
14 McEuen requests an award of \$515,864.15 in attorney fees and an award of litigation costs in the  
15 amount of \$75,345.40, which includes expert witness fees. *Id.* at 1-2.

16 Riverview objects to the amounts requested, raising nine objections to the attorney fee  
17 request and twelve objections to the request for litigation costs. Dkts. 148 & 150.

18 McEuen subsequently requested an additional award of attorney fees in the amount of  
19 \$23,770.37 for a total of \$539,634.52 in reasonable attorney fees. Dkt. 153. The increase is due  
20 to fees incurred in responding to Riverview’s objections. *Id.*

### 21 **STANDARDS FOR AN AWARD OF ATTORNEY FEES**

22 Attorney fees under SOX are provided by 18 U.S.C. §1514A(c)(2)(C), which reads:

23 An employee prevailing in any action . . . shall be entitled to . . . litigation costs,  
24 expert witness fees, and reasonable attorney fees.

1 In addition, attorney fees in Washington employment actions are provided by RCW  
2 49.48.030, which reads:

3 In any action in which any person is successful in recovering judgment for  
4 wages or salary owed to him or her, reasonable attorney's fees, in an amount to  
be determined by the court, shall be assessed against said employer or  
former employer. . .

5 The language of both statutes is mandatory. The Court lacks discretion to deny fees, but  
6 retains discretion over the amount of the fees to award. A district court has discretion in  
7 determining the amount of a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).  
8 However, “[t]he district court must provide a concise and clear explanation of its reasons for the  
9 fee award.” *Id.*

10 When awarding reasonable attorneys’ fees pursuant to “fee-shifting statutes,” the district  
11 court must balance between granting sufficient fees to attract qualified counsel to litigate, *see City of*  
12 *Riverside v. Rivera*, 477 U.S. 561, 579-80 (1986), and avoiding a windfall to counsel when they  
13 succeed, *see Blum v. Stenson*, 465 U.S. 886, 897 (1984). The burden falls on the plaintiff to  
14 demonstrate the amount of attorney fees and costs to which he or she is reasonably entitled. *See*  
15 *Gisbrecht v. Barnhart*, 535 U.S. 789, 807 (2002); *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942,  
16 948 (9th Cir. 2007). The plaintiff must “exercise ‘billing judgment’ with respect to hours worked . . .  
17 and should maintain billing time records in a manner that will enable a reviewing court to identify  
18 distinct claims.” *Hensley*, 461 U.S. at 437.

19 The “lodestar” figure is considered the “guiding light” of fee-shifting jurisprudence. *City of*  
20 *Burlington v. Dague*, 505 U.S. 557, 562 (1992). In order to determine the lodestar figure, the Court  
21 calculates “the number of hours reasonably expended on the litigation multiplied by a reasonable  
22 hourly rate.” *Hensley*, 461 U.S. at 433. The Court excludes from this initial fee calculation hours  
23 that were not reasonably expended. *Id.* at 434. Proper exclusions include overstaffed, redundant, or  
24

1 unnecessary time. *Id.* The Court must also consider the extent of Plaintiffs’ success, as that is a  
2 “crucial factor” in determining an appropriate award. *Id.* at 440.

3 After determining the lodestar figure, the Court should then determine whether to adjust  
4 the lodestar figure up or down based on any *Kerr* factors that have not been subsumed in the  
5 lodestar calculation. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975) cert.  
6 denied, 425 U.S. 951 (1976). The twelve *Kerr* factors are: (1) the time and labor required, (2)  
7 the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal  
8 service properly, (4) the preclusion of other employment by the attorney due to acceptance of the  
9 case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations  
10 imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9)  
11 the experience, reputation, and ability of the attorneys, (10) the 'undesirability' of the case, (11)  
12 the nature and length of the professional relationship with the client, and (12) awards in similar  
13 cases. *Id.* The *Kerr* factors are consistent with the Washington Rules of professional Conduct.  
14 See RPC 1.5(a).

15 Riverview challenges McEuen’s calculation of the lodestar figure and raises a number of  
16 *Kerr* factors as warranting a reduction in the requested attorney fee award. The Court will  
17 initially address the lodestar figure (hourly rate and time expended), and then address  
18 Riverview’s *Kerr* objections.

## 19 **Lodestar Calculation**

### 20 **1. Reasonable hourly rate**

21 In determining hourly rates, the Court must look to the “prevailing market rates in the  
22 relevant community.” *Bell v. Clackamas County*, 341 F.3d 858, 868 (9th Cir. 2003). The rates  
23 of comparable attorneys in the forum district are usually used. See *Gates v. Deukmejian*, 987

1 F.2d 1392, 1405 (9th Cir. 1992). In making its calculation, the Court should also consider the  
 2 experience, skill, and reputation of the attorney requesting fees. *Schwarz v. Sec’y of Health &*  
 3 *Human Servs.*, 73 F.3d 895, 906 (9th Cir. 1995). The Court is allowed to rely on its own  
 4 knowledge and familiarity with the legal market is setting a reasonable hourly rate. *Ingram v.*  
 5 *Oroudjiam*, 647 F.3d 955, 928 (9th Cir. 2011).

6 McEuen provides the Court with the following chart indicating the hours expended and  
 7 rates charged by Plaintiff’s counsel and other timekeepers as of April 23, 2014:

<b>Timekeeper</b>	<b>Experience</b>	<b>Rate</b>	<b># Hours</b>	<b>Fee</b>
<i>Partner</i>				
Thomas H. Tongue	46 years	\$475.00	0.50	\$237.50
George J. Cooper	42 years	\$435.00	0.75	\$326.25
J. David Zehntbauer	18 years	\$380.00	0.25	\$95.00
JoDee K. Keegan	17 years	\$380.00	12.60	\$4,788.00
Allyson S. Krueger	18 years	\$370.00	1.50	\$555.00
<i>Associate</i>				
Anne D. Foster	15 years	\$370.00	313.25	\$115,902.50
<i>Paralegal</i>				
John T. Miller	7 years	\$270.00	52.40	\$14,148.00
Samuel T. Smith	6 years	\$260.00	460.9	\$119,834.00
Blair E. McCrory	6 years	\$260.00	18.50	\$4,810.00
Joshua D. Stadler	4 years	\$245.00	112.70	\$27,611.50
Mary Anne Nash	4 years	\$245.00	66.80	\$16,366.00
Laysan C. Unger	2 years	\$245.00	92.65	\$22,699.25
<i>Paralegal</i>				
Sandra D. Hatch	30 years	\$185.00	3.90	\$721.50
Cristi J. Lutjen	23 years	\$185.00	0.20	\$37.00
Kelley D. Chaney*	22 years	\$185.00	488.60	\$90,391.00
Randall G. Malstrom	21 years	\$185.00	1.25	\$231.25
Jamie Morris-Pease	9 years	\$180.00	3.60	\$648.00
Total			1,638.35	\$419,401.75

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 19 Dkt. 143 at 3-4.

20  
 21 Riverview does not challenge McEuen’s counsels’ hourly rates as set forth. Dkt. 148 at  
 22 9. However, McEuen seeks a 23% upward adjustment of these hourly rates for a total requested  
 23 fee award of \$515,864.15. Dkt. 143 at 4. McEuen argues that the adjustment is necessary to  
 24 bring the Portland firm’s hourly rates in line with the prevailing market rate for the

1 Seattle/Tacoma community. *Id.* at 4-6; Dkt. 146. The 23% upward adjustment would provide  
2 the lead partner attorney Ann Foster an hourly rate increase from \$370 to \$455 and the lead  
3 associate attorney Samuel Smith an hourly rate increase from \$260 to \$343. This upward  
4 adjustment is supported by the declaration of McEuen's expert on attorneys' fees, Stephanie  
5 Bloomfield. Dkt. 146. Ms Bloomfield is a partner in the Tacoma office of Gordon Thomas  
6 Honeywell. *Id.* at 2. Ms. Bloomfield has substantial experience in employment and civil rights  
7 litigation in the Western District of Washington and charges an hourly rate of \$425. *Id.* at 2-3, 6.  
8 She opines that a range of hourly rates from \$350 - \$550 have been awarded by the Western  
9 District of Washington in the Seattle-Tacoma area. *Id.* at 6. Ms Bloomfield also cites to a  
10 survey of attorneys in the greater Seattle area, specifically at the law firms of Davis Wright  
11 Tremaine, Lane Powell, and Perkins Coie, where the average hourly partner rates are represented  
12 as \$486, \$460 and \$550 respectively, and the average hourly associate rates are represented as  
13 \$304, \$295, and \$368 respectively. Dkt. 143 at 4-5; Dkt 146.

14 Riverview objects to this upward adjustment. Riverview contends that an upward  
15 adjustment is unreasonable and not justified as the normal rates charged by McEuen's counsel  
16 are relatively comparable to the rates charged by Riverview's counsel, i.e. \$350 for Ryan  
17 Hammond and \$250 for Jennifer Pirozzi, both who work in the Seattle/Tacoma legal community.  
18 Dkt. 148 at 9. Riverview also argues that Ms Bloomfield's use of her hourly fee is misleading  
19 because in the two employment cases she references the majority of the work was performed by  
20 another partner who billed at a rate of \$375 per hour in both cases, and associates in her firm,  
21 who billed between \$200 and \$275 per hour. Dkt. 149-10; Dkt. 149-11. Riverview also  
22 questions the relevancy of the survey of attorney hourly rates because the firms reviewed are  
23 large defense firms with a practice that is national in scope. The survey also fails to reveal the  
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1 practice areas of the attorneys surveyed. Dkt. 148 at 9. Here, the survey has little relevance in  
2 the determination of a reasonable hourly rate.

3 This Court has familiarity with the legal market in this community. The Court recently  
4 approved an hourly rate of \$325 for counsel's work in an employment discrimination case. See  
5 *Castellano v. Charter Communications, LLC*, 2014 WL 1569242 (W.D. Wash. 2014).

6 The Court finds that McEuen's counsels' standard hourly rates reflect prevailing market  
7 rates in the Western District of Washington. The Court will deny the request for a 23% upward  
8 adjustment.

9 Riverview also challenges the hourly rate charged by the paralegals employed by  
10 McEuen's counsel, ranging from \$180 and \$185. Defendant also contends that the amount of  
11 paralegal time spent in this litigation is excessive. McEuen argues that the paralegal fees,  
12 amounting to \$92,028.75 should be substantially reduced. Dkt. 148 pp. 10-11.

13 Paralegal fees are properly considered a part of an attorney fee award and are to be  
14 assessed at market rates that prevail in the community. *Missouri v. Jenkins*, 491 U.S. 274, 284-  
15 89 (1989). McEuen has presented evidence that paralegals' work in the Western District of  
16 Washington is billed at rates of \$175 to \$225/hour. Dkt. 146 At 8. McEuen also offered a  
17 survey from the Oregon Paralegals Association that supports an hourly rate of \$185. Dkt. 144 at  
18 2; Dkt. 144. The paralegal rates sought herein are reasonable.

19 The appropriate hourly rate of attorney compensation is the standard rate charged by  
20 McEuen's counsel. This rate is reflected as follows:

<b>Timekeeper</b>	<b>Experience</b>	<b>Rate</b>
<i>Partner</i>		
Thomas H. Tongue	46 years	\$475.00
George J. Cooper	42 years	\$435.00
J. David Zehntbauer	18 years	\$380.00
JoDee K. Keegan	17 years	\$380.00
Allyson S. Krueger	18 years	\$370.00

Anne D. Foster	15 years	\$370.00
Associate		
John T. Miller	7 years	\$270.00
Samuel T. Smith	6 years	\$260.00
Blair E. McCrory	6 years	\$260.00
Joshua D. Stadtler	4 years	\$245.00
Mary Anne Nash	4 years	\$245.00
Laysan C. Unger	2 years	\$245.00
Paralegal		
Sandra D. Hatch	30 years	\$185.00
Cristi J. Lutjen	23 years	\$185.00
Kelley D. Chaney*	22 years	\$185.00
Randall G. Malstrom	21 years	\$185.00
Jamie Morris-Pease	9 years	\$180.00

## 2. Hours reasonably expended.

Having determined the appropriate hourly rates of compensation the Court must determine the reasonable number of hours expended. See *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). At the outset, “[t]he fee applicant bears the burden of documenting the appropriate hours expended in litigation and must submit evidence in support of those hours worked.” *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1992).

Riverview objects to attorney fees that reflect duplicative efforts by multiple attorneys. Dkt. 148 at 3-4. A court may reduce the number of hours awarded where the prevailing party requests hours that are “excessive, redundant, or otherwise unnecessary.” *Hensley*, at 434. However, as the Ninth Circuit has observed:

It must also be kept in mind that lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee. By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker.

*Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008). Riverview does not cite to any particular billing entries that it believes reflect unnecessarily duplicative work. Furthermore, a



1 district court “may not set the fee based on speculation as to how other firms would have staffed the  
2 case.” *Moreno*, 534 F.3d at 1114. This proposed reduction is rejected.

3 Riverview objects to the number of hours credited to interoffice meetings and  
4 communications. Dkt. 148 at 4-5. This proposed reduction is rejected. The number of billing entries  
5 for intra-office communications identified by Riverview do not appear excessive in light of the  
6 nature of this case. Furthermore, collaborating with others and jointly formulating legal theories is an  
7 intrinsic part of litigation success.

8 Riverview objects to an award of fees for time spent on unfiled or unsuccessful motions.  
9 Dkt. 148 p. 5. The Court rejects this proposed reduction. Drafting motion pleadings that may not  
10 achieve the desired result is an ordinary part litigation and time spent in this pursuit is recoverable  
11 pursuant to fee shifting statutes.

12 Riverview objects to an award of fees for time spent subsequent to the Riverview’s service of  
13 the offer of judgment on April 1, 2014. Dkt. 148 at 5. McEuen argues that the cut-off date is the  
14 date of acceptance of the offer of judgment, April 4, 2014. Dkt. 156 at 5-6. The cut-off date is  
15 ordinarily the date the offer of judgment is extended to the plaintiff. However, in the present  
16 circumstance, McEuen is entitled to post-offer attorney fees and expert witness fees incurred in  
17 presenting the present motion. See *Marek v. Chesny*, 473 U.S. 1, 9 (1985); *Thompson v. Gomez*, 45  
18 F.3d 1365, 1366 (9th Cir. 1995); *Bradford v. HSBC Mortgage Corp.*, 859 F. Supp. 2d 783 (E.D. Va.  
2012).

19 Riverview objects to the amount of time spent by McEuen’s counsel in preparing the federal  
20 complaint, preparing the mediation statement and briefing motions *in limine*. Dkt. 148 at 5-6. More  
21 specifically, Riverview argues that the OSHA complaint and subsequent federal complaint are  
22 substantially the same, and, therefore, the \$11,762.00 in fees incurred for preparation of the  
23 complaint is excessive. *Id.* Riverview also contends that \$14,398.00 for the mediation  
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1 statement, and \$27,594.00 for the motions *in limine*, should be substantially reduced because the  
2 time expended is excessive. *Id.* The Court rejects these contentions. The time spent in drafting  
3 these documents appears reasonable.

4 Riverview objects to an award of fees for “block billing” representing fees of \$42,905.00  
5 and “unaccounted time” representing fees in the amount of \$8,169.50. Dkt. 148 at 6-7. It is  
6 well-established that the fee applicant bears the burden of documenting the appropriate hours  
7 expended in the litigation and must submit evidence in support of those hours worked. See  
8 *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007). However, the work that  
9 Defendant characterizes as “pervasive block billing” in this case is unfairly characterized.  
10 McEuen’s counsel submitted detailed accounts of all work done on McEuen’s case. Most of the  
11 items on Riverview’s list of “block billing” are under an hour. When the time billed is more than  
12 one hour, counsel usually identifies two or three different tasks that were accomplished in that  
13 particular span of time, which is common in private practice. See Dkt. 149-4. These entries are  
14 not “block billing” in the negative sense of the term as they cover relatively limited amounts of  
15 time and give sufficient information for the Court to assess the nature of the work done.  
16 Furthermore, lawyers are not required to record in great detail how each minute of their time is  
17 spent on a case; rather, they must only provide enough evidence to show that the effort expended  
18 during those hours was reasonable. See *Secalt S.A. v. Wuxi Shenxi Constr. Mach. Co.*, 668 F.3d  
19 677, 690 (9th Cir. 2012). The Court will not reduce the number of hours for block billing.

20 Riverview has identified a number of timekeeper entries reflecting unaccounted time and  
21 fees. Dkt. 149-5. McEuen has not presented sufficient detail, nor rebutted this evidence, to  
22 justify an award of fees for time that is not documented. The fees for this undocumented time,  
23 \$8,169.50, will be deducted from the lodestar figure.

Riverview objects to the fees incurred in the preparation of a privilege log. Dkt. 148 p. 7. This objection is based on a discovery order that provides that McEuen produce a privilege log, “at Plaintiff’s own expense.” Dkt. 47. The fact that the Court required McEuen to produce the privilege log at her expense does not mean that attorney fees incurred in its preparation cannot be later recouped as an award to the prevailing party. Attorney time reasonably expended in discovery is recoverable under the fee shifting statutes.

Riverview requests that the number of paralegal hours be reduced because they are excessive. Other than argument, Riverview has presented no substantive evidence that the amount of time expended by the paralegals is excessive.

The time spent by McEuen’s counsel, including paralegals, appears reasonable. The lodestar figure is reflected as follows:

<b>Timekeeper</b>	<b>Experience</b>	<b>Rate</b>	<b># Hours</b>	<b>Fee</b>
<i>Partner</i>				
Thomas H. Tongue	46 years	\$475.00	0.50	\$237.50
George J. Cooper	42 years	\$435.00	0.75	\$326.25
J. David Zehntbauer	18 years	\$380.00	0.25	\$95.00
JoDee K. Keegan	17 years	\$380.00	12.60	\$4,788.00
Allyson S. Krueger	18 years	\$370.00	1.50	\$555.00
<i>Associate</i>				
Anne D. Foster	15 years	\$370.00	313.25	\$115,902.50
<i>Paralegal</i>				
John T. Miller	7 years	\$270.00	52.40	\$14,148.00
Samuel T. Smith	6 years	\$260.00	460.9	\$119,834.00
Blair E. McCrory	6 years	\$260.00	18.50	\$4,810.00
Joshua D. Stadtler	4 years	\$245.00	112.70	\$27,611.50
Mary Anne Nash	4 years	\$245.00	66.80	\$16,366.00
Laysan C. Unger	2 years	\$245.00	92.65	\$22,699.25
<i>Paralegal</i>				
Sandra D. Hatch	30 years	\$185.00	3.90	\$721.50
Cristi J. Lutjen	23 years	\$185.00	0.20	\$37.00
Kelley D. Chaney*	22 years	\$185.00	488.60	\$90,391.00
Randall G. Malstrom	21 years	\$185.00	1.25	\$231.25
Jamie Morris-Pease	9 years	\$180.00	3.60	\$648.00
<b>Total</b>			<b>1,638.35</b>	<b>\$419,401.75</b>
<b>Undocumented time deduction</b>				<b>\$8,196.50</b>
<b>Lodestar figure</b>				<b>\$411,205.25</b>

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**Adjustments for *Kerr* Factors**

The final step in fee assessment is evaluating whether to enhance or reduce the presumptively reasonable lodestar figure based on the Court’s evaluation of those *Kerr* factors not subsumed in the lodestar calculation. *Ballen v. City of Redmond*, 466 F.3d 736, 746 (9<sup>th</sup> Cir. 2006).

**1. Time and Labor**

The first *Kerr* factor, time and labor required, is subsumed in the lodestar calculation and need not be addressed.

**2. Novelty and Difficulty**

McEuen asserts that SOX claims are difficult to win and that there is little precedent in this area of the law. Riverview disputes this assertion. While McEuen’s observations are correct, this item is reflected in the volume of hours billed, and does not justify an upward adjustment.

**3. Skill**

The requisite skill required to perform the legal services are reflected in the fees charged by McEuen’s counsel and subsumed in the lodestar calculation.

**4. Preclusion of Other Employment**

There is no significant evidence of the preclusion of other employment.

**5. Customary Fee**

Issues relating to counsels’ customary fee and that of the customary fee charged in the locality are subsumed in the lodestar calculation.

1       **6. Fixed or Contingent Fee**

2       McEuen’s counsel has not addressed this factor.

3       **7. Time Limitations**

4       The time constraints do not appear to be to involve a substantial departure from standard  
5 employment discrimination claims. The Court finds this factor neutral.

6       **8. Amount Involved and the Results**

7       The acceptance of the offer of judgment reveals a modest recovery. Although the  
8 judgment is not substantial, this litigation was hotly contested from the outset with numerous  
9 motions up to the eve of trial, and the substantial fund at risk in the litigation

10       **9. Experience, Reputation, and Ability**

11       The experience, reputation and ability of counsel is reflected in their hourly rates and  
12 subsumed in the lodestar calculation.

13       **10. Undesirability**

14       McEuen’s counsel argues that the difficulty of prevailing on a SOX claim makes them  
15 undesirable. Riverview disputes this assertion. The Court finds this factor neutral.

16       **11. Nature and Length of Relationship**

17       No evidence has been submitted regarding the nature and length of McEuen’s  
18 relationship with her counsel.

19       **12. Awards in Similar Cases.**

20       No evidence has been submitted concerning awards in similar cases.

21       On balance, consideration of the *Kerr* factors does not warrant an adjustment to the  
22 lodestar calculation.

1 **Supplemental Attorney Fees**

2           McEuen seeks \$23,770.37 in supplemental attorney fees for 67.70 hours expended on the  
3 recovery of fees and costs incurred in seeking the fee award. Dkt. 153 at 10; Dkt. 157-17. It is  
4 well settled in the Ninth Circuit that a party pursuing its right to attorney fees and costs is  
5 allowed to recover the time spent preparing and arguing the petition for fees and costs with the  
6 court. *Thompson v. Gomez*, 45 F.3d 1365, 1366 (9th Cir. 1995); *McGrath v. County of Nevada*,  
7 67 F.3d 248, 253 (9th Cir. 1995). McEuen is entitled to an award of attorney fees for the  
8 presentation of this motion. However, because this request includes the previously rejected 23%  
9 upward locality adjustment, the Court will reduce the award accordingly, resulting in a  
10 supplemental attorney fee award of **\$19,325.50**.

11 **Conclusion on Attorney Fee Award**

12           McEuen is entitled to an attorney fee award of **\$430,530.75**. This calculation takes in  
13 consideration the lodestar figure and the *Kerr* factor enhancements or reductions to the lodestar.  
14 The prejudgment attorney fee award is \$411,205.25 and the supplemental award of fees for post  
15 judgment proceedings is \$19,325.50.

16 **LITIGATION COSTS AND EXPERT WITNESS FEES**

17           McEuen filed a combined motion for attorney fees and costs. Dkt. 142. Riverview's  
18 initial objection to an award of costs is that McEuen failed to file a separate cost bill with the  
19 Clerk as required by LCR 54(d)(1) and that many of the proposed costs are outside the scope of  
20 recoverable costs pursuant to 28 U.S.C. § 1920. Dkt. 150 at 1-4.

21           McEuen's request for an award of costs is not governed by the taxable costs statute, 28  
22 U.S.C. § 1920. McEuen seeks litigation costs pursuant to 18 U.S.C. §1514A(c)(2)(C), which  
23 provides:

1 An employee prevailing in any action . . . **shall be entitled to . . . litigation costs, expert witness fees**, and reasonable attorney fees.

2 As indicated in Ninth Circuit precedent, where a statute specifically provides for recovery  
3 of costs of an action, such costs include reasonable out-of-pocket litigation expenses that would  
4 normally be charged to a fee paying client, even if the court cannot tax these expenses as “costs”  
5 under 28 U.S.C. § 1920. *Trustees of Const. Industry and Laborers Health and Welfare Trust v.*  
6 *Redland Ins.*, 460 F.3d 1253, 1257 (9th Cir. 2006). Expenses under 18 U.S.C. §1514A(c)(2)(C)  
7 may be greater than taxable costs. Additionally, LCR 54(d)(1) refers to the general procedure of  
8 filing a cost bill with the Clerk for “taxable” costs. The Clerk typically will not tax costs beyond  
9 those set forth in the taxable costs statutes, 28 U.S.C. §§ 1920, 1921, 1923, 1927, and 2412. “A  
10 party seeking additional costs may file a motion, directed to the court, seeking an award of the  
11 excess costs.” LCR 54(d). In accordance with these procedures, McEuen was not required to file  
12 a separate cost bill with the Clerk. The combined motion was in accordance with Court  
13 procedure.

14 While McEuen is entitled to litigation costs and expert witness fees as the prevailing  
15 party, she must document or otherwise substantiate the litigation costs.

16 McEuen moves for an award of litigation costs in the amount of \$79,908.90, a sum which  
17 includes expert witness fees. Dkt. 142; Dkt. 157. McEuen requests recovery of the following  
18 costs: (a) fees of the clerk; (b) fees for service of summons and subpoenas; (c) fees for printed or  
19 electronically recorded transcripts; (d) fees and disbursements for photocopies, scans and color  
20 copies; (e) ESI fees/Streamline Imaging; (f) DVD duplication and certified mail; (g) delivery  
21 charges; (h) online research; (i) deposition fees (appearance and videographer); (j) medical  
22 records; (k) fees for witnesses; and (l) expert fees. Dkt. 147-1. A summary of these expenses  
23 follows:  
24

1	Copies & scans	\$632.85
	Delivery Charges	\$45.18
2	DVD/CD creation	\$36.00
	Certified Mail	\$32.10
3	Appearance Fee - deposition	\$1,722.50
	Online Research	\$3,769.44
4	Deposition - videographer	\$1,382.00
	Filing Fee	\$350.00
5	Streamline Imaging	\$20,904.16
	Expert Fees	\$44,659.67
6	Service Fee	\$1,485.23
	Transcript	\$4,217.50
7	Witness Fee and Mileage	\$647.27
	Medical Records	\$25.00
8		
9	Total Litigation Costs	\$79,908.90

10           McEuen has provided the invoices for each of these categories. Dkt. 157-4 through Dkt.  
11 157-14. Riverview objects to a number of these items. First, Riverview objects to an award of  
12 the costs for the expense of service of summons and subpoenas. Dkt. 150 at 5. These claimed  
13 expenses are adequately documented (Dkt. 157-10) and were incurred as a result of this  
14 litigation. McEuen is entitled to an award of costs for service of summons and subpoenas.

15           Riverview objects to the recovery of the costs for printed or electronically recorded  
16 transcripts. Dkt. 150 at 6. McEuen has properly documented the costs of these deposition  
17 transcripts (Dkt. 157-11; Dkt. 157-12) that were either used in the summary judgment  
18 proceedings or prepared for trial. These transcripts are recoverable costs of litigation.

19           Riverview objects to a request for \$639.35 in fees and disbursements for photocopies,  
20 scans and color copies. Dkt. 150 at 6. This objection has merit. McEuen has failed to  
21 adequately document these charges. The Court will deduct \$639.35 from the award of litigation  
22 costs.

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1 Riverview objects to EIS fees/Streamline Imaging. Dkt. 150 at 6-7. These costs are  
2 documented (Dkt. 157-8) and were incurred as a cost of litigation.

3 Riverview objects to an award of \$68.10 in costs for DVD duplication and certified mail.  
4 Dkt. 150 at 7. This objection has merit. McEuen has failed to adequately document these  
5 charges. The Court will deduct \$68.10 from the award of litigation costs.

6 Riverview objects to \$45.18 in delivery charges. Dkt. 150 at 7. These costs are  
7 documented (Dkt. 157-4) and were incurred as a result of this litigation.

8 Riverview objects to online research fees. Dkt. 150 at 7. These costs are documented  
9 (Dkt. 157-5) and are recoverable as litigation costs. See *Trustees of Const. Industry and*  
10 *Laborers Health and Welfare Trust v. Redland Ins.*, 460 F.3d 1253 1257-58 (9th Cir. 2006).

11 Riverview objects to an award of the costs of depositions, i.e. appearance fees and video  
12 recording. Dkt. 150 at 8. McEuen has documented these costs with invoices ( Dkt. 157-6; Dkt.  
13 157-11) and they are properly considered a cost of litigation.

14 Riverview objects to an award of \$25.00 in costs incurred in procuring McEuen's  
15 medical records. Dkt. 150 at 8. This cost is documented (Dkt. 157-14) and considered a cost of  
16 litigation.

17 Riverview objects to \$647.27 in fees for witnesses. Dkt. 150 at 8-9. These witness  
18 expenses are documented (Dkt. 157-13) and were an expense of litigation. The offer of  
19 judgment was made on the eve of trial and McEuen had already incurred the costs of witness  
20 attendance.

21 Riverview objects to the request for the recovery of \$44,659.67 in expert witness fees.  
22 Dkt. 150 at 9-11. Dkt. 157-9; Dkt. 157-18. These expert fees include the costs of McEuen's  
23 attorney fee expert, Stephanie Bloomfield, employed for the purpose of the present motion. Dkt  
24

1 157-9. at 10-14. Riverview's argument in opposition to the expert witness fees is without merit.  
2 McEuen has provided documentation of her expert witness fees. Costs, including expert witness  
3 fees are appropriately awarded for this post judgment motion seeking an award of fees and  
4 litigation costs.

#### 5 **Conclusion on Costs**

6 McEuen's request for \$79,908.90 in litigation costs is reduced by \$68.10 for  
7 insufficiently documented costs of DVD duplication and certified mail, and \$639.35 in  
8 insufficiently documented fees for photocopies, scans and color copies. Applying these  
9 deductions results in a total litigation cost award of **\$79,201.45**.

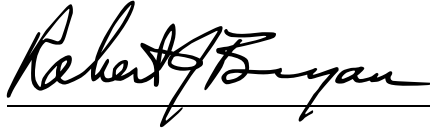
#### 10 **CONCLUSION**

11 The Court finds that nearly all of the fees and costs sought by McEuen were reasonably  
12 incurred in this matter and should be recovered without deduction or penalty. In approving the  
13 lodestar figure proposed by McEuen, with the exception that an upward locality adjustment is  
14 unwarranted and the deduction of fees for unaccounted for hours, the Court notes that the billing  
15 records submitted in support of the fee request specifically sets forth the tasks that were  
16 performed, the time spent on the tasks, the person who performed the task, and the rates  
17 requested by that attorney or paralegal. Similarly, except for a couple of minor expenses, the  
18 costs incurred were specifically detailed and explained, including amounts, dates of expenses,  
19 and the identity of the persons or entities paid. For the foregoing reasons, it is hereby

#### 20 **ORDERED:**

21 Plaintiff's Motion for Attorney Fees and Costs (Dkt. 142) is **GRANTED AS**  
22 **MODIFIED**. Plaintiff is awarded **\$430,530.75** in attorney fees and **\$79,201.45** in litigation  
23 costs.

1 Dated this 27<sup>th</sup> day of May, 2014.

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4 ROBERT J. BRYAN  
United States District Judge

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